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Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse

DARREN LENARD HUTCHINSON*

i'm clear about why i am and how i am—i cannot extricate the lesbian from my soul no more than i could the chicana—i have always been both.¹

I was mute,
tongue-tied,
burdened by shadows and silence.
Now I speak
and my burden is lightened
lifted
free.²

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1. Naomi Littlebear, *Earth-Lover, Survivor, Musician*, in *THIS BRIDGE CALLED MY BACK: RADICAL WRITINGS BY WOMEN OF COLOR 157* (Cherríe Moraga and Gloria Anzaldúa eds., 1981) [hereinafter *THIS BRIDGE CALLED MY BACK*].

2. Marlon T. Riggs, *Tongues Untied*, in *BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN 200, 205* (Essex Hemphill ed., 1991) [hereinafter *BROTHER TO BROTHER*]. The original source of this excerpt is Riggs' film *Tongues Untied*. *MARLON T. RIGGS, TONGUES UNTIED* (1987) (documentary on black gay men) The film *Tongues Untied* presents poetry of several authors. Marlon Riggs died on April 5, 1994, due to AIDS. *Marlon Riggs Dies, Film Maker Was 37*, N.Y. TIMES, Apr. 6, 1994, at B9.

I. INTRODUCTION: "TONGUES UNTIED"

In the poem "Tongues Untied," Marlon T. Riggs, a black gay filmmaker and writer, recounts childhood confrontations with racism and homophobia. Riggs remembers being labelled a "nigger" and excluded by white students at Hepzibah Junior High in Augusta, Georgia, where he was "bused" at age twelve, and being called a "homo" by the older brother of a childhood friend.³ Through these "coming-of-age" experiences, a young Riggs learns to "[dis]claim"⁴ his marginalized racial and sexual statuses: he hides "deep inside [him]self where it is still. Silent, safe"⁵

While living in the largely white gay and lesbian community of San Francisco, an adult Riggs begins to acknowledge his gay identity. Riggs, however, tries to ignore the "absence of black images" in the "Castro" or the fact that the "few" existing images—"joke, fetish, cartoon, caricature or disco diva adored from a distance"⁶—affirm racial hierarchy. Nevertheless, Riggs eventually learns that in the Castro, he is "an alien, unseen, and seen, unwanted."⁷

The turning point in the poem—and in Riggs' life—occurs when, after persistent introspection and reclaiming of suppressed racial identity, Riggs escapes "delusion, pain, alienation, [and] silence"⁸—and *integrates* (instead of treating as separate) his black and gay identities. Thus, at the poem's conclusion, the knots of silence and invisibility caused by interlocking racism and homophobia are "untied."

The symbolic meaning of the phrase "tongues untied" has grown to identify a small, yet expanding, cultural, intellectual, and artistic "movement" aimed at revealing—or ending the silence around—the interactions of race, class, gender, and sexuality,⁹ what one participant in the

3. Riggs, *Tongues Untied*, in *BROTHER TO BROTHER*, *supra* note 2, at 201.

4. *Id.*

5. *Id.* at 202.

6. *Id.* at 203.

7. *Id.*

8. *Id.* at 204.

9. See *Introduction to TONGUES UNTIED 7* (Martin Humphries ed., 1987) (explores racism, sexism and homophobia through poetry in order to "end[] the silence that has surrounded the lives of Black gay men.") While the phrase "tongues untied" has been associated primarily with work by black gay men, a broader and related movement has formed across racial and gender

movement described as "the transformation of silence into language and action."¹⁰ The work of this movement contrasts starkly with that of the "dominant" gay and lesbian culture and scholarship, where issues of racial and class subordination are neglected or rejected and where a universal gay and lesbian experience is assumed.¹¹ The work of this movement highlights the need for an examination of racial, gender, and class subordination within gay and lesbian political discourse and legal theory. These concerns, however, remain largely outside of traditional legal fora.¹²

lines. In fact, women of color published the earliest scholarship in this movement. See, e.g., *AFREKETE* (Catherine E. McKinley & E. Joyce DeLaney eds., 1995) (black lesbian anthology); *BLACK MEN/WHITE MEN: A GAY ANTHOLOGY* (Michael Smith ed., 1983) (black gay themes); *KEITH BOYKIN, ONE MORE RIVER TO CROSS: BLACK AND GAY IN AMERICA* (1996) (same); *THIS BRIDGE CALLED MY BACK*, *supra* note 1 (women of color feminist/lesbian anthology); *BROTHER TO BROTHER*, *supra* note 2 (black gay themes); *CHICANA LESBIANS: THE GIRLS OUR MOTHERS WARNED US ABOUT* (Carla Trujillo ed., 1991) (anthology) [hereinafter *CHICANA LESBIANS*]; *COMPAÑERAS: LATINA LESBIANS* (Juanita Ramos ed., 1987) (anthology); *STEVEN CORBIN, FRAGMENTS THAT REMAIN* (1993) (novel with black gay themes); *MELVIN DIXON, VANISHING ROOMS* (1991) (novel with black gay themes); *JEWELLE GOMEZ, FORTY-THREE SEPTEMBERS* (1993) (essays with black lesbian themes); *ESSEX HEMPHILL, CEREMONIES: PROSE AND POETRY* (1992) (black gay themes) [hereinafter *CEREMONIES*]; *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* (Barbara Smith ed., 1983) (black feminist/lesbian anthology) [hereinafter *HOME GIRLS*]; *IN THE LIFE: A BLACK GAY ANTHOLOGY* (Joseph Beam ed., 1986) [hereinafter *IN THE LIFE*]; *RANDALL KENAN, A VISITATION OF SPIRITS* (1989) (novel with black gay themes); *AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES* [hereinafter *SISTER OUTSIDER*] (1984) (black feminist/lesbian anthology); *AUDRE LORDE, ZAMI: A NEW SPELLING OF MY NAME* (1982) (autobiography of black lesbian writer); *A LOTUS OF ANOTHER COLOR: AN UNFOLDING OF THE SOUTH ASIAN GAY AND LESBIAN EXPERIENCE* (Rakesh Ratti ed., 1993) (anthology) [hereinafter *A LOTUS OF ANOTHER COLOR*]; *PIECE OF MY HEART: A LESBIAN OF COLOUR ANTHOLOGY* (Makeda Silvera ed., 1991); *THE ROAD BEFORE US: 100 GAY POETS* (Assoto Saint ed., 1991) (black gay poetry); *DARIECK SCOTT, TRAITOR TO THE RACE* (1995) (novel with black gay themes); *SHADE: AN ANTHOLOGY OF FICTION BY GAY MEN OF AFRICAN DESCENT* (Bruce Morrow & Charles H. Rowell eds., 1996); *SOJOURNER: BLACK GAY VOICES IN THE AGE OF AIDS* (B. Michæl Hunter ed., 1993) (poetry); *TALKING BLACK: LESBIANS OF AFRICAN AND ASIAN DESCENT SPEAK OUT* (Valerie Mason-John ed., 1995) (anthology); *WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* (1986). See also *URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION* (1995) (a critique and historical sketch of gay and lesbian politics, written by an Indian lesbian and former head of the National Gay and Lesbian Task Force, which urges gay rights movement to locate itself within broader movements for social change—including racial, gender and class equality).

10. *LORDE, The Transformation of Silence Into Language and Action*, in *SISTER OUTSIDER*, *supra* note 9, at 44. Audre Lorde died on November 17, 1992 of breast cancer. *Audre Lorde, 58, A Poet, Memoirist and Lecturer, Dies*, N.Y. TIMES, Nov. 20, 1992, at A23.

11. See *VAID, supra* note 9, at 286 ("A false assumption underlies all gay and lesbian organizing: that there is something at once singular and universal that can be called gay or lesbian or bisexual or even transgendered identity.")

12. The body of legal scholarship on the interaction of race and sexuality remains in its infancy—much of the scholarship published during the completion of this Article—and is not formally linked. Also, most of the articles in this area offer only a brief exposition of the

This Article introduces the concerns of this movement¹³ into legal

issue. For a sampling of literature exploring the subject, see Mary Eaton, *Homosexual Unmodified: Speculation on Law's Discourse, Race, and the Construction of Sexual Identity* [hereinafter *Homosexual Unmodified*], in LEGAL INVERSIONS: LESBIANS, GAY MEN AND THE POLITICS OF LAW 46-76 (Didi Herman & Carl Stychin eds., 1995) (arguing that homosexuality is coded as "white" in judicial opinions) [hereinafter LEGAL INVERSIONS]; Cynthia Petersen, *Envisioning A Lesbian Equality Jurisprudence*, in LEGAL INVERSIONS, *supra* at 118-37 (criticizing omission of race in lesbian legal analysis); Elvia R. Arriola, *Fairies, Marimachas, Queens and Leszles: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33 (1995) (attributing police harassment of gay participants in New York City's Stonewall riots to their race, class, and gender role nonconformance); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERK. WOMEN'S L.J. 103, 132-35 (1994) (discussing omission of race and class in lesbian legal theory) [hereinafter *Gendered Inequality*]; Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. CAL. REV. L. & WOMEN'S STUD. 183, 212-18 (1995) (criticizing omission of race in lesbian legal analysis) [hereinafter *At the Intersection*]; Angela Gilmore, *They're Just Funny That Way: Lesbians, Gay Men and African-American Communities As Viewed Through the Privacy Prism*, 38 HOW. L.J. 231 (1994) (discussing relationship of black gays and lesbians with the black community); Eric Heinze, *Gay and Poor*, 38 HOW. L.J. 433 (1995) (arguing that poor gays and lesbians may have specific needs requiring further sociological and legal analysis); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories"*, 4 LAW & SEXUALITY 83 (1994) (arguing that gay and lesbian litigation "victories" may not uniformly benefit the gay and lesbian community due to race, class, gender, and gender identity differences). The *Southern California Review of Law and Women's Studies* has also published a series of essays, presented at a symposium, that add to this literature. See Sheila M. Aguilar, *Los Angeles Asian Pacific Islander Sisters (LAAPIS)*, 5 S. CAL. REV. L. & WOMEN'S STUD. 75 (1995) (discussing political and social activities of Asian lesbian organization); Isabelle R. Gunning, *Stories from Home: Tales from the Intersection of Race, Gender and Sexual Orientation*, 5 S. CAL. REV. L. & WOMEN'S STUD. 143 (1995) (discussing impact of racism and homophobia on black lesbians); Joan W. Howarth, *First and Last Chance: Looking for Lesbians in Fifties Bar Cases*, 5 S. CAL. REV. L. & WOMEN'S STUD. 153 (1995) (discussing issues of race, class, and gender status implicated in 1950s California cases challenging state efforts to close gay bars); D. Lisa Powell, *United Lesbians of African Heritage*, 5 S. CAL. REV. L. & WOMEN'S STUD. 81 (1995) (discussing political and social activities of black lesbian organization); Ruthann Robson, *To Market, To Market: Considering Class in the Context of Lesbian Legal Theories and Reforms*, 5 S. CAL. REV. L. & WOMEN'S STUD. 173 (1995) (discussing impact of class and economic markets upon lesbians); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995) (arguing that sex and race create internal conflicts within "sexual minority communities" and that these communities must, therefore, develop a discourse on the connections between race, gender, and sexuality).

13. This Article is also greatly inspired by a body of critical race, antiracist, and feminist scholarship that explores the relationship between race and gender. See, e.g., ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria Hull & Patricia B. Scott eds., 1982); ANGELA DAVIS, WOMEN, RACE & CLASS (1981); PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984); BELL HOOKS, AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM (1981) [hereinafter AIN'T I A WOMAN?]; BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984) [hereinafter FROM MARGIN TO CENTER]; BELL HOOKS, YEARNING: RACE, GENDER AND CULTURAL POLITICS (1991); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); MICHELLE WALLACE, BLACK MA-

discourse in an attempt to initiate a dialogue around issues of race and class¹⁴ between those scholars presently engaged in the construction of gay and lesbian legal theories.¹⁵ Part II examines specific acts of violence and discrimination against gay, or perceived as gay, people of color, and the legal and political challenges to these acts, in order to demonstrate the ready interplay between race, class, and sexual subordination—or the multidimensionality of oppression. Part III contrasts the

CHO AND THE MYTH OF THE SUPERWOMAN (1979); Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003; Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology 1892-1920*, 3 UCLA WOMEN'S L.J. 1 (1993); Darci E. Burrell, *Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN'S L.J. 87 (1993); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 [hereinafter *Demarginalizing the Intersection*]; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993) [hereinafter *Mapping the Margins*]; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991); Deborah J. Krauss, Note, *Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 HARV. C.R.-C.L. L. REV. 523 (1991); Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989).

14. Because race and class are interlocking forces, I have included a significant discussion of class inequality and poverty in this "racial" critique of gay and lesbian legal theory and political discourse. This Article, however, does not "extensively" analyze "female" status and patriarchy—although they also inform sexual subordination. Because this Article largely omits patriarchy from analysis, it essentializes, to some degree, the experiences of people of color and is subject to the criticism that it tends to reflect gay male experiences. I do not intend, however, to represent the experiences of all gay people of color. Accordingly, I have explicitly stated, where appropriate, how "maleness," the negative construction of men of color, and female status—rather than the essentialist notion of "race"—have informed my discussion of anti-gay discrimination.

Furthermore, even though this Article attempts to portray incidents in the lives of gay men of color, it cannot fully capture the complexity of their experiences. No single article could complete such a feat. Instead, I hope this Article will serve as a starting point for a more intense examination of the various complexities of gay life. Accordingly, I invite and encourage similar discussions, including feminist critiques of this Article, surrounding gender, class, race, and other sources of disempowerment.

15. For an excellent compilation of the rapidly growing body of legal scholarship pertaining to gay and lesbian issues, see Standing Comm. on Lesbian and Gay Issues, Am. Assoc. Law Libraries, *Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law: 1969-1993*, 86 LAW LIBR. J. 1 (1994).

multidimensional nature of these gay and lesbian experiences with gay and lesbian legal theory and political discourse, which, by excluding issues of racial and class subordination from analysis, have a narrow and essentialist¹⁶ focus. In Part III, I argue that gay and lesbian essentialism negates and obscures the experiences of people of color and the poor, centralizes the experiences of race- and class-privileged individuals, renders inadequate the theories and solutions proposed to explain and confront sexual subordination, and fosters tension with antiracist political agendas and with people of color. In Part IV, I locate my racial critique of gay and lesbian legal theory and political discourse within the extensive and ongoing anti-essentialist debates in feminist legal theory and critical race theory.¹⁷ I also demonstrate how this Article develops and extends these debates. Finally, I invite gay and lesbian legal theorists and political activists to engage in a conversation around sexual, racial, and class inequality and to adopt a “multidimensional framework”—or *multidimensionality*—to analyze and challenge sexual subordination. By offering multidimensionality to gay and lesbian legal theorists and political activists, I wish to provide them with a methodology by which to analyze the impact of racial and class oppression (and other sources of social inequality) upon sexual subordination and gay and lesbian experience and to cease treating these forces as separable, mutually exclusive, or even conflicting phenomena. In time, gay and lesbian scholars and activists may begin to see the terms “gay,” “lesbian,” and “homophobia” as multilayered. Furthermore, a multidimensional construction of sexual identity oppression can enrich gay and lesbian legal theory and political action by permitting a deeper analysis of power inequality among gays and lesbians and between gays, lesbians, and heterosexuals. Finally, multidimensionality will allow gay and lesbian legal theorists and political activists to reformulate their theories and activism so that they no longer relegate people

16. In this Article, “essentialism” refers to an attempt to define a group as unitary despite its members’ diverse, as opposed to “essential,” experiences. See Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. Rev. 639, 674 n.4 (1993); Harris, *supra* note 13, at 584. The discussion of essentialism in this Article is, therefore, distinct from the essentialism/constructivism debates in gay and lesbian legal theory which discuss whether a “homosexual orientation” is an “essential,” “deep-rooted, fixed, and intrinsic feature of individuals” or whether “it is a contingent, socially malleable trait” Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 547 (1994). I do not wish to imply, however, that these debates are necessarily distinct.

17. See *supra* note 13.

of color and the poor (and racism and poverty) to "shadows and silence."

For the wages of sin were visible everywhere, in every wine-stained and urine-splashed hallway, in every clanging ambulance bell, in every scar on the faces of the pimps and their whores, in every helpless, newborn baby being brought into this danger, in every knife and pistol fight on the Avenue, and in every disastrous bulletin: a cousin, mother of six, suddenly gone mad, the children parcelled out here and there; an indestructible aunt rewarded for years of hard labor by a slow, agonizing death in a terrible small room; someone's bright son blown into eternity by his own hand; another turned robber and carried off to jail.¹⁸

II. HETEROSEXISM AND HOMOPHOBIA:

A COMBINATION OF RACIAL, CLASS, AND SEXUAL OPPRESSION

In the early morning dawn in Queens, New York, June 2, 1990, three male members of a neo-Nazi, white supremacist gang murdered Julio Rivera—a 29-year-old, gay, Puerto Rican male.¹⁹ Rivera's killers attacked him repeatedly with a hammer, wrench, beer bottle, and knife. One of the white supremacist assailants later confessed, in connection with a plea agreement, that they killed Rivera "because he was gay."²⁰ Rivera's murder tragically reminded gay and lesbian people of their vulnerability to hate-inspired violence. Rivera's death also presented intersecting issues of racial, class, and sexual marginalization—issues that were largely omitted from political discourse surrounding his death.

Immediately following Rivera's death, gay and lesbian activists monitored and criticized the police investigation. In particular, they objected to the police refusal to classify the murder as an anti-gay crime.²¹ The police refused to characterize the crime as gay-related

18. JAMES BALDWIN, *THE FIRE NEXT TIME* 20 (1963).

19. For a detailed account of the murder, see Alessandra Stanley, *The Symbols Spawned by a Killing*, N.Y. TIMES, Nov. 18, 1991, at B1.

20. Joseph P. Fried, *A Murder Verdict Becomes a Rallying Cry*, N.Y. TIMES, Nov. 24, 1991, § 4, at 6.

21. See *id.* at 6. Under New York law, persons who commit acts of violence on the basis of sexual orientation are not subject to any enhanced or special penalties. See Martin S. Zwering, *Legislating Against Hate in New York: Bias Crimes and the Lesbian and Gay Community*, 11 *TOURO L. REV.* 529, 561 (1995) (citing Arthur S. Leonard, *Bias Motivated Crime Requires New Law*, N.Y. L.J., Sept. 25, 1989, at 2). Rather, the statute only provides en-

despite its extreme brutality and its occurrence in an isolated schoolyard known as a meeting place for gay men.²² Instead, the police insisted that the crime was drug-related, noting Rivera's "cocaine habit" and the fact that "drug dealers" also frequented the park.²³ The police never assigned a full-time investigator to the case.²⁴ The police's response to the crime outraged gay and lesbian groups, which proclaimed Rivera's murder "the Gay Howard Beach."²⁵

Although gay and lesbian activists compared Rivera's slaying to the racially motivated Howard Beach incident, the racial and class subordination issues implicated by Rivera's killing and the police response escaped analysis.²⁶ The most obvious reason for believing that racism

hanced penalties for acts of violence based on the "race, color, religion, or national origin" of the victim. See 39 N.Y. Penal Law § 240.30 (McKinney 1996 Supp.). Furthermore, "the current penalty scheme does not cover [any] acts motivated by the defendant's prejudice which result in the death of the victim." Zwerling, *supra*, at 562. Nevertheless, classification of Rivera's murder (and other acts of anti-gay violence) as "gay-related" could have bolstered political efforts to make "sexual orientation" a protected status under New York penal law.

22. See Fried, *supra* note 20, at 6. In his groundbreaking study of homophobic violence, Gary David Comstock notes that such violence often involves torture, mutilation, and excessive physical assault, and that many of these crimes against gay men occur in gay cruising areas by groups of perpetrators. GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 46-51, 66 (1991).

23. See Fried, *supra* note 20, at 6.

24. See Donna Minkowitz, *It's Still Open Season on Gays: Prosecution of Gay Bashers*, 254 *THE NATION* 368 (1992).

25. See Joseph P. Fried, *Trial in Gay Man's Killing Opens in Court in Queens, N.Y.* *TIMES*, Nov. 7, 1991, at B3. Gay and lesbian activists compared Rivera's slaying to the racially motivated attack of three black men by a group of whites in Howard Beach, Queens, on December 20, 1986. The gang of whites beat the black men with bats and sticks and then chased them into a road where one of the black men was struck by a car and killed. Police characterized the attack as a bias crime. One of the survivors reported that the gang shouted "niggers, you don't belong here," as they attacked the men. See Robert D. McFadden, *Black Man Dies After Beating by Whites in Queens*, *N.Y. TIMES*, Dec. 21, 1986, § 1, at 1.

26. See *infra* pp. 584-85, 626-34 (discussing how use of sex-race analogies by gay and lesbian political activists preclude discussions of race). Although gay and lesbian activists responded to Rivera's murder with needed vigor, they explained his victimization and the police responses largely as manifestations of homophobia. See, e.g., sources cited *supra* notes 19-21, 24-25. See also *THE QUESTION OF EQUALITY* (1995) (documentary on gay civil rights movement); Robert Vazquez-Pacheco, *In Their Own Words*, in *THE QUESTION OF EQUALITY* 124 (David Deitcher ed., 1995) (companion book to documentary) ("No one wanted to discuss race in relation to the Rivera case, even though race was one of the most blatant things about it."). *But see Gays Seek Justice for Victim of Hate*, *ORLANDO SENTINEL TRIB.*, Dec. 1 1991, at A13 (reporting activist's belief that the police "branded Julio as a Latino, drug user, hustler and therefore not worthy of anything . . .") (quoting Matt Foreman, head of the New York City Gay and Lesbian Anti-Violence Project); Vazquez-Pacheco, *supra*, at 124 (noting racial activism of Latino gay men in the aftermath of Rivera's death). Consequently, issues of race and class which led to his murder and shaped the police response remained unexamined and unchal-

may have contributed to Rivera's slaying is the fact that he was killed by members of a white supremacist organization. Although one of the assailants testified that the group killed Rivera because he was gay, Rivera's Latino status likely rendered him particularly vulnerable to the homophobic attack.²⁷ Viewed in this manner, Rivera's assault can be characterized as an act of "racist-homophobia," rather than a "gay" bashing.

Newspaper articles reporting the murder, and the public and police responses to it, vividly highlight racial and class aspects of the crime. Several articles emphasize that Rivera was a Puerto Rican man with a cocaine addiction who grew up "in a South Bronx project"²⁸—a combination resulting in the archetype of urban violence. They also report that Rivera was "very Latin [and] very macho."²⁹ Thus, as one article reports, "Rivera . . . was the most improbable gay martyr—a Hispanic drug user from Queens who lived on the far fringes of gay society."³⁰ These articles use racial and heterosexist stereotypes of men of color to construct a portrait of Rivera as a "hot, macho, Latin"³¹—a man whose

lenged.

27. See Julie Inness, *Going to the Bottom*, 9 BERK. WOMEN'S LJ. 162, 170 (1994) ("When a Black lesbian is called a 'dyke,' the word cannot be understood as directed at her only as a lesbian; her attacker wishes to harm her because he sees her as a Black lesbian . . ."). Members of the skinhead group denied charges of racism, see Peg Tyre, *Former "Skinheads" Deny Racism*, NEWSDAY, Nov. 14, 1991, at 19, as well as homophobia, see Curtis L. Taylor, *Accused Killer: I'm Not Homophobic*, NEWSDAY, Nov. 8, 1991, at 21. Given the context in which they were made—the wake of a criminal trial—these statements were likely self-serving, offered only to garner public support for the assailants and, thus, devoid of any credibility.

28. Stanley, *supra* note 19, at B1. The "South Bronx" refers to a largely poor and Puerto Rican neighborhood in the Bronx, New York.

29. *Id.* See also Donatella Lorch, *An Unlikely Martyr Focuses Gay Anger*, N.Y. TIMES, Nov. 15, 1991, at B1 (reporting that Rivera "loved to 'play mecho'").

30. Stanley, *supra* note 19 at B1.

31. Jenny Rivera comments that

[h]istorically, Latinos have been stereotyped as violent and alien. This misrepresentation of the "Latino character" has developed during the past century, and non-Latino society today continues to express and exploit inaccurate images of Latinos and Latino family life.

Popular myth has become accepted as truth; Latino males are believed to be irrational and reactive. The standard description of Latino males as hot-blooded, passionate, and prone to emotional outbursts is legendary. 'Macho' is the accepted—and expected—single-word description synonymous with Latino men and male culture. Consequently, it is natural to expand and apply this construct to the entire Latino community, and thereby justify the assumptions that Latinos are violent.

Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD LJ. 231, 240 (1994) (discussing racial stereotyping of Latino males) (citations omitted) (emphasis added).

status as a symbol of sexual subordination was, therefore, deemed "unlikely" and "improbable."³²

While the subtext of race and class clearly impacted the reporting of Rivera's murder, the conclusion that racial and class biases may have also influenced the police reaction can be inferred from the circumstances of the crime, the nature of the police response, and the greater social context of racial, class, and sexual subordination. There are at least two possible explanations for the police department's initial failure to classify the crime as an anti-gay murder. Each involves a combination of racial, class, and sexual oppression issues. First, the police may not have actually believed Rivera was gay. Second, the police may have known or discovered Rivera was gay but, despite the compelling evidence of anti-gay motive, decided against labelling the crime a gay bashing.³³

Under the first explanation, the police did not believe Rivera was gay. Such disbelief possibly resulted from competing stereotypical images which construct "gay" men as effeminate and weak³⁴ and poor "Latin" men as "macho" and violent³⁵—thus heterosexual.³⁶ These negative class, racial, gender, and sexual constructs may have made it difficult—or impossible—for the officers to comprehend that Rivera was actually "gay" and the *victim* of anti-gay violence.³⁷ Under these competing stereotypes, a "Latino gay man" becomes an oxymoron. Hence, as one newspaper reports, Rivera's victimization "do[es] not hold up to . . . perfunctory logic."³⁸ Under racial and class hierarchy,

32. Lorch, *supra* note 29, at B1.

33. These explanations are not necessarily exclusive of each other; that is, *both* may explain the police response.

34. See RICHARD A. ISAY, *BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT* 20 (1989); A.P. MacDonald, Jr., *Homophobia: Its Roots and Meanings*, 3 *HOMOSEXUAL COUNSELING J.* 23, 30 (1976).

35. See Rivera, *supra* note 31, at 240.

36. The clash between Rivera's "Latino" and "gay" statuses reveals that "gay" stereotypes are culturally, racially and class contingent. See *infra* pp. 609-13 (discussing multilayered nature of gay and lesbian stereotypes).

37. Under racial hierarchy, Rivera could possibly not be a "victim" at all, but rather a threat and a criminal. For a more extensive discussion of this point, see generally Stephen L. Carter, *When Victims Happen to Be Black*, 97 *YALE L.J.* 420, 421 (1988), which argues that the "meaning of victimhood in our society is constructed by a dominant culture that often displays difficulty conceiving that important harms can come in varieties unlikely to afflict its members."

38. Stanley, *supra* note 19, at B1. This article suggests that the status of Rivera as a "victim" and Daniel Doyle, one of his assailants, as a killer, is ironic because "[i]t was Mr. Rivera, a longtime cocaine user, whom close friends describe as deeply troubled and unhappy," *id.*, while Mr. Doyle had a 3.4 grade point average and was "very smart, very sweet, very

however, one has less difficulty visualizing a poor, heterosexual, "macho," Latino drug addict killed in an illegal narcotics transaction.

The second explanation assumes that the police actually knew Rivera was gay—either after their own investigation or the activists' forceful protests—but declined to classify the crime as a "gay" bashing, despite evidence of anti-gay motive. Racial, class, and sexual bias again may have informed the police inaction. Homophobic police would not want to draw greater public attention to the problems of homophobic violence by truthfully labelling the crime as an act of anti-gay bias.³⁹ The police, if they were homophobic, needed an alternative interpretation of the crime—one that diminished or erased the significance of Rivera's sexuality. Rivera's race and class provided this necessary diversion and helped the police reconstruct the facts of Rivera's murder and negate his homosexuality. The police invoked the class- and race-based images of poor Latinos as "criminals" and "drug-users" to detract from Rivera's victimization and to recast him as responsible for his own murder. The police then manipulated these racial and class constructs to suppress the homophobic nature of the crime and to excuse their own inaction. Consequently, racism served to reinforce homophobia.

The activists' essentialist framing of the crime as a "gay" bashing, rather than a racist-homophobic attack, may actually have invited the police to use Rivera's race to erase his gayness. Had the activists stressed both the homophobic *and* racial motivations of the skinhead assailants and portrayed Rivera as a *gay Latino* victim, the police's racially-coded explanation would have backfired: it would have buttressed a claim that racial bias contributed to Rivera's death and to *their own* indifference to his attack. A multidimensional response, by contrast, exposes and confronts the negative class, racial, and heterosexist forces that may have informed the police inaction. Under a multidimensional framework, the police's race- and class-based explanation would have failed or been problematic from the outset.⁴⁰

The race and class issues implicated by Rivera's *death* demonstrate

committed to his work," *id.* (quoting Doyle's college English professor).

39. The activists' focus on homophobia suggests that they believe this reason explains the police response.

40. I do not wish to imply that a multidimensional response would have prevented the officers' manipulation of race and class. Given the irrationality of racism, such a response may have occurred even under multidimensional activism. Rather, I believe that multidimensionality would have provided a more accurate and possibly more effective political response to the officers' inaction.

the importance of considering multiple sources of disempowerment when responding legally and politically to sexual subordination.⁴¹ Rivera, however, suffered a violent combination of class, racial, and sexual subordination during his *life* as well. Placing Rivera's death in the context of his life, instead of viewing him solely at the moment he was killed, permits a better understanding of the interplay between racial, class, and sexual subordination. Rivera, like scores of Puerto Ricans in New York City, was poor,⁴² unemployed,⁴³ uneducated (formally),⁴⁴ and gay. During his short life, Rivera attempted to "deal" with these statuses. In order to escape poverty—and "the far fringes of gay society"—an adolescent Rivera entered into a series of relationships with "wealthy, older men who introduced him to the theater, fine food and wine, designer clothes, cocaine and the club scene."⁴⁵ Soon Rivera grew to "like[] the best of everything . . . and he got it from the men in his life; Armani suits, crystal, the best colognes. Once he saw the good side of life, he could never go back to where he came from"—the South Bronx.⁴⁶ Rivera, however, "was never a really happy person [due to the homophobia of] his uncles and aunts . . . [and] the stigma of being from the South Bronx."⁴⁷ Instead, Rivera developed self-destructive habits, eventually succumbing to a cocaine addiction and apparently sustaining this addiction by exchanging sex for "money or drugs" in risky, anonymous encounters.⁴⁸ Rivera's self-destructive be-

-41. Under a multidimensional paradigm, for example, gay and lesbian legal theorists and civil rights attorneys might challenge police inaction to violence against gays and lesbians by filing claims of racial discrimination. See *infra* pp. 578-81 (discussing racial discrimination suit brought to remedy police inaction in wake of a physical assault on person of color whom police perceived as "gay").

42. A sampling of social statistics with respect to the Latino community shows that Rivera's plight was all too common. In 1990, 25% of Latino families lived below the poverty level, compared to 9.5% of non-Latinos. See U.S. Dep't of Commerce, Econ. and Stat. Admin., Bureau of the Census, *The Hispanic Population in the United States* 8 (Current Population Reports Population Characteristics Series P-20, No. 455, Mar. 1990). Also, Latino children accounted for 21% of children living in poverty although they represented only 11% of the total population of children. See *id.* Among Latinos, Puerto Rican families had the highest rate of poverty—37.5%.

43. In 1990 the Latino unemployment rate was 10% compared to 6.9% for non-Latinos. See *id.* at 3.

44. In 1991 only 51% of Latinos had completed at least four years of high school. Only 10% had completed four years of college. See *id.*

45. Stanley, *supra* note 19, at B1.

46. *Id.* (quoting Rivera's sister).

47. *Id.*

48. Curtis L. Taylor, *Witness Recounts Gay Man's Death*, NEWSDAY, Nov. 7, 1991, at 8 (the assailants "us[ed] money or drugs for sex to lure Rivera into a hidden alcove in the school-

haviors, possibly spawned by the oppression he faced,⁴⁹ helped to create the circumstances surrounding his death.⁵⁰ Rivera never overcame the combination of homophobia, racism, and poverty in his life, and he died without "ever lik[ing] himself."⁵¹

Thus, a "re-reading" of Rivera's life reveals that the debilitating forces of racial, class, and sexual subordination worked violence against him long before his death. These forces limited his life choices, contributed to his murder, and explain the ambivalent police response to the crime.⁵²

Another tragedy of racial, class, and sexual subordination is presented by the life and death of Venus Xtravaganza, a young, poor, Puerto Rican, transsexual male featured in the film *Paris Is Burning*,⁵³ a documentary on poor, gay and transgendered blacks and Latinos who live in New York City. *Paris Is Burning* examines Harlem's "drag ball" culture, which has its roots in the Harlem Renaissance.⁵⁴ Venus, a partici-

yard").

49. Several studies have linked alcohol and substance abuse to stress associated with sexual subordination. See Dennis Anderson, *Family and Peer Relations of Gay Adolescents*, 14 *ADOLESCENT PSYCHIATRY: DEV. AND CLINICAL STUD.* 162, 176 (1987); Robert J. Kus, *Alcoholism and Non-Acceptance of Gay Self: The Critical Link*, 15 *J. HOMOSEXUALITY* 25, 25-26 (1988); David J. McKirman & Peggy Peterson, *Stress, Expectancies, and Vulnerability to Substance Abuse: A Test of a Model Among Homosexual Men*, 97 *J. ABNORMAL PSYCHOL.* 461, 465 (1988); Rosario, Hunter & Rotheram-Borus, HIV Center for Clinical and Behavioral Studies, New York State Psychiatric Institute, Unpublished Data on Lesbian Adolescents (1992).

50. See Taylor, *supra* note 48, at 8.

51. Stanley, *supra* note 19, at B1 (quoting Rivera's sister).

52. Two of Rivera's assailants were convicted by a jury of second-degree murder. The third, who testified against the other two, pleaded guilty to manslaughter. Joseph P. Fried, 2 *Accomplices Guilty of Murder in "Gay Bashing" Case in Queens*, *N.Y. TIMES*, Nov. 21, 1991, at A1. During the trial, the judge sparked a controversy by privately questioning prospective jurors regarding their sexual orientation and their attitudes toward gays and lesbians. Joseph P. Fried, *Judge in Queens Murder Trial Admits Asking Juror Whether She Is Homosexual*, *N.Y. TIMES*, Nov. 5, 1991, at B1. The judge did not permit defense counsel or prosecutors to attend the questioning. *Id.* An appellate court subsequently reversed the convictions, finding that the private questioning denied defendants their right to a "public trial" under the Sixth and Fourteenth Amendments of the United States Constitution. See *New York v. Bici*, 621 *N.Y.S.2d* 666 (App. Div. 1995); *New York v. Brown*, 621 *N.Y.S.2d* 668 (App. Div. 1995). *Brown*, one of the defendants whose conviction was overturned, subsequently pleaded guilty to a reduced charge of first-degree manslaughter and agreed to testify for the prosecution in the re-trial of the remaining co-defendant. See Joseph P. Fried, *Man Gully in '90 Killing in Queens*, *N.Y. TIMES*, May 14, 1996, at B3. *Bici*, the remaining co-defendant, failed to appear for a court hearing after his accomplice agreed to cooperate with authorities. *Defendant in Killing Fails to Appear*, *N.Y. TIMES*, May 15, 1996, at B6. A judge subsequently revoked *Bici's* bail and ordered his arrest. See *id.* *Bici*, however, remains missing. See Scott Fallon, *Gay Activists Blast Stay—Case Release*, *NEWSDAY*, June 23, 1996, at A29.

53. *PARIS IS BURNING* (Prestige Films 1991).

54. See HEMPHILL, *To Be Real*, in *CEREMONIES*, *supra* note 9, at 119 (citing Eric Garber, *A*

part in the balls, wants to taste "power," which life has taught her is clustered around whiteness, wealth, and heterosexuality. To this end, she desires to become "a spoiled, rich white girl [because t]hey get what they want whenever they want it . . . and they don't have to really struggle with finances."⁵⁵ Other individuals in the film share Venus' desires. Participants in the drag balls competitively "mock[] and play[] out the rituals of a fashion show."⁵⁶ In their contests, as in the "high" fashion world they mimic,

power remains almost exclusively defined in materialistic, Caucasian, and consumer terms. Many long to be rich and famous. Some long to be white and female, clearly an escapist longing, a longing that if realized would then place them in collusion with white supremacy—the primary source of their present disempowerment. They want to be stars in a world that barely wants to see them alive and thriving. They want things in a world that has caused more than a few of them to not want themselves.⁵⁷

The fantasy of drag ball culture, however, cannot negate the reality

Spectacle in Color: The Lesbian and Gay Subculture of Jazz Age Harlem, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (Duberman, Vicinus & Chauncey eds., 1990). All references in this Article to *Paris Is Burning* are taken from *Ceremonies* in which Hemphill discusses the film at length. See *id.* at 111-21. Hemphill, a black gay poet, died on November 4, 1995, due to complications from AIDS. *Essex Hemphill, 38, Poet and Performer*, N.Y. TIMES, Nov. 10, 1995, at B7.

55. HEMPHILL, *supra* note 54, at 118.

56. *Id.* at 111.

57. *Id.* at 116. See also BELL HOOKS, *Is Paris Burning?*, in BLACK LOOKS: RACE AND REPRESENTATION 147-48 (1992) ("What viewers [of *Paris Is Burning*] witness is not black men longing to impersonate or even to become like "real" black women but their obsession with an idealized, fetishized vision of femininity that is white."). Hemphill draws a parallel between the oppression-induced fantasy of drag ball culture and similar manifestations in rap music. He argues that

[i]t would be inaccurate to suggest that using illusion to construct identity is unique to Black gay reality. Everyone is capable of creating and employing illusion and fantasy for whatever purpose. An immediate example can be cited in a style of rap music known as "gangsta rap." The rapper boasts of being an outlaw, of having control and power, guns and money; again, things longed for by the disempowered . . . They are seductive longings, mutated dreams forged from the multitudinous oppressions constructing American society.

HEMPHILL, *supra* note 54, at 116. Although I agree with Hemphill's observation that rap music often expresses a longing for masculinist power, I disagree with his implicit, though possibly unintended, assumption that rap culture is external to "Black gay reality." For a fictional, "popular culture" account of the relationship between "hip-hop" and black gay and bisexual culture, see JAMES EARL HARDY, *B-BOY BLUES* (1994).

of multilayered subordination—but can only “temper” and “obscure” it.⁵⁸ Thus, Venus never realizes her escapist longings. Instead, she begins to engage in sex work to *survive*: “she always took a chance. She always went into a stranger’s car. She always did what she wanted to get what she wanted”⁵⁹ Later, Venus, as a friend recounts, is murdered, and police discover “her dead after four days, strangled, under a bed in a sleazy hotel in New York City *But that’s part of life; that’s part of being a transsexual in New York City and surviving.*”⁶⁰ Venus’ disempowerment was caused by an active interplay of poverty, racism, and sexual subordination, and her life and death may not be understood without considering these multiple sources of oppression.⁶¹

One final illustration of the multidimensional nature of oppression is provided by the case of Jeffrey Dahmer. In July 1991 Dahmer, a young white male, confessed to police that he had killed and dismembered seventeen males in his Milwaukee apartment.⁶² Most of

58. HEMPHILL, *supra* note 54, at 116. The balls, however, do not only temper oppression through fantasy. Rather, they may offer *concrete* support as participants, organized as teams (or “houses”), sometimes “function as surrogate families for Black and Puerto Rican gay youth who may be homeless, orphaned, or rejected by their [biological] families because of their gayness.” *Id.* at 119.

59. *Id.* at 118 (quoting friend of Venus).

60. *Id.* (quoting friend of Venus) (emphasis added).

61. The murder of Moses Preston Waller, a black, transgendered sex worker, also illustrates the intersection of race, class, and sexuality in acts of violence against transgendered, lesbian, and gay people, particularly, the vulnerability of transgendered sex workers to acts of violence. Waller, nicknamed “Silver,” was robbed and stabbed in the chest by a prospective client. Andrew Jacobs, *No Burial Aid for Moses Preston Waller*, N.Y. TIMES, June 2, 1996, § 13, at 6.

The New York State Crime Victims Board denied a request by Silver’s grandmother, Rosalie Roots, for reimbursement of Silver’s burial expenses. *See id.* The board denied her request on the grounds that Silver “contributed to the infliction of his injury.” *Id.* A board attorney, however, stated that “it was not common practice for members to reject claims for victims who had engaged in prostitution.” *Id.* (quoting Everett A. Mayhew). Furthermore, Roots claims that a board spokesperson informed her that the board has previously reimbursed families of white heterosexual female prostitutes. *See id.*

The New York Gay and Lesbian Anti-Violence Project has filed an appeal on Roots’ behalf. *Id.* Windy Brown, the attorney representing Roots, recognizes the racial and sexual aspects of the board’s ruling. Brown asks: “Why is a straight white prostitute any more innocent than an African-American prostitute?” *See id.* The board’s decision adds further support for my thesis that discrimination on the basis of sexual orientation is linked with racism and class oppression.

62. *See* *Sinthasomphone v. Milwaukee*, 838 F. Supp. 1320, 1321-22 (E.D. Wis. 1993). On November 28, 1994, while serving fifteen consecutive life sentences for the murders, Dahmer was beaten to death by a fellow inmate. *See* Don Terry, *Jeffrey Dahmer, Multiple Killer, Is Bludgeoned to Death in Prison*, N.Y. TIMES, Nov. 29, 1994, at A1.

Dahmer's victims were black gay men.⁶³ Dahmer lived in an economically depressed neighborhood.⁶⁴ Like Rivera and Venus Xtravaganza, many of Dahmer's victims were lured to their deaths by promises of money for sexual favors, namely, posing nude for photographs.⁶⁵

Dahmer's confession stunned the nation. Perhaps more surprising than the murders, however, was the revelation that three white police officers had once (prior to Dahmer's confession) responded to emergency calls by Dahmer's neighbors—two black women—and found fourteen year-old Konerak Sinthasomphone, a Laotian youth, drugged, naked, bleeding, and fleeing Dahmer's apartment.⁶⁶ Despite the imperiled condition in which they found Konerak, two of the officers returned him to the apartment after Dahmer convinced them that he and Konerak were "lovers involved in a spat."⁶⁷ When the officers returned to the police station, they described the case as a "boy-boy" incident and joked that they needed "de-lousing."⁶⁸ The officers also failed to enter Dahmer's name into police computers or file an official report of the incident.⁶⁹ Dahmer killed Konerak after the police left.⁷⁰ Subsequent to Dahmer's confession, it was revealed that he had previously been convicted of molesting an older brother of Konerak in 1988.⁷¹

63. See Edward Walsh, *Sweeping Changes Urged in Milwaukee Police Department: Civilian's Report Prompted by Dahmer Case*, WASH. POST, Oct. 16, 1991, at A3. Eleven of Dahmer's victims were black. *Sinthasomphone*, 838 F. Supp. at 1321. I found no sources that verify the exact number of gay men among Dahmer's victims.

64. See Don Terry, *Milwaukee Grasping for Answers As Horror Mounts Over Killings*, N.Y. TIMES, July 29, 1991, at A1.

65. See William Booth, *Dahmer Charged in 8 More Murders*, WASH. POST, Aug. 7, 1991, at A1. I have not located any helpful sociological or criminological analysis on the relationship between class, race, sexuality, gay male sex work, and anti-gay violence. The discussion in this Article, however, suggests that this relationship warrants examination.

66. See James Barron, *Milwaukee Police Once Queried Suspect*, N.Y. TIMES, July 21, 1991, § 1, at 6. Dahmer met Konerak at a Milwaukee mall and enticed the child to accompany him to his apartment with promises of money in exchange for his posing nude or semi-nude for photos. See *Sinthasomphone*, 838 F. Supp. at 1322. Dahmer testified that he had "drilled a hole" in Konerak's head and drugged him with hydrochloric acid before the youth attempted to escape. *Id.*

67. Debbie Howlett, *Police Were in Dahmer's Room*, USA TODAY, Aug. 2, 1991, at 3A.

68. *Id.*

69. See Barron, *supra* note 66, § 1, at 6. The officers were suspended for failing to execute these procedures. See *id.* The two officers who returned Konerak to Dahmer's apartment were subsequently fired but won reinstatement after a judge found the dismissals "shocking to one's sense of fairness." *Victory for Two in Dahmer Case*, N.Y. TIMES, Apr. 28, 1994, at B10 (quoting Judge Robert Parins).

70. See Barron, *supra* note 66, § 1, at 6.

71. See William Celis III, *Family Sought New Life Only to Find New Pain*, N.Y. TIMES, July 31, 1991, at A14. Dahmer received an eight-year prison term for this crime, but he was

Had the police officers conducted a computer search of Dahmer's name, they would have discovered his prior molestation conviction.⁷² The police inaction implicates a combination of racial, class, gender, and sexual subordination issues.

The police officers dismissed the concerns of the two poor black women who reported their fear that a "child [was] being raped and molested by [Dahmer]."⁷³ Instead, one officer tried to assure the women that "it wasn't a child, it was an adult . . . I can't do anything about somebody's sexual preferences in life."⁷⁴ An officer also threatened to arrest one of the black women if she persisted in seeking help for Konerak.⁷⁵ Finally, the officers turned away an ambulance crew that arrived on the scene—although one of the paramedics concluded that Konerak needed medical treatment.⁷⁶

Thus, the police ignored Konerak's obvious injuries, denied him necessary medical care, portrayed the incident pejoratively, dismissed the black women, and accepted Dahmer's characterization of the horrible scene they discovered as a lovers' quarrel. Furthermore, the officers apparently believed that violence, drugs, and dramatic differences in age are common features of "boy-boy" relationships—a patently homophobic conclusion.⁷⁷ The officers may have also acted on racist stereotypes of Asian men as effeminate—thus "homosexual"⁷⁸—when they "read" the scene as a domestic dispute.

In response to the officers' egregious conduct, Konerak's estate and several of his family members have filed a lawsuit against the officers and the City of Milwaukee under Title 42 U.S.C. Section 1983 ("Sec-

released and placed on probation after serving one year of the sentence. *See id.*

72. *See* Barron, *supra* note 66, § 1, at 6.

73. *See* Howlett, *supra* note 67, at 3A (quoting police transcript).

74. *Id.* (quoting police transcript) (emphasis added).

75. *Sinthatomphone*, 838 F. Supp. 1324. Historically, black women have been perceived as lacking credibility as witnesses in legal proceedings due to intersecting racial and gender stereotypes, particularly when they allege that they have suffered sexual assault or harassment. Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, S. CAL. L. REV. 1467, 1470 (1992). In this case, however, they lacked credibility as witnesses of a *third-party's* sexual assault.

76. *See Sinthatomphone*, 838 F. Supp. at 1324.

77. Neither Dahmer's nor Konerak's sexual orientation is publicly known. In any event, this information is irrelevant for my analysis. The relevant facts in this scenario are the officers' belief and Dahmer's declaration that he and Konerak were lovers (read "gay") and the officers' anti-gay and racial bias.

78. *See* Petersen, *supra* note 12, at 122 (discussing "racist iconography of manhood" that "typically depicts Asian men as effeminate and passive"); David Mura, *How America Unsexes the Asian Male*, N.Y. TIMES, Aug. 22, 1996, at C9 (discussing sexual stereotyping of Asian men).

tion 1983").⁷⁹ The complaint alleges that the officers' failure to provide protection for Konerak resulted from discrimination on the basis of race *and* sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.⁸⁰ The complaint also alleges that the City of Milwaukee maintained a policy or custom of discrimination against people of color *and* sexual minorities, pursuant to which the officers acted.⁸¹ Thus, this litigation is one

79. This statute provides, in relevant part, that [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). The term "person" used in the statute includes "municipalities" and other local government units. See *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978).

80. Although the published decisions in this case do not make clear, through conversations with plaintiffs' attorney, I discovered, as the facts of the case suggest, that plaintiffs' race claim is based on discrimination against Konerak and the two black women and the sexual orientation claim is based on Konerak's perceived sexual orientation.

Police officers generally have no affirmative duty to provide protection. See *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 197 (1989). If they discriminate in providing such protection, they may nevertheless violate the Equal Protection Clause of the Fourteenth Amendment, see *id.* at 197 n.3 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (citation omitted); *Watson v. Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) (citation omitted).

81. See *Sinthatomphone v. Milwaukee*, 785 F. Supp. 1343, 1347 (E.D. Wis. 1993) (complaint alleges that City of Milwaukee "has a longstanding practice of intentional discrimination against and reckless disregard of the rights of racial minorities and homosexuals."). In order to prevail on a claim of discrimination against a municipality under Section 1983, a plaintiff must demonstrate that the constitutional deprivation was made pursuant to an official municipal policy or custom. See *Monell*, 436 U.S. at 690-91.

The complaint also alleges that the officers violated Konerak's rights under the Due Process Clause of the Fourteenth Amendment by failing to protect him. See *Sinthatomphone* 838 F. Supp. at 1328. The court, however, relying upon *DeShaney*, held that the officers were entitled to "qualified immunity" and granted them summary judgment on plaintiffs' due process claim. See *Sinthatomphone*, 838 F. Supp. at 1327-28. The qualified immunity defense shields state officials from liability unless the officials' conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Shockingly*, the court attached semi-nude photos of Konerak, taken by Dahmer, to its opinion granting summary judgment, and West Publishing Co. reprinted them in the Federal Supplement. The police officers submitted the photographs into evidence to support their claim that they believed Dahmer and Konerak were lovers. *Sinthatomphone*, 838 F. Supp. at 1323. The court based its finding of qualified immunity on its conclusion that "one does not inevitably know that getting a naked person off the streets, taking him to an apartment where his clothes and near-naked pictures of him are present, and leaving him there with a person who convincingly presents himself as a friend will result in death and dismem-

of the *few* reported discrimination cases brought by actual or perceived as gay or lesbian people of color, in which the racially *and* sexually subordinate statuses of the plaintiff is mentioned in the opinion.⁸² It is also the *only* reported case in which the court found as "factually viable" a multidimensional claim of sexual and racial discrimination. Therefore, although the case overall lacks controversy⁸³ and any particularly groundbreaking judicial analysis, it nevertheless merits some attention in this Article.

After conducting discovery, the officers and the City of Milwaukee moved for summary judgment, but the court denied both of these motions. In the affidavits accompanying their motion, the officers disputed that they acted with discriminatory intent.⁸⁴ The court, however, held that the undisputed facts would permit a jury to infer that they acted with discriminatory intent.⁸⁵ Discriminatory intent may be shown with direct or indirect evidence.⁸⁶ In this case, the officers' intent, as in most discrimination cases, is subject to proof by circumstantial evidence.⁸⁷ Because plaintiffs' discrimination claim requires proof of the officers' intent or motive through inferences from the surrounding—and compelling—evidence of bias, the claim does not lend itself to summary judgment.⁸⁸ Thus, the court appropriately denied the officers' mo-

berment." *Id.* at 1328. The court's decision to attach the photographs to its opinion and West's decision to reprint them further marginalized Konerak.

82. *See, e.g., Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (affirming award of summary judgment to defendant in Title VII and Section 1981 racial discrimination suit, brought by black gay male plaintiff, on the grounds that plaintiff's allegations related to "homosexuality" a status not protected by Title VII or Section 1981, rather than race); *Watkins v. United States*, 837 F.2d 1428 (9th Cir. 1988), *amended*, 847 F.2d 1329, *different results reached on reh'g*, 875 F.2d 699 (9th Cir. 1989) (*en banc*, *cert. denied*, 498 U.S. 957 (1990) (finding military estopped from discharging black gay plaintiff on the basis of his admitted gay status); *Rhynne v. Perry*, 1995 WL 77970 (S.D.N.Y. Feb. 24, 1995) (dismissing, for failure to exhaust administrative remedies, Title VII complaint alleging discrimination due to plaintiff's status as a "black male homosexual"). For a criticism of the courts' essentialist treatment of race and sexual orientation in the *Williamson* and *Watkins* cases, see Eaton, *Homosexual Unmodified*, *supra* note 12.

83. *But see supra* note 81 (arguing that the court further marginalized Konerak).

84. *See Sinthasomphone v. Milwaukee*, 878 F. Supp. 147, 151 (E.D. Wis. 1995). In order to prevail on their equal protection claim against the police, the Sinthasomphone estate and family must demonstrate that the officers acted with "discriminatory intent." *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 256 (1977); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976).

85. *See Sinthasomphone*, 878 F. Supp. at 151.

86. *See Batson v. Kentucky*, 476 U.S. 79, 93 (1985); *Village of Arlington Heights*, 429 U.S. at 266.

87. *See Sinthasomphone*, 878 F. Supp. at 151.

88. *See id.* (citation omitted). *See also National Union Fire Ins. Co. v. Turtur*, 892 F.2d

tion.

The City of Milwaukee moved for summary judgment on the grounds that in 1991—the *same year* Konerak was murdered—it allegedly implemented official measures to correct any problems of bias within its police department.⁸⁹ The City of Milwaukee thus argued that the only relevant evidence for determining whether it has a policy of discrimination was its conduct subsequent to 1991 and that this evidence demonstrated that no such policy existed.⁹⁰ The court rejected this argument and held that the police department's pre-1991 history of discrimination was relevant for determining whether the City of Milwaukee had an unwritten "policy" of discrimination against people of color and gays and lesbians *at the time* of Konerak's death.⁹¹ The court's ruling is consistent with legal precedent. As the Supreme Court has held, a custom or policy of discrimination may arise in the Section 1983 context when "practices of state officials could well be *so permanent and well settled* as to constitute a 'custom or usage' with the force of law."⁹² Thus, evidence of the department's pre-1991 history is necessary for the trier of fact to determine whether the police department had been engaging in a pattern of discriminatory practices at the time the officers returned Konerak to Dahmer's apartment and whether these practices were "so permanent and well settled" so as to carry "the force of law."⁹³

199, 205 (2d Cir. 1989) (citing *Wechsler v. Steinberg*, 733 F.2d 1054, 1058-59 (2d Cir. 1984)); *Suydam v. Reed Stenhouse, Inc.*, 820 F.2d 1506, 1509 (9th Cir. 1987); CHARLES A. WRIGHT & ARTHUR R. MILLER, 10A FEDERAL PRACTICE AND PROCEDURE (CIVIL) 2d § 2730, at 236-38 (2d ed. 1983). Often, civil rights actions will involve a question of fact regarding the defendant's intent or motive, thereby precluding summary judgment. See WRIGHT & MILLER, *supra* § 2732.2, at 349-50. There is, however, no general bar to granting summary judgment in civil rights actions, and courts will grant summary judgment in these actions when the material facts are not in dispute or when there is no legal basis for the relief a plaintiff seeks. See *id.* at 362-65.

89. In particular, the City of Milwaukee argued that in 1991 it hired a new police chief who was an advocate of "community-oriented policing." *Sinthesomphone*, 878 F. Supp. at 150. Nevertheless, the City of Milwaukee conceded that the police department had "problems" with discrimination prior to 1991. See *id.* at 149.

90. See *id.*

91. See *id.* at 150-51. The court, however, held that the City of Milwaukee could rely on evidence of corrective measures so that a jury could determine whether these measures remedied any policy of discrimination that existed prior to Konerak's murder. See *id.* at 151.

92. *Monell*, 436 U.S. at 691 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970) (emphasis added)). See also *St. Louis v. Praprotmik*, 485 U.S. 112, 127 (1987) (citing *Adickes*, *supra*).

93. The court's opinion lists a "few" of the "many" historic signs of a possible policy of discrimination by the police department. They include: (1) a 1984 opinion by the Court of

The court's rulings regarding the factual viability of plaintiffs' discrimination claims are consistent with my argument that both racial *and* sexual subordination informed the police's improper response to Konerak's subjugation. This case also demonstrates that multidimensionality need not remain exclusively a creature of legal scholarship, but that it may (and should) influence civil rights cases brought to remedy acts of discrimination.

One final aspect of the Dahmer tragedy merits attention. The officers' racial and sexual bias not only subordinated Konerak but also privileged Dahmer. Affirming racial privilege, the officers accorded Dahmer deference and credibility—allowing him to settle his “spat” alone. Thus, the police subjected Konerak to further “domestic abuse.”⁹⁴ Dahmer, meanwhile, negotiated a favorable resolution, from

Appeals for the Seventh Circuit upholding a jury verdict, which found that Milwaukee police officers conspired for twenty years to “cover up” a racially motivated shooting of a black man by white officers; (2) a 1972 finding by the Wisconsin Advisory Commission to the United States Commission on Civil Rights (“WAC”) that “[t]he charge of racism among policemen [wa]s not a new one, nor one foreign to Milwaukee”; (3) a 1979 finding by the Office of Revenue Sharing that the Milwaukee Police Department “had engaged in procedures and policies that adversely affected employment opportunities for black police officers”; (4) a 1981 conclusion by “consultants” that “a substantial degree of racial polarization [exists] within the [Milwaukee] police department”; (5) a 1991 study by the Wisconsin Fire and Police Commission “report[ing] overt racism and sexism at the Police Academy”; (6) a 1991 finding by the Milwaukee Citizen's Commission on Police-Community Relations “that several [Milwaukee] residents complained of ‘racist and homophobic attitudes and a general lack of respect’ from police officers”; (6) a 1993 finding by the Police Foundation, with which the Milwaukee mayor and chair of the Wisconsin Fire and Police Commission agree, that “institutionalized racism and sexism” in the Milwaukee Police Department “needs to be openly discussed and dealt with”; (7) a 1994 finding by the WAC that the “Milwaukee Police Department has for the past two decades ‘manifested a police culture unsympathetic, and even antagonistic, in its dealings with minority communities of the City’”; and (8) a recommendation by the WAC that the Milwaukee police department adopt “a clearly stated unambiguous policy against discriminatory practices.” *Sinthasomphone*, 878 F. Supp. at 150.

94. The officers' inaction in the wake of Konerak's abuse mirrors the responses of law enforcement to male-female domestic violence cases where police have often failed to protect women from their battering husbands and lovers. See generally Susanne M. Brown, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295 (1995); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501 (1993); Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788 (1986). In this context, the police inaction affirms gender hierarchy, and “the state . . . is thus complicit in one of the most fundamental and extreme acts of male domination over women in contemporary American society.” Eppler, *supra*, at 790 (citing R. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979); J. FLEMING, *STOPPING WIFE ABUSE* (1979); R. LANGLEY & R. LEVY, *WIFE BEATING, THE SILENT CRISIS* (1977); D. MARTIN, *BATTERED WIVES* (1st ed. 1976); E. PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1974); S. SCHECHTER, *WOMEN AND MALE VIOLENCE* (1982)). Several courts have held

his perspective, of the encounter. He maintained dominion over his home and Konerak, who in this context becomes his sexual property (read "it"). The efforts of Konerak and the black women, on the other hand, proved unavailing. Their attempts to secure protection were met with threats, disregard, slurs, jokes, and inaction.⁹⁵

that police inaction to incidents of male-female domestic violence may support claims of sex discrimination (most of the victims of such abuse are women) in violation of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Freeman*, 911 F.2d at 52; *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696 (9th Cir. 1990); *Pinder v. Comm'rs of Cambridge*, 821 F. Supp. 376 (D. Md. 1993); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

95. One might argue, however, that the police responded to Konerak's (and Rivera's) abuse solely out of anti-gay bias (they did not want to help a couple of "queers"). Indeed, one commentator has made such an observation and claims that "[i]f Konerak Sinthasomphone had been a young woman, the Milwaukee police would have responded very differently" Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 336 (1995). Not only does this sweeping statement fail to recognize police indifference to female victims of male domestic violence, it also completely rules out race and class as possible factors in the police treatment of Konerak and Dahmer. While I am mindful that heterosexist police, judges, and legislators often fail to treat incidents of gay and lesbian domestic violence seriously, see Carla M. Da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251 (1994); Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273 (1993); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990); Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993); Murphy, *supra*, we must also remain aware that racial and class biases may also influence their responses. Otherwise, we may suggest that race and class have no importance in the lives of gay people of color—that a homosexual orientation eclipses or otherwise overshadows racial and class statuses. The persistence of racial and class inequality speaks against such a conclusion. Furthermore, it is likely that the results of this scenario would have differed if the race of Dahmer and Konerak had been reversed or if the two women were white and upper-class. Indeed, the fact that "a large number of hate-motivated criminals tend to be young middle-class white males," Zwerling, *supra* note 21, at 545 (citing David Chang, *Beyond Uncompromising Positions: Hate Crimes Legislation and the Common Ground Between Conservative Republicans and Gay Rights Advocates*, 21 FORDHAM URB. L.J. 1097, 1101 (1994)); see also COMSTOCK, *supra* note 22, at 60 ("Regardless of the gender or race of the victim, perpetrators [of homophobic violence] are more likely to be white than of color"), provides an additional reason (besides homophobia) for law enforcement officers to treat anti-gay violence lightly. If the case, however, involves a person of color as the assailant and a white victim, racial biases might bring it greater attention. Therefore, both the Rivera and Dahmer cases could have had different results if the races of the assailants and the victims were inverted.

During the completion of this Article, the City of Milwaukee settled the suit with Konerak's estate and family, agreeing to pay them \$850,000. See *Milwaukee to Pay \$850,000 to Family of Dahmer Victim*, WASH. POST, Apr. 26, 1995, at A6. In a final show of "diplomacy" toward the Sinthasomphone family, the County of Milwaukee, upon discovering the terms of the settlement, asked Konerak's family to repay \$65,000 (of a total of \$106,368) in welfare

* * *

As the Rivera, Venus Xtravaganza, and Dahmer tragedies illustrate, racial, class, and sexual subordination are interrelated. Several of these forces may contribute to a single act of discrimination, as the killing of Rivera and the police behavior in the Rivera and Dahmer tragedies reveal. These sources of disempowerment may also combine to limit an individual's life choices, as the short lives of Rivera, Venus, and the Dahmer victims demonstrate. Moreover, because race and class also create privilege, these statuses may offer some insulation from forces of oppression.⁹⁶ For instance, the police deferred to Dahmer, who was white (and male), although they believed he was gay. Despite the multidimensional nature of social reality, prevailing gay and lesbian legal and political responses to sexual subordination, as Part III illustrates, omit racial and class inequality from analysis and, instead, focus almost exclusively upon the experiences of race- and class-privileged individuals. Consequently, gay and lesbian legal theory and political discourse fail to reflect the complexity of gay and lesbian experiences and exclude people of color and the poor from equality debates.

In this great gay mecca,
I was an invisible man, still
I had no shadow, no substance
No history, no place
No reflection⁹⁷

III. ESSENTIALIST LEGAL THEORY AND POLITICAL ACTION

Although race, class, and sexual subordination actively interact in the lives of gay and lesbian people, gay and lesbian equality discourse invariably excludes racial and class inequity from analysis. The exclusion of race typically occurs when it is treated as analogous to—hence separate from—sexual orientation. For example, one gay theorist, William Paul, has specifically endeavored to determine whether “homosexuals are a minority group with issues identical to the movements for

benefits the family received during the past ten years. See *Give Back Welfare, County Tells Family*, WIS. ST. J., Apr. 27, 1995, at 3B. A “county spokesman” stated that such demands are routinely made when families receive “windfalls” from other sources. See *id.*

96. See *infra*, pp. 605-08 (discussing how class privileges gays and lesbians).

97. Riggs, *Tongues Untied*, in *BROTHER TO BROTHER*, *supra* note 2, at 203.

racial and ethnic minority civil rights."⁹⁸ To reach his conclusion that "people with a homosexual orientation do constitute a minority group,"⁹⁹ Paul purports to analyze the "differences in the discrimination directed by the majority toward Lesbians and Gay men on the one hand and toward racial and ethnic minorities on the other."¹⁰⁰ Although Paul acknowledges passively that gays and lesbians "are members of all races, both sexes, and all socioeconomic groups,"¹⁰¹ his analogy of racial "minorities" to gays and lesbians treats the two as mutually exclusive groups, thereby omitting gays and lesbians of color. A statement by Benjamin Schatz, the Executive Director of the American Association of Physicians for Human Rights, captures, rather strikingly, the essentializing effects of analogical reasoning in gay and lesbian political discourse. During an interview in which Schatz explains how the AIDS epidemic has forced gay and bisexual men to reveal their sexual identities, Schatz states that "AIDS [has] de-invisibilized us The biggest difference between *us* and *blacks* was that *we* were invisible."¹⁰² Clearly, Schatz excludes "blacks" from his population of "gays" ("us" and "we"). Thus, *black gays* are "invisible" under Schatz's analogy.¹⁰³

Race and sexuality analogies, as this Part demonstrates, also preclude an examination of the ways in which racial domination and privilege impact gay and lesbian people. By omitting people of color and ignoring white racial privilege, the analogies obscure the potent social role of race.¹⁰⁴

98. William Paul, *Minority Status for Gay People*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 351, 353 (William Paul et al. eds., 1982).

99. *Id.* at 368.

100. *Id.* at 355.

101. *Id.* at 353.

102. Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES, Oct. 11, 1992 (Magazine), at 29 (emphasis added).

103. Mary Eaton has observed that:

analogical reasoning inserts a space between the things analogized that may be narrowed according to degrees of logical correspondence, but remains ultimately unbridgeable. The effect of this is plain: The possibility of cross-identification or consubstantial oppression is utterly unintelligible in a mode of reasoning that depends upon a separation between identities of oppressions. "Black homosexual" is therefore an oxymoron in an analogical comparison of blacks and homosexuals.

Eaton, *Homosexual Unmodified*, *supra* note 12, at 62.

104. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 297 (1994) (attempts to compare homosexuals and other groups "erases 'vertical' differences within a group . . . [and] 'horizontal' differences across the spectrum of legally protected groups"). Cf. Trina Grillo & Stephanie M.

A. *The Exclusion of Race and Class from Gay and Lesbian Legal Theory*

1. *Essentialist Legal Solutions to Gay and Lesbian Inequality*

Gay and lesbian legal theorists embrace essentialism by excluding issues of race from analysis.¹⁰⁵ As a result, the legal theories and solu-

Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 401 (1991) ("Comparing sexism to racism perpetuates patterns of racial domination by marginalizing and obscuring the different roles that race plays in the lives of people of color and of whites."). Comparisons of racial and sexual subordination abound in both gay legal theory and political discourse. See, e.g., Robert Dawidoff & Michael Nava, *Why Martin Luther King, Jr. Is a Gay-Rights Hero: His Life and His Message Resonate Beyond the Fight Against Racial Prejudice*, L.A. TIMES, Jan. 16, 1994, at M5; William Eskridge, *Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet*, RECONSTRUCTION, No. 2, at 52 (1993); Gerald Gilmerman, *Dred Scott Revisited: A Comment On Bowers v. Hardwick*, 30 BOST. BAR J. 4 (1986); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985). These comparisons separate racial privilege and subordination from sexual orientation and thereby preclude discussions of power differentials created by racial hierarchy within the population of gays and lesbians and between white gay people and people of color.

105. Before I develop this argument, I wish to note, preliminarily, that lesbian theorists have already criticized gay male and feminist legal theorists and, more so, political activists for failing to acknowledge the intersection of sexism and homophobia, equating lesbian and gay male experience, and omitting lesbian issues from analysis. See, e.g., RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 21-22* (1992). Some theorists, most notably Robson, are attempting to construct a more specific, lesbian-centered "lesbian legal theory." See, e.g., *id.*; Paula L. Eitelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993); Ruthann Robson, *Embodiment(s): The Possibilities of Lesbian Legal Theory in Bodies Problematicized by Postmodernisms and Feminisms*, 2 LAW & SEXUALITY 37 (1992); Ruthann Robson & S.E. Valentine, *Love(H)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L. REV. 511 (1990); Ruthann Robson, *The Specter of a Lesbian Supreme Court Justice: Problems of Identity in Lesbian Legal Theorizing*, 5 ST. THOMAS L. REV. 433 (1993). Hence, there is a history of anti-essentialist criticism, focusing on "gender," in gay and lesbian legal theory and political discourse that pre-dates the scholarship exploring race and sexual orientation.

Although lesbian theorists have correctly criticized the respective "male-centered" and heterosexist nature of gay and feminist theory and political action, they too have faced criticism for failing to consider how race informs lesbian experience. See SHANE PHELAN, *GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS* (1994) [hereinafter *GETTING SPECIFIC*]; SHANE PHELAN, *IDENTITY POLITICS: LESBIAN FEMINISM AND THE LIMITS OF COMMUNITY* 161-66 (1989) [hereinafter *IDENTITY POLITICS*]; Arriola, *Gendered Inequality*, *supra* note 12, at 132-35; Jackie Goldsby, *Queen for 307 Days*, in AFREKETE, *supra* note 9, at 165-88; LORDE, *Man Child: A Black Lesbian Feminist's Response*, in SISTER OUTSIDER, *supra* note 9, at 72; LORDE, *An Open Letter to Mary Daly*, in SISTER OUTSIDER, *supra* note 9, at 66; Eaton, *At the Intersection*, *supra* note 12, at 212-18; Petersen, *supra* note 12 at 118-37; Barbara Smith & Beverly Smith, *Across the Kitchen Table:*

tions they propose for "gay" and "lesbian" inequality may have limited benefits—if any—for people of color and the poor. Recent works by William Eskridge on same-sex marriage¹⁰⁶ serve as a perfect example of gay and lesbian essentialism and the problematic impact it has upon theory. In these publications, Eskridge advocates legal recognition of same-sex marriage.¹⁰⁷ A significant portion of Eskridge's analysis attempts to dispose of the concerns of lesbian theorists who argue that achieving legal legitimacy for gay and lesbian unions would actually affirm traditional power differences supplied by gender, assimilate gays and lesbians into middle-class society, and divide the gay and lesbian community along race, class, and gender lines.¹⁰⁸ The lesbian critiques of the pursuit of same-sex marriage have been the site of the most contentious anti-essentialism debate—primarily around issues of "gender"—in gay and lesbian legal theory and politics.¹⁰⁹ As my discussion

A Sister to Sister Dialogue, in THIS BRIDGE CALLED MY BACK, *supra* note 1, at 120-24;. Thus, while the gender-based lesbian feminist critiques of gay and lesbian legal theory and politics support my thesis that gay and lesbian equality theory and activism are essentialist, they generally have not provided much illumination on issues of race in lesbian experience. I note, however, that most of the racial critics in gay and lesbian legal theory are lesbian.

106. See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996) [hereinafter THE CASE FOR SAME-SEX MARRIAGE]; William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). This Article initially addressed arguments Eskridge makes in *A History of Same-Sex Marriage*. I have extended my analysis to focus upon arguments Eskridge develops in *The Case for Same-Sex Marriage*, which was published during the completion of this Article.

107. See generally sources cited *supra* note 106.

108. For a survey of these criticisms, see generally Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in LESBIANS, GAY MEN, AND THE LAW 401 (William B. Rubenstein ed., 1993) [hereinafter LESBIANS, GAY MEN AND THE LAW]; Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993); Robson & Valentine, *supra* note 105.

109. In addition to the debates cited *supra*, note 108, *Law and Sexuality: A Review of Gay and Lesbian Legal Issues*, a journal produced by students at Tulane Law School, has sponsored a symposium on the issue and published the papers presented at the forum. See Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 L. & SEXUALITY 31 (1991) (arguing that members of the gay and lesbian community will not uniformly benefit from the legalization of same-sex marriage due to racial and class differences); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 L. & SEXUALITY 63 (1991) (arguing that the legalization of same-sex marriage will help counter societal homophobia); Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991) (arguing that same-sex marriage will help subvert gender-based distinctions in marriage). Other scholars and attorneys have also contributed to the debate. See ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 106, at 51-85 (1996) (defending efforts to legalize same-sex marriage and responding to lesbian critiques); Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321 (1991) (arguing that gays and lesbians should seek to make the private and governmental

benefits of marriage available for everyone); Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1419 (defending efforts to legalize same-sex marriage and responding to lesbian critiques); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIANS, GAY MEN, AND THE LAW*, *supra* note 108, at 398 (same); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 *N.Y.U. REV. L. & SOC. CHANGE* 567 (1995) (same).

Outside of these contentious debates, gay and lesbian legal theorists, civil rights attorneys, and other commentators have extensively explored legal issues pertaining to same-sex marriage, giving gay and lesbian marriage extreme priority in the contemporary legal struggle for gay and lesbian equality. For a survey of the voluminous scholarship on same-sex marriage, see generally sources cited *supra* and *supra* note 108; Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 *S. CAL. L. REV.* 745 (1995); Anne M. Burton, *Gay Marriage—A Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil and Political Rights*, 3 *IND. J. GLOBAL LEGAL STUD.* 177 (1995); Robert L. Cordell, II, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 *COLUM. HUM. RTS. L. REV.* 247 (1994); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 *WIS. L. REV.* 1033 (1994); Jonathon Dietrich, *The Lessons of the Law: Same-Sex Marriage and Baehr v. Lewin*, 78 *MARQ. L. REV.* 121 (1994); Lisa Farabee, *Marriage, Equal Protection, and New Judicial Federalism: A View From the States*, 14 *YALE L. & POL'Y REV.* 237 (1996); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 *HOW. L.J.* 173 (1992); Vincent C. Green, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 *BROOK. L. REV.* 399 (1996); Joseph W. Hovemill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 *MD. L. REV.* 450 (1994); Christine Jax, *Same-Sex Marriage—Why Not?* 4 *WIDENER J. PUB. L.* 461 (1995); Nancy Lingeman & Kenneth May, *For Better or for Worse, In Sickness and in Health, Until Death Do Us Part: A Look at Same-Sex Marriage in Hawaii*, 16 *U. HAW. L. REV.* 447 (1994); Richard D. Mohr, *The Case for Gay Marriage*, 9 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 215 (1995); William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 *J.L. & POL.* 89 (1991); Edward A. Slavin, Jr., *What Makes a Marriage Legal: Here Is the Case for Legalizing Gay Relationships*, 18 *HUM. RTS. Q.* 16 (1991); Jeffrey J. Swart, *The Wedding Luau—Who Is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities*, 43 *EMORY L.J.* 1577 (1994); Erik J. Toulon, *Call the Caterer: Hawaii to Host First Same-Sex Marriage*, 3 *S. CAL. REV. L. & WOMEN'S STUD.* 109 (1993); Kevin A. Zambrowitz, *"To Love and Honor All the Days of Your Life": A Constitutional Right to Same-Sex Marriage?*, 43 *CATH. L. REV.* 907 (1994); Marty K. Courson, Note, *Baehr v. Lewin: Hawaii Takes a Tentative Step to Legalize Same-Sex Marriage*, 24 *GOLDEN GATE U. L. REV.* 41 (1994); Anthony Dominic D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 *U. ILL. L. REV.* 911 (1995); Otis R. Damslet, Note, *Same-Sex Marriage*, 10 *N.Y.L. SCH. J. HUM. RTS.* 555 (1993); William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 *YALE L.J.* 1495 (1994); Note, *In Sickness and in Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 *HARV. L. REV.* 2038 (1996); Edward J. Juel, Note, *Non-Traditional Family Values: Providing Quasi-Marital Rights to Same-Sex Couples*, 13 *B.C. THIRD WORLD L.J.* 317 (1993); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 *STAN. L. REV.* 499 (1995); Scott K. Kozuma, Note, *Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Political and Human Legitimacy*, 30 *WILLAMETTE L. REV.* 891 (1994); Note, *The Legality of Homosexual Marriage*, 82 *YALE L.J.* 573 (1973); Claudia A. Lewis, Note,

will reveal, however, the lesbian feminist critiques themselves have also, at times, suffered from a lack of racial analysis.

Eskridge criticizes lesbian feminists who argue that gays and lesbians should not pursue marriage because that institution has traditionally subordinated women.¹¹⁰ Eskridge argues that the fact

[t]hat Western marriages have traditionally been the social instrument by which women have been subordinated does not mean that marriage "causes" that subordination. Women's subordination may be more deeply related to social attitudes about gender differences than to the formal construct of marriage per se. If that is true, same-sex marriage does not buy into a rotten institution; it only buys into an institution that is changing, as women's roles and status are changing in our society.¹¹¹

Eskridge further notes that the feminist critique of marriage as a major source of women's oppression "comes perilously close to essentializing marriage as an inherently regressive institution . . ." ¹¹² Eskridge's general observation regarding the essentialist nature of the lesbian feminist critique is correct. In particular, the negative feminist

From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 YALE L.J. 1783 (1988); Candace L. Sage, Note, *Sister-State Recognition of Valid Same-Sex Marriages: Baehr v. Lewin—How Will It Play in Peoria?*, 28 IND. L. REV. 115 (1994); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993).

In addition, same-sex marriage has been the subject of substantial litigation and scrutiny by state legal authorities. See ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 106, at 232-33 & n.24 (listing numerous cases rejecting same-sex couples' petitions for equal marriage rights), and 248-49 & n.18 (same; listing opinions of attorneys general of several states who have argued that their states' marriage laws can constitutionally prohibit same-sex marriage).

110. See, e.g., Ettlbrick, *supra* note 108, at 402 (stating that marriage is "steeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis . . ."); Polikoff, *supra* note 108, at 1536 ("desire to marry . . . betrays the promise of . . . radical feminism"); Robson & Valentine, *supra* note 105, at 535 ("Marriage has remained interwoven with both the development and the perpetuation of patriarchy and women's status within patriarchy."). The lesbian, gender-based opposition to marriage arises out of feminist criticism. Robson & Valentine, *supra* note 105 at 535 ("Underlying the lesbian critique of marriage is the gendered perspective on marriage developed by feminists."). For a sampling of feminist critiques of marriage see MICHELE BARRETT & MARY MCINTOSH, *THE ANTI-SOCIAL FAMILY* (1982); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970); PATEMAN, *THE SEXUAL CONTRACT* (1988); Sheila Cronan, *Marriage*, in *RADICAL FEMINISM* 213-21 (Anne Koedt et al. eds., 1973). See also ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967-75* (1989) (cataloguing feminist anti-marriage politics).

111. See Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1488.

112. *Id.*

depiction of marriage contrasts with the portrait of marriage advanced by feminist legal scholars and social theorists of color. Feminists of color have challenged this negative portrait of marriage (and the privacy sphere more broadly), noting that women of color often view marriage and family life as a "site of solace and resistance against racial oppression."¹¹³

Eskridge, however, covers the narrow feminist critique of marriage with his own overlay of essentialism by failing to examine the impact, and even dismissing the importance, of racism and poverty on the claims he makes. For example, Eskridge opposes the contention that the pursuit of same-sex marriage is a negative attempt to "assimilate" mainstream norms, which gay and lesbian politics should seek to undermine.¹¹⁴ Eskridge argues that gays and lesbians "are gender rebels because that role has been thrust upon us by oppressive dividing practices, including legal discriminations like the exclusion from marriage. *If those dividing practices were to collapse, we might tend to meld back into society's mainstream, which does not inevitably strike me as baleful.*"¹¹⁵ Assume for the sake of argument that gays and lesbians are "gender rebels" and that "dividing practices" of "gender" exclusion exist apart from other forms of social inequality. Even under these assumptions, the people who would likely benefit from social change limited to gender-linked "dividing practices," in particular the exclusion from marriage, and quietly "meld back into society's mainstream" prob-

113. Roberts, *supra* note 13, at 1470-71; see also HOOKS, FROM MARGIN TO CENTER, *supra* note 13, at 37 (family life and marriage allow black women to "experience dignity, self-worth, and a humanization that is not experienced in the outside world."). This observation, however, is not without its problems. Because women of color may view the home as a sanctuary against racist oppression, they may decline to seek state assistance (which they approach with distrust), when they suffer domestic abuse from their male partners. See Crenshaw, *Mapping the Margins*, *supra* note 13, at 1257; Miriam H. Rutenber, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence*, 2 AM. U. J. GENDER & L. 171, 182-84 (1994). In addition, lesbians of color may face homophobic violence and marginalization in the home and battering from their intimate partners.

114. Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1488. Again, lesbian theorists have been the primary source of this criticism. Paula Eitelbrick, for example, argues that "[t]he thought of emphasizing our sameness to married heterosexuals in order to obtain [the right to marry] terrifies me . . . We end up mimicking all that is bad about the institution of marriage in our effort to appear to be the same as straight couples." Eitelbrick, *supra* note 108, at 403. Similarly, Robson and Valentine argue that "[p]ursuing state approval of [lesbian] relationships . . . forces lesbian partners into potentially damaging attempts to calibrate their lives to conform to heterosexual models." Robson & Valentine, *supra* note 105, at 539. See also Polikoff, *supra* note 108, at 1536 ("desire to marry . . . is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution.").

115. Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1490 (emphasis added).

ably do not face multiple forms of social and economic oppression. Also, poor gays and lesbians and gays and lesbians of color, unlike the white and affluent, are excluded from society *before* they ever discover their sexual orientation. Therefore, they cannot meld *back* into the mainstream—they have never been part of it.¹¹⁶ Furthermore, *both* sides of the assimilation debate obscure the extent to which many gays and lesbians, due to race, class and gender privileges, are already closely linked to and “assimilated” within mainstream social power structures.

Eskridge also confronts lesbian theorists who argue that the legalization of same-sex marriage will benefit primarily “affluent white male couples”¹¹⁷ and divide the gay and lesbian community among racial, class, and gender lines. Lesbian theorist Paula Ettelbrick has most vigorously stated this argument. Ettelbrick believes that legal and political efforts aimed at legalizing same-sex marriage reflect a universal “need to be accepted by the broader society.”¹¹⁸ She, nevertheless, contends that

[t]hose closer to the norm or to power in this country are more likely to see marriage as a principle of freedom and equality. Those who are more acceptable to the mainstream because of race, gender and economic status are more likely to want the right to marry. It is the final acceptance, the ultimate affirmation of identity.

On the other hand, more marginal members of the lesbian and gay community (women, people of color, working class and poor) are less likely to see marriage as having relevance to our struggles for survival. After all, what good is the affirmation of our relationships (that is, marital relationships) if we are

116. As James Baldwin poignantly stated:

A black gay person who is a sexual conundrum to society is already, long before the question of sexuality comes into it, menaced and marked because he's black or she's black. The sexual question comes after [temporally] the question of color; it's simply one more aspect of the danger in which all black people live.

Richard Goldstein, “Go the Way Your Blood Beats”: An Interview With James Baldwin, in *LESBIANS, GAY MEN, AND THE LAW*, *supra* note 108, at 43. See also Jewelle Gomez, *Repeat After Me: We Are Different. We Are the Same.*, 14 N.Y.U. REV. L. & SOC. CHANGE 935, 938 (1986) (“[B]y the time I learned that being gay was a reality with which I would have to reckon, I was already struggling with another reality—black skin—that was immensely more devastating in my daily life.”).

117. Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1491-93.

118. Ettelbrick, *supra* note 108, at 403.

rejected as women, black, or working class?¹¹⁹

Ettelbrick's argument is compelling. Because most gays and lesbians of color remain invisible and marginalized within the larger gay and lesbian community,¹²⁰ it is extremely unlikely that a marriage license will close much of the gulf between them and the center of a heterosexual society that is stratified by race, class, gender, and sexuality. On the other hand, gays and lesbians who are privileged by interlocking racism, sexism, and class inequality stand a greater chance of blending—if they have not already—into this multi-oppressive society. As a result, persons who face multiple oppressions and those who possess social privileges will likely have disparate views on the ability of marriage to place them within structures of power and acceptability and to transform radically their lives.

Eskridge calls this assertion the "new insiders argument,"¹²¹ because it suggests that privileged gays and lesbians can marry and create a class of "insiders" who fit neatly within the larger non-gay and lesbian community.¹²² The "new insiders argument" "underwhelms"¹²³—even "baffles"¹²⁴—Professor Eskridge. Eskridge dismisses this racial, gender, and class critique by noting that "there is no evidence—neither polls, surveys nor theoretical models—suggesting that the marriage option would be disproportionately exercised by rich gay men as compared to people of color or lesbians or less affluent homosexuals."¹²⁵ The lack of "evidence" documenting the opinions of men of color, lesbians, and the poor regarding the gay marriage movement, versus those of white affluent gay men, may have less to do with their tacit acceptance of and excitement for the movement than with their exclusion from and invisibility within gay and lesbian political discourse.¹²⁶

119. Ettelbrick, *supra* note 108, at 403-04. See also Duclos, *supra* note 109, at 51 n.75 ("Lesbians and gay men who are oppressed because of their race, culture, and/or disability will probably not find that the respectability marriage confers is adequate to ameliorate these kinds of discrimination.").

120. See *supra* p. 562; see also *infra* pp. 604-05.

121. Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1491.

122. See *id.* Again, many gays and lesbians may *already* fit neatly within structures of power.

123. *Id.* at 1492.

124. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 106, at 82-83.

125. *Id.* at 83.

126. Reflecting on the invisibility of black men in gay political discourse, Joseph Beam commented that "[m]ore and more each day, as I looked around the well-stocked shelves of Giovanni's Room, Philadelphia's gay, lesbian, and feminist bookstore where I worked, I won-

Moreover, substantial sociological, historical, and anthropological research demonstrates that Africans, American blacks, and other non-white cultures place tremendous importance on "extended families,"¹²⁷ rather than rigid nuclear bodies, as a means of social organization and child rearing.¹²⁸ These patterns result from economic necessity and cultural practice.¹²⁹ Furthermore, Census data and significant sociological studies indicate that heterosexual blacks "exercise the marriage option" *less often* than their white counterparts.¹³⁰

Although this family structure research and statistical data do not explicitly focus on gays and lesbians, it is possible that gays and lesbians of color who grew up in this tradition and who have similar economic backgrounds, will replicate these family structures. Indeed,

dered where was the work of Black gay men." Beam, *Introduction to IN THE LIFE*, *supra* note 9, at 14.

127. "An extended family is one in which individual relationships extend beyond the conjugal family—spouses and children—and include daily interaction with, and responsibilities for, other family members such as aunts, uncles, grandparents, and cousins." Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1658 (1995).

128. *See id.* at 1658-67. *See also* ANDREW BILLINGSLEY, CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES 94-95 (1992); ELMER P. MARTIN & JOANNE MARTIN, THE BLACK EXTENDED FAMILY (1978); THE EXTENDED FAMILY IN BLACK SOCIETIES (Demetri B. Shimkin et al eds., 1978); CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974); Madeleine L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453, 1467-68 (1994) ("Extended kinship networks are found to be particularly prevalent and important within African-American communities."); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 132-33 ("mothering" in black community involves "a rich tradition of women-centered, communal childcare. These cooperative networks include members of the extended family . . . as well as nonblood kin and neighbors."); Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319, 1322-23 (1992) ("To Latinos, familia brings to mind much more than the nuclear family; familia encompasses broad, extended family ties including many generations of aunts, uncles, grandparents, and cousins.") (citing ANGELA L. CARRASQUILLO, HISPANIC CHILDREN AND YOUTH IN THE UNITED STATES 70, 72-73 (1991)); William A. Vega, Note, *Hispanic Families in the 1980s: A Decade of Research*, 52 J. MARRIAGE & FAM. 1015, 1016-17; .

129. *See generally* sources cited *supra* note 128. *See also* Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORD. L. REV. 1505, 1546 (1996) ("shared parenting responsibilities among kin' predominate in many Caribbean, African, and African American contexts, in long-standing cultural patterns, and as a hedge against poverty.") (citing Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 541 (1983)).

130. *See generally* ANDREW CHERLIN, MARRIAGE, DIVORCE AND RE-MARRIAGE (2d ed. 1992). Several sociological studies have attributed this disparity to class differences. Specifically, these studies argue that individuals seek partners with financial and economic resources. These studies therefore conclude that the prevalence and persistence of poverty among blacks renders marriage less beneficial or attractive to many of them. *See generally* WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE (1978).

many gays and lesbians of color have documented the significance of extended family networks in their writings.¹³¹ Noticeably absent from their scholarship, however, are vigorous arguments in support of same-sex marriage and nuclear family models. Also, several gays and lesbians of color have recently voiced criticism of the gay and lesbian marriage movement.¹³²

Thus, under a multidimensional analysis the argument that gay and lesbian interest in and benefits from same-sex marriage may vary under different racial, class, and ethnic contexts is not "baffling." Rather, it speaks to the cultural differences and the incongruent dispersal of social and economic power within the population of gays and lesbians. Accordingly, lesbians, men of color, and the poor may place less stock in marriage as a means of ending, or substantially reducing, their oppression. Gays and lesbians of color, if their writings are a reliable indication, have been generally ambivalent towards the same-sex marriage issue. Furthermore, Eskridge himself concedes that "lesbians . . . contribute more than their share of marriage critics."¹³³

131. See, e.g., GOMEZ, *I Lost It at the Movies*, in FORTY-THREE SEPTEMBERS, *supra* note 9, at 9 (describing importance of author's relationship with her grandmother and mother, with whom she grew up, and relating the process of coming out to them); HEMPHILL, *Mrs Emily's Grandson Won't Hush His Mouth*, in CEREMONIES, *supra* note 9, at 43-46 (describing Hemphill's relationship with his grandmother and the process of revealing his sexual orientation to her). The prevalence and importance of extended family networks in communities of color does not mean, however, that people of color do not marry or wish to marry. Rather, it suggests that people of color may place less reliance upon marriage as an institution of social organization, child rearing, and freedom.

132. See David Dunlap, *Some Gay Rights Advocates Question Drive to Defend Same-Sex Marriage*, N.Y. TIMES, June 7, 1996, at A12 ("there [are] several causes 'more fundamental to survival' for gay men and lesbians . . .") (quoting black lesbian activist); *id.* (reporting view of Keith Boykin, executive director of the National Black Gay and Lesbian Leadership Forum, that marriage movement is "marching down the wrong path and running a disastrous course," given divisions within the gay and lesbian community, lack of public support, and the pervasiveness of other forms of discrimination against gays and lesbians).

133. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 106, at 83. Eskridge also dismisses the lesbian critiques by citing recent surveys in gay and lesbian periodicals that purport to indicate overwhelming support for same-sex marriage among lesbians and gays. See *id.* at 78-79 (citing Janet Lever, *Sexual Revelations*, THE ADVOCATE, Aug. 1994, at 17, 24; *Readers Favor Legal Marriage*, PARTNERS MAGAZINE FOR GAY AND LESBIAN COUPLES, July/Aug. 1990, at 1; Elizabeth Rhodes, *New Ties That Bind: Same-Sex Couples Challenge the System to Gain Legal Recognition of Their Commitments to Each Other*, SEATTLE TIMES, July 21, 1991, § K, at 1). Polls taken by gay and lesbian magazines, however, tend to be *extremely poor* predictors of gay and lesbian opinion because these polls are invariably based on biased samples that exclude the poor and people of color. See *infra* pp. 605-08. Accordingly, the surveys Eskridge cites likely tell us more about the desire for same sex-marriage among the white and affluent, rather than the views held by people of color and the poor.

Eskridge also notes that "lesbians of color in 1920s Harlem" passed as "men" in order to

By stark contrast, several white and economically advantaged gay male legal and political commentators consider the legalization of same-sex marriage *crucial* to the(ir) struggle(s) for legal, political, and social equality. Eskridge, for example, claims that “[m]arriage is *the most important right* the state has to offer”¹³⁴ He argues that once gay marriages have “slowly blossom[ed] . . . like dandelions in spring-time,”¹³⁵ they will spawn a multitude of dramatic benefits for gays and lesbians. In particular, Eskridge contends that same-sex marriage will “undermine social homophobia,”¹³⁶ render the “insider-outsider issue . . . almost irrelevant” for the “next generations of homosexual youth,”¹³⁷ provide “discipline” for gay men,¹³⁸ and help working-class lesbians

obtain marriage licenses. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 106, at 83. Eskridge’s “evidence” misses the point. The mere fact that some black lesbian couples “legally” married in the 1920s does not tell us much about general attitudes of gay and lesbian people of color toward same-sex marriage in the 1920s or, more relevantly, in the 1990s. Second, the occurrence of gay or lesbian marriage standing alone does not prove its importance as a vital liberation tool, nor does it demonstrate the comparative views and gains of people of color and affluent gay white men towards and from marriage.

134. *Id.* at 8 (emphasis added).

135. *Id.* at 81.

136. *Id.* at 82.

137. *Id.* Even if same-sex marriage could undermine homophobia, this limited change would not eliminate the “insider-outsider” issue for young gays who are poor, female, or of color.

138. *Id.* at 83. Eskridge states that

[i]n order to achieve committed relationships gay men need the discipline of marriage more than lesbians do. Gay men are like Ulysses, who directed that he be bound to the ship’s mast as it passed the Sirens, sea creatures whose seductive voices enticed men to their deaths. Likewise, gay men realize that they tend to lose their balance and succumb to private sirens if they are not socially and even legally constrained.

Id.

Eskridge argues that lesbians, by contrast “have achieved a balance of sexual freedom and interpersonal commitment” and that same-sex marriage will “civilize[] gay men by making them more like lesbians.” *Id.* at 83-84.

Eskridge overstates the power of law. He fails to demonstrate how “legal constraints” can push gay men toward (rather than repel them from) committed relationships. It is interesting to note that the “law” in some states *outlaws* gay male sexual practice but has not stopped many gay men from engaging in sex. According to Eskridge, their sexual lives are in fact wanton—“unbalanced” and “uncivilized.”

Furthermore, Eskridge’s Homeric metaphor seems to accept, though possibly unintentionally, caustic stereotypes regarding gay male sexual practice. Even if such stereotypes were true, Eskridge’s argument, extended to its logical conclusion, implies a false dichotomy between heterosexual and gay men. Under Eskridge’s analysis, gay men, who cannot legally marry, are vulnerable to “seductive voices”; heterosexual males, for whom marriage is available, are seemingly immune from—or “deaf” to—these forces, supposedly, by the “social” and “legal” “constraint” of marriage. The prevalence of infidelity, rape, incest, pornography, and use of female sex workers by heterosexual males (married and unmarried) speaks against such a dichotomy

gain custody of their children.¹³⁹ Furthermore, Thomas Stoddard, a

and against a conclusion that marriage "tames" male sexuality. Finally, Eskridge does not explain why we should view unmarried, non-monogamous (and even promiscuous) males as "uncivilized."

139. See *id.* at 84. Specifically, Eskridge argues that the outcome of *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995), might have differed if Virginia recognized same-sex marriages. In the *Bottoms* case, Sharon Bottoms, a working-class lesbian, lost custody of her child after the court granted a custody petition brought by Kay Bottoms—Sharon Bottoms' mother.

The decisions in *Bottoms* are replete with gender and class hostility and homophobia. For a more extensive analysis of this point see Stephen B. Pershing, "Entreat Me Not to Leave Thee": *Bottoms v. Bottoms* and the Custody Rights of Gay and Lesbian Parents, 3 WM. & MARY BILL RTS. J. 289 (1994); Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995). For a general discussion of the difficulties gays and lesbians face in custody battles due to judicial bias, see Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996). The trial judge, for example, based the award of custody to Kay Bottoms on the following:

Sharon Bottoms has admitted that she is living in an homosexual relationship. She is sharing her bed with her female lover. Examples given were kissing, patting, all of this in the presence of the child I will tell you first that the mother's conduct is illegal. I will tell you that it is the opinion of the court that her conduct is immoral. And it is the opinion of this court that the conduct of Sharon Bottoms renders her an unfit parent.

Bottoms, 444 S.E.2d at 279 (quoting ruling of the trial court) (numerous ellipses omitted). Sharon Bottoms appealed, and the appellate court reversed the decision, finding that "[t]he fact that a parent is homosexual does not per se render a parent unfit to have custody of his or her child." *Id.* at 281 (citing *Doe v. Doe*, 284 S.E.2d 799, 806 (Va. 1981)).

Kay Bottoms appealed to the Supreme Court of Virginia, which reversed the appellate decision and remanded the case for the trial court to reinstate the order of custody. See *Bottoms*, 457 S.E.2d at 102. The court's "reasoning" reinforces, and is informed by, class, gender, and sexual biases. The court declared Sharon Bottoms unworthy of custody because it found that she

moves her residence from place to place, relying on others for support, and uses welfare funds to "do" her fingernails before buying food for the child. She has participated in illicit relationships with numerous men, acquiring a disease from one, and "sleeping" with men in the same room where the child's crib was located.

Id. at 108. The court also reasoned that "active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement" *Id.* (citing *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)).

Eskridge correctly notes that the *Bottoms* case reflects judicial homophobia. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 106, at 84. Eskridge, however, argues that "most judges would still have been reluctant to terminate *married* parental custody. Sharon was vulnerable because she was lesbian and working-class and unmarried." *Id.* (emphasis in original). Eskridge therefore concludes that legal "recognition for same-sex marriages would have insulating ripple effects for working-class lesbians like Sharon Bottoms." *Id.*

Eskridge's conclusion places too much importance on marital status rather than interwoven class, gender and sexual subordination. Eskridge's "argument rests on the assumption that possession of a marriage certificate will legitimize the [lesbian or gay] sexual relationship . . . so that the judge will not consider the . . . relationship . . . a threat to the 'best interests of the

lawyer and former Executive Director of Lambda Legal Defense and Education Fund (a gay and lesbian civil rights organization), "would like to see the [same-sex marriage] issue rise to the top of the agenda of every gay organization"¹⁴⁰ Stoddard believes that "marriage is . . . the political issue that most fully tests the dedication of people who are *not* gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men."¹⁴¹ Similarly, Evan Wolfson, a senior attorney at Lambda, argues that *Baehr v. Lewin* is "the most important gay rights victory that we have ever had"¹⁴² Wolfson contends

children'" Duclos, *supra* note 109, at 55-56 (challenging assumption that marriage will aid gays and lesbians in custody disputes). Marriage will likely have little impact on homophobia in gay and lesbian custody cases. See *id.* at 56 ("The history of judicial treatment of same-sex relationships in the custody context constitutes such appalling evidence of deep-seated and visceral anti-lesbian and anti-gay feeling . . . that it seems naive to think such attitudes can be wiped out by a marriage certificate."). Even if marriage will blunt homophobia, it will not diminish the gender, class and racial subordination issues that also arise in gay and lesbian custody cases.

140. Stoddard, *supra* note 109, at 400.

141. *Id.* (emphasis in original).

142. Maria De La O, *Profile: Evan Wolfson; The Fight for Same-Sex Marriage*, 21 *HUM. RTS.* 22 (1994) (emphasis added). In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court ruled that Hawaii's prohibition of same-sex marriage constitutes unlawful gender discrimination, subject to strict scrutiny, under Hawaii's constitution. The court remanded the case to the trial court for the state to offer a compelling interest for its policy. *Id.* During the completion of this Article, the trial court held, on remand, after a bench trial, that the state had failed to offer a compelling interest for the policy. This decision has been stayed pending an appeal by the state. See *Baehr v. Miike* Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct.) (1996).

Since the decision in *Baehr*, gay and lesbian legal theorists, political activists, and other commentators have engaged in extensive debates over whether the full faith and credit clause should compel other states to recognize same-sex marriages that may occur in Hawaii (if the courts ultimately reject the state's "compelling" reasons for prohibiting same-sex marriage). See, e.g., Cordell, *supra* note 109; Cox, *supra* note 109; d'Amato, *supra* note 109; Keane, *supra* note 109; Sage, *supra* note 109. The enormous attention paid this issue by gay and lesbian theorists underscores the class differences that exist among gays and lesbians and the class assumptions that underlie pro-same-sex marriage arguments. Only individuals with ample economic resources could leave their homes, travel to Hawaii for a wedding (and perhaps honeymoon), and return to their resident state to battle legal authorities for recognition of their marriages. As a further indication of the class-based assumptions that inform the same-sex marriage issue, Professor Jennifer Gerrarda Brown has argued that same-sex marriage could become an economic "cash cow"—due to the formation of gay and lesbian matrimonial markets—in states that give it legal recognition. Brown, *supra* note 109. Brown concedes that her argument is subject to the criticism that "it assumes wealth among gay men and lesbians. This seems to leave out poorer people, or at least conditions the right of marriage upon a couple's ability to travel." *Id.* at 748 n.10. Brown reasons however, that economically disadvantaged gays and lesbians "might take solace from the hope that" a greater number of states will legalize same-sex marriage once they discover the economic benefits reaped by "first-mov-

that the *Baehr* decision “shifted the very ground underlying gay people’s second-class status, and one of the, *if not the major*, barriers to our full and equal citizenship has cracked wide open.”¹⁴³ Wolfson also believes that “marriage is *the central* legal and social issue of our society.”¹⁴⁴

Perhaps the most extreme example of the emphasis placed on same-sex marriage comes from Andrew Sullivan, a conservative gay writer and former Editor-in-Chief of the *New Republic*. In his recently released book, *Virtually Normal*, Sullivan argues that same-sex marriage should be the “centerpiece” of a “new gay politics”¹⁴⁵—a narrow politics limited only to combatting “state” discrimination against “homosexuals.”¹⁴⁶ Sullivan believes that “denying [marriage] to homosexuals is *the most public affront possible* to their public dignity.”¹⁴⁷ Sullivan thus places the utmost reliance upon legal marriage as an instrument of sexual freedom and equality. He contends that

[g]ay marriage . . . is the first step in any resolution of the homosexual question . . . If nothing else were done at all, and gay marriage were legalized, ninety percent of the political

er” states. *Id.* Although poor gays and lesbians can probably wait for marriage to spread across the mainland, they would likely derive greater benefit from *direct* policies aimed at improving their economic situations.

Congress has responded to the Hawaii litigation by enacting the “Defense of Marriage Act.” See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The legislation adopts a federal, opposite-sex definition of marriage. *Id.* The legislation also purports to grant states permission to decline recognition of same-sex marriages performed in other states. *Id.* Several states have also moved to adopt opposite-sex marital statutes. See Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 10, 1996, at A1.

143. Wolfson, *supra* note 109, at 581 (emphasis added).

144. Joseph Hanania, *The Debate Over Gay Marriages: No Untly*, L.A. TIMES, June 13, 1996, at E1 (emphasis added).

145. ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 178 (1995).

146. *Id.* at 169-87. Sullivan’s emphasis on fighting “state” discrimination stems from his adherence to traditional liberalism and its opposition to state interference with “individual” liberty and “private” affairs. See *id.* at 171 (“[I]t is the only politics that . . . fully respects liberalism’s public-private distinction . . .”). This position, however, directly conflicts with Sullivan’s vigorous support of marriage (both same- and opposite-sex), because by recognizing marriage, the state attaches certain duties and economic incentives to traditionally “private” relationships. See ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 106, at 66-72 (discussing state-imposed duties and benefits of marriage). See also Bradley P. Smith, *No, I’ll Categorize You*, 105 YALE L.J. 2025, 2030 (1996) (noting Sullivan’s conflicting positions and arguing that “[g]overnment recognition of any marriage is an inherently nonneutral act, as it encourages binary, exclusive coupling through a variety of economic incentives. Marriage also infuses a variety of public rights and duties into the most private of human relationships.”).

147. SULLIVAN, *supra* note 145, at 179 (emphasis added).

work necessary to achieve gay and lesbian equality would have been achieved. *It is ultimately the only reform that truly matters.*¹⁴⁸

Only those individuals buffered from racial, class, and gender oppression and who, but for their (homo)sexual orientation are “virtually normal,” could reasonably expect as narrow a reform as legal marriage to bring them almost complete (“ninety percent”) equality and liberation. Women, men of color, and the economically disadvantaged (including *many* white gay men) need much broader and deeper social change to improve their lives.¹⁴⁹ Thus, the disparate responses of white men, women, and gay men of color to the same-sex marriage movement likely evidence that they are unequally affected by social power and, therefore, would benefit differently—if at all—from state recognition of their relationships.¹⁵⁰

Ultimately, however, the true issue for legal scholars and civil rights attorneys involved in the same-sex marriage debates is not whether some gays and lesbians of color (or white lesbians or the poor) desire marriage. These populations are large and diverse. Some of these individuals will find marriage important;¹⁵¹ others will not. Rath-

148. *Id.* at 185 (emphasis added).

149. See Smith, *supra* note 146, at 2029 (arguing that Sullivan’s disapproval of political and legal challenges to “private” discrimination against gays and lesbians is “pragmatically questionable” and unprincipled).

150. Eskridge’s own explanation for the recent explosion of interest in same-sex marriage among gays and lesbians actually confirms the anti-essentialist concern that marriage is driven by white, upper-class interests. Eskridge attributes the marriage movement, in part, to the following 1980s demographic patterns:

The “queer boomers” were aging, making more money than love, and settling down with partners. The guppie (gay urban professional) with a partner and a Porsche was replacing the free love advocate with a placard and a toke. The new Generation Xers were open to the diverse sexuality offered by gay liberation but more skeptical of its early barn-burning radicalism.

ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 106, at 58. Clearly, marginalized segments of the gay and lesbian community do not reside within this exclusive, Porsche-owning, urban, professional, marriage-seeking community.

151. In fact, despite their general ambivalence toward the issue, several people of color—both gay and heterosexual—have voiced support for same-sex marriage. Michelle Garcia, *Altered States: Same-Sex Marriage and Civil Rights*, ETHNIC NEWSWATCH, Apr. 30, 1996, at 16 (describing support for marriage among gays and lesbians of color); Deb Price, *Japanese-American Group Backs Gay Marriages*, STAR TRIB., Oct. 5, 1994 (reporting support for same-sex marriage by the Japanese American Citizens League, a racial civil rights organization); Liz Spayd & Brigid Quinn, *The Gay Marriage Trap: We Fell Into a Right-Wing Ambush*, WASH. POST, June 16, 1996, at C1 (noting that black gay activist Keith Boykin supports same-sex marriage, though critical of its priority in gay and lesbian politics and of the movement’s political strate-

er, gay and lesbian legal theorists, given the multidimensional nature of heterosexism, must continue to problematize and rethink grand claims that gay and lesbian marriages will “undermine social homophobia,” place gays and lesbians into “society’s mainstream,” eliminate “insider-outsider issues,” and “fully test” society’s commitment to complete equality for gays and lesbians. They certainly need to question the troubling assertion that same-sex marriage is “the only reform that truly matters.” When we consider race, class, and gender inequality—and the virulence of homophobia—these lofty claims tumble, regardless of the interest individual gays and lesbians of color may have in marriage. Venus Xtravaganza, for example, wanted desperately to marry.¹⁵² Marriage alone, however, would likely have provided her few—if any—material benefits¹⁵³ and surely would not have thrust her into “society’s mainstream”—due precisely to the persistence of racism, poverty, and hostility toward transgendered people.¹⁵⁴ Thus, racial, class, and gender

gies). Also, people of color have brought legal challenges to prohibitions of same-sex marriage. See ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 106, at 55-56 (discussing “first” black lesbian couple to bring suit challenging same-sex marriage prohibition); Carey Goldberg, *Couple Who Stirred Issue of Same-Sex Marriage Still Hopeful*, N.Y. TIMES, July 28, 1996, § 1, at 12 (reporting that Patrick Lagon, a *Baehr* litigant, is of Filipino descent); Fern Shen, *A Same-Sex Couple Married to the Cause: Women Embrace National Fight They Helped Spur Over Wedlock*, WASH. POST, Sept. 10, 1996, at A1 (reporting that Genora Dancel, a *Baehr* litigant, is of Hawaiian descent).

152. HEMPHILL, *supra* note 54, at 118.

153. Eskridge and other proponents of gay and lesbian marriage argue that married couples may take advantage of an array of economic and other preferences including inheritance and tax law benefits and health insurance coverage from their partners’ employers. See, e.g., ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 106, at 66-70; Mohr, *supra* note 109, at 227; Stoddard, *supra* note 109, at 399-400. Many of these benefits, however, will primarily affect employed and economically privileged individuals, not the poor. See Colker, *supra* note 109, at 325 (discussing unequal class distribution of marriage’s economic benefits); Duclos, *supra* note 109, at 52-55 (same); Eitelbrick, *supra* note 108, at 402-05 (same); Robson, *supra* note 12, at 182 (“Marriage will not be an advantage for lesbians in all classes. The very availability of marriage could economically disadvantage lesbians receiving public entitlements because the state imputes the income of one ‘partner’ to the other, thus disqualifying a partner who might otherwise be eligible for ‘welfare’ benefits.”). Furthermore, legal scholars have failed to explain why the state should deny unmarried gays and lesbians (and heterosexuals) these benefits. See Colker, *supra* note 109, at 324 (“It makes more sense to change institutions so that their benefits are not marriage dependant rather than make lesbian and gay people eligible for those benefits only by getting married.”); Polikoff, *supra* note 108, at 1549 (“[a]dvocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all”).

154. Venus’ desire for marriage, wealth, and white female status actually affirms—not challenges—racial, gender, and class hierarchy. See HEMPHILL, *supra* note 54, at 116 (the longing to be white, wealthy, and female reflects a desire to be “in collusion with white supremacy”);

inequities destabilize essentialist claims regarding the potential “mainstreaming” effects of same-sex marriage—regardless of whether individual people of color wish to pursue it.

Despite his essentialism, Eskridge actually concedes that “[t]he *legitimate* concern of the new insiders argument is that prejudice is *multilayered and synergistic* in America.”¹⁵⁵ He, nevertheless, fails to contend with—and dismisses—the reality of multidimensional oppression because “the availability or nonavailability of same-sex marriage does not affect that reality. The gay man on average is still in a better position, whether he can get married or not.”¹⁵⁶ Thus, Eskridge acknowledges the existence of a privileged “gay man.” This gay man, however, seemingly represents the positionality of all gay men—his experiences reflect “the” gay male experience. Eskridge also dismisses the factors—race, class, and gender hierarchies—that create this man of privilege. As Eskridge states,

[t]he gay man is less likely to commit himself to gender and race discrimination issues than is the lesbian or the person of color, again whether or not he can get married. The gay man is already more likely to be an insider. Allowing him to marry another man will not change that.¹⁵⁷

Eskridge’s gay man, who is—“more likely”—an insider apathetic toward issues of race and gender inequity, is also “likely” white and economically privileged.

Ironically, Eskridge implies that feminist critics should cease challenging efforts to allow “the gay man” to marry because he will not, after all, develop a strong commitment to “gender . . . discrimination issues” and will retain his “better position,” “whether or not he can get married.” At the same time, however, Eskridge strenuously argues that because the denial of same-sex marriage precludes “the gay man” from marrying another man—an act a woman could do—and affirms pernicious gender-role stereotypes and hierarchies, it is a form of invidious sex discrimination under the Constitution.¹⁵⁸ Eskridge neglects to ex-

HOOKS, *supra* note 57, at 148 (“[I]f the class, race, and gender aspirations expressed by the drag queens . . . is always the longing to be in the position of the ruling-class woman then . . . there is also the desire to act in partnership with the ruling-class white male This combination of class and race longing that privileges the ‘femininity’ of the ruling-class white woman, adored and kept, shrouded in luxury, does not imply a critique of patriarchy.”).

155. Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1492 (emphasis added).

156. *Id.* at 1492-93.

157. *Id.* at 1493.

158. See ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 106, at 162-72; Eskridge, *A*

plain why "the gay man's" gender discrimination claim should have priority over several lesbians' claims that marriage, as an institution, oppresses them "as women"—particularly when "the gay man," as Eskridge states, has no interest in "gender discrimination issues" and will maintain "his" patriarchal privilege under marriage.

Eskridge then advances legal arguments for same-sex marriage although, as he concedes, it will neither affect the reality of multilayered oppression nor change the forces that make "the gay man" an insider.¹⁵⁹ If gay marriage does not challenge racial, class, and gender inequality, then we should—in light of the "multilayered and synergistic" nature of sexual subordination—continue to question its high priority,¹⁶⁰ and even legitimacy, as an instrument of gay and lesbian liberation. At a minimum, we should examine—given the adverse impact poverty may have on the level of benefits and attractiveness of marriage—what other legal and policy reforms must occur in order to make marriage and family life accessible to and meaningful for poor gays and lesbians.

History of Same-Sex Marriage, *supra* note 106, at 1510. The *Baehr* court also applied this reasoning. See *Baehr*, 852 P.2d at 44. Furthermore, several commentators have extensively developed the theory, in same-sex marriage and other contexts, that discrimination against lesbians and gay men is sex discrimination. See, e.g., Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) [hereinafter *The Miscegenation Analogy*]; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Francisco Valdes, *Queers, Sisters, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995); I. Bennett Capers, Note, *Sexual Orientation and Title VII*, 91 COLUM. L. REV. 1158 (1991). These scholars argue that sexual orientation discrimination is "sex" discrimination because it prohibits a woman, for example, from engaging in an activity (e.g. marriage to a woman) in which a man could lawfully engage. This reasoning often extends, by analogy, the Supreme Court's ruling in *Loving v. Virginia*, 388 U.S. 1 (1967), which found antimiscegenation statutes unconstitutional on the grounds that they prohibit blacks, for example, from marrying whites—something a white person could lawfully do—and that they reinforce white supremacy. For a more extensive discussion of this analogy, see Koppelman, *The Miscegenation Analogy*, *supra*. See also ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra*, at 153-63.

159. See Eskridge, *A History of Same-Sex Marriage*, *supra* note 106, at 1492-93.

160. See Colker, *supra* note 109, at 326 ("I would not encourage the lesbian and gay community to make [same-sex marriage] legislation a high priority item."); Dunlap, *supra* note 132, at A12 (reporting view of black lesbian activist that health and anti-violence issues are "more fundamental to [gay and lesbian] survival"); Hanania, *supra* note 144, at E1 (same-sex marriage issue is "diverting limited resources and energies from other priorities desperately in need of tending") (quoting Martin Duberman, a gay historian and Director of the Center for Gay and Lesbian Studies at City University of New York); Spayd & Quinn, *supra* note 151, at C1 (gays and lesbians should "focus on rights fundamental to the gay movement's survival, like combating workplace discrimination, AIDS and reproductive cancers, whose incidence is particularly high among lesbians").

Because he fails to consider, and even dismisses, the fact that racial and economic subordination affect gay and lesbian experience,¹⁶¹ Eskridge overstates the value of legalized same-sex marriage as an instrument of social transformation and equality for all gay and lesbian people and nullifies the diverse cultural practices and experiences of people of color and the poor.

2. Focusing on "Commonality"

a. "Common," "Essentializing," and "Monolithic" Assumptions

In addition to rejecting the importance of racial and class privilege and subordination in gay and lesbian lives, gay and lesbian legal theorists also marginalize racial and class differences by attempting to articulate "common" experiences of or assumptions about all gay and lesbian people. These common experiences and assumptions, however, may obscure the realities of people of color and the poor. For example, Marc Fajer, in a provocative analysis, endeavors to "re-tell" personal narratives of gay and lesbian people in order to "counter and demonstrate" homophobic stereotypes.¹⁶² Fajer compellingly argues, as have other commentators, that these negative stereotypes affect judicial decisionmaking in cases involving questions of gay and lesbian equality and that their deconstruction is, therefore, an important task for legal scholars and civil rights attorneys.¹⁶³ To begin the important project of countering negative gay and lesbian constructs, Fajer borrows the "storytelling" technique from critical race scholars such as Richard Delgado¹⁶⁴ and Mari Matsuda.¹⁶⁵ Fajer notes that his attraction to this

161. It is in his legal arguments for same-sex marriage that Eskridge analyzes racial subordination. Race enters his analysis, however, only by analogy. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 106, at 153-63. Eskridge likens bans on same-sex marriage to antimiscegenation statutes, declared unconstitutional on Equal Protection grounds in *Loving*, 388 U.S. at 1. Eskridge claims that both racial and gender exclusions in marriage perpetuate harmful social hierarchies. Eskridge develops this reasoning from arguments Koppelman makes in the sodomy context. See generally Koppelman, *The Miscegenation Analogy*, *supra* note 158.

Eskridge's racial analogy treats race and sexual orientation as unconnected and unrelated identities. Eskridge's distancing of race from sexuality through analogy, however, does not diminish the importance of race and class in gay and lesbian lives or in his analysis. Rather, by neglecting to interrogate issues of racial and economic subordination, Eskridge advances arguments, e.g., that same-sex marriage will eradicate "insider-outsider" issues, based on racial and class privilege.

162. Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 515 (1992).

163. See generally *id.*

164. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*,

jurisprudential method stems from its powerful ability to offer "new perspectives" into legal discourse.¹⁶⁶ Fajer's analysis introduces to legal theory an important dialogue, grounded on "gay and lesbian" experiences, regarding issues of sexual subordination. His analysis, however, could have benefitted from some consideration of the racial and class complexity of homophobic stereotypes and the impact this complexity has upon people of color.

As an initial matter, Fajer does not discuss the racial backgrounds of the individuals whose stories he re-tells. This omission implies a unitary gay experience, one unaffected by racial differences.¹⁶⁷ Fajer's omission of race also directly impacts his analysis. For example, Fajer characterizes "coming out"—or the "process of telling other people we are gay"¹⁶⁸—as "perhaps *the* central events in gay lives today."¹⁶⁹ Such a characterization blurs race and class differences. Because race- and class-subordinate individuals are burdened by multiple forms of social and economic exclusion, they can likely point to other, perhaps more "central" and "traumatic"¹⁷⁰ experiences in their "gay lives"—such as racial discrimination and economic deprivation.¹⁷¹

Fajer also argues that coming out is "liberating and emotionally helpful"¹⁷² and that "concealment" of one's gay identity, on the other hand, "interferes with the creation and cohesion of a gay community."¹⁷³ The coming out process, however, does not necessarily or automatically "liberate" people of color, who, by revealing their sexual orientation and attempting to integrate themselves within white gay and lesbian communities, may encounter racial hierarchy. Thus, racial hierarchy prevents the formation of a "cohesive" gay community—even

87 MICH. L. REV. 2411 (1989).

165. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

166. See Fajer, *supra* note 162, at 517. Fajer argues that "[s]tories from previously excluded voices enrich our understanding of how the law operates and suggest new approaches to many legal issues." *Id.* at 519 (citations omitted).

167. See Rosenblum, *supra* note 12, at 88 (to label "parties in [litigation] as lesbian or gay without specifying other aspects of their social position implies that they occupy a universal position. The effect of these false universals is to erase other queers and to ignore their very different experiences.>").

168. Fajer, *supra* note 162, at 520.

169. *Id.* (emphasis added).

170. See *id.*

171. See sources cited *supra* note 116 (describing sexual orientation as an *additional* burden for gays and lesbians of color).

172. Fajer, *supra* note 162, at 596 (citation omitted).

173. *Id.* at 598.

among those gays and lesbians who do not "conceal" their sexual orientation. Marlon Riggs' experiences with racism in the predominately white San Francisco gay and lesbian community demonstrate this aspect of the coming out process. South Asian gays and lesbians have also documented the racial and cultural marginalization they encounter in gay and lesbian communities:

Once some of us entered the lesbian and gay subculture of the West, our feeling of isolation did not fade as we had assumed it would; it only changed face . . . None of our newly found gay or lesbian friends and acquaintances spoke our languages, shared our history, or really understood our culture.¹⁷⁴

These comments expose a fundamental weakness in the formation of "gay" and "lesbian" communities. As lesbians of color have observed in the context of lesbian separatism, these communities coalesce around the singular issue of sexual identity, thereby denying racial and class inequality and cultural differences.¹⁷⁵ A narrow portrayal of the coming out process similarly blurs the racial complexity of sexual identity.¹⁷⁶

Fajer's tendency to emphasize the experiences of class-privileged individuals is further illustrated by his discussion of "romantic images and symbols" invoked by gays and lesbians to describe their relationships.¹⁷⁷ Seeking to demonstrate the "long-term" and monogamous nature of gay and lesbian romances, Fajer lists, among other items, "candlelight dinners, flowers, and Niagara Falls" as symbols of "love"

174. *Introduction to LOTUS OF ANOTHER COLOR*, *supra* note 9, at 12. *See also id.* at 14 (The gay and lesbian "subculture does not acknowledge that South Asians and other ethnically distinct groups have a different life experience, different societal and familial influences, and different needs . . .").

175. *See, e.g.,* Combahee River Collective, *A Black Feminist Statement*, in *THIS BRIDGE CALLED MY BACK*, *supra* note 1, at 214 (questioning "whether lesbian separatism is an adequate and progressive political analysis and strategy, even for those who practice it, since it so completely denies any but the sexual sources of women's oppression, negating the facts of race and class"); Smith & Smith, *supra* note 105, at 120-23 (discussing racial and class essentialism of lesbian separatism). *See also* PHELEN, *IDENTITY POLITICS*, *supra* note 105, at 161-66 (discussing racial and class critiques of lesbian separatism).

176. *Compare Introduction to A LOTUS OF ANOTHER COLOR*, *supra* note 9, at 12, 14 (discussing marginalization of South Asians within larger gay and lesbian community) with Gregory J. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 *LAW & SEXUALITY* 133, 145-46 (1991) (asserting that "lesbians and gay men probably maintain self esteem most effectively when they identify with and are integrated into the larger lesbian and gay community.").

177. *See* Fajer, *supra* note 162, at 552.

in gay and lesbian relationships.¹⁷⁸ He also re-tells the story of one "male couple [that] returned to Europe to find the place they had [first] met"¹⁷⁹ Such images subtly unveil the existence of economic privilege among gays and lesbians by portraying the notion of "romance" in middle and upper-class terms. Fajer's conclusion that "[t]he prohibition of gay marriage may be *the most significant* form of discrimination against gay couples,"¹⁸⁰ may also reflect a presumption of racial and class privilege in gay and lesbian relationships.¹⁸¹

The "exploitation" of economic privilege in the gay and lesbian community has had a significant, negative effect on gay and lesbian legal and political reform efforts and on heterosexual society's perceptions of gays and lesbians. Several surveys have fostered the development of a stereotype that "all" gay men and lesbians are wealthy—relative to the "heterosexual" population.¹⁸² These surveys are based on data compiled from reading lists of gay and lesbian magazines, mailing lists of gay and lesbian political organizations, and polls of persons attending gay and lesbian cultural events.¹⁸³ Gay and lesbian magazines have "exploited" these surveys in order to solicit corporate advertisements.¹⁸⁴ *Anti-gay* and lesbian groups, however, have appropriated the surveys—in order to depict the gay and lesbian community as wealthy and privileged and, therefore, undeserving of civil rights protection.¹⁸⁵

178. *Id.*

179. *Id.* at 553.

180. *Id.* at 577 (emphasis added).

181. See *supra* pp. 589-602. Even if middle- and upper-class romantic ideals were desired by poor people of color, the result would not be unproblematic. The linkage of personal satisfaction and self-worth with upper-class status has led to consumerism and nihilism among the poor of color. See CORNELL WEST, RACE MATTERS 17-31 (1993). Indeed, the desire to achieve upper-class status proved detrimental for both Rivera and Venus Xtravaganza. See *supra* pp. 572-73 (describing Rivera's fatal quest to escape poverty); HEMPHILL, *supra* note 54, at 118 (noting Venus' desire to have a "car" and "nice home" in "Peekskill" or "Florida," among other things; describing how attempt to actualize this desire helps create circumstances surrounding her murder).

182. See, e.g., Samuel A. Marcossou, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 160 n.69 (1995) (discussing studies apparently indicating gay wealth); Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR. AM. L. & POL'Y REP. 33, 45 & n.48 (1994) (discussing use of data apparently indicating gay wealth to bolster anti-gay political agendas); Karen De Witt, *Gay Presence Leads Revival of Declining Neighborhoods*, N.Y. TIMES, Sept. 6, 1994, at A14 (discussing "notion that all homosexuals are rich"); Stuart Elliott, *A Sharper View of Gay Consumers*, N.Y. TIMES, June 9, 1994, at D1 ("it has become conventional wisdom to consider homosexuals far more affluent than the general population").

183. See VAID, *supra* note 9, at 252-53.

184. See *id.* at 252.

185. See *id.* at 250-52. See generally Schacter, *supra* note 104, at 291-94. Perhaps the

These surveys, however, overstate gay and lesbian income levels. First, the poor are less likely than the wealthy to hold magazine subscriptions¹⁸⁶ or to join mailing lists of political organizations (a step typically taken after making a financial contribution to the organizations). Consequently, the surveys tend to exclude the poor and, therefore, produce a biased sample of gays and lesbians. Furthermore, as Samuel Marcossou observes,

[t]he lesbians and gay men most apt to respond to such surveys

most damaging use of these surveys was by the organization "Colorado for Family Values" during the campaign to pass "Amendment 2" to the Colorado constitution. Amendment 2, which passed on November 3, 1992, prohibited the state and its subdivisions from enacting legislation or regulations which give gays and lesbians a "protected status or claim of discrimination." *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994), *aff'd sub nom. Romer v. Evans*, 116 S. Ct. 1620 (1996). The Supreme Court subsequently declared Amendment 2 unconstitutional, reasoning that it targeted homosexuals for discrimination and lacked a rational relationship to a legitimate governmental purpose, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Evans*, 116 S.Ct. at 1620. The Supreme Court invalidated the amendment on different grounds than the Colorado Supreme Court. The latter court found that the amendment violated the "fundamental right" of gays and lesbians to participate in the political process. *See Evans*, 882 P.2d at 1335.

To help garner political support for Amendment 2, Colorado for Family Values distributed highly effective literature which asked "[a]re homosexuals 'disadvantaged' economically? You decide! Records show that even now, not only are gays not economically disadvantaged, they're actually one of the most affluent groups in America!" *VAID*, *supra* note 9, at 252 (quoting organization's literature). *See also Schacter*, *supra* note 104, at 292 (reporting organization's view that "militant gays would create a whole new protected class of affluent, well-educated, sexually deviant political power brokers. The true meaning of civil rights would never be the same.") (citing Will Perkins, *Views on Gay Rights Conflict*, DENVER POST, Oct. 11, 1992, at 1D (opinion letter authored by the Executive Chairman of the Board of Colorado for Family Values)).

This position has also been advanced in legal scholarship. Richard F. Duncan, for example, attempts to distinguish discrimination against "racial and ethnic minorities" from discrimination against "homosexuals." Relying on the gay wealth studies, Duncan argues that "the available evidence indicates that [discrimination against homosexuals] is neither pervasive nor economically devastating. Not only are homosexuals an affluent and a highly educated class, they are also politically powerful." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 409 (1994). Justice Scalia's dissent in *Evans*, in which Chief Justice Rehnquist and Justice Thomas join, also portrays gays and lesbians as disproportionately wealthy and powerful and, therefore, undeserving of even rational basis protection. *See Evans*, 116 S.Ct. at 1634 ("[T]hose who engage in homosexual conduct tend to . . . have high disposable income . . . [and] they possess political power much greater than their numbers."). Justice Scalia characterizes Amendment 2 as an "unimpeachable," "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws." *Id.* at 1629.

186. *See VAID*, *supra* note 9, at 254 (citing study finding income levels of periodical subscribers exceed national average).

are those who are in a position of relative comfort and security, and not those in a position of relative economic insecurity, for whom the loss of their job or home if their sexual orientation became known would be most catastrophic. If relatively poor gay men and lesbians are less willing to state their sexual orientation in response to surveys, or simply do not participate in them, the results will overstate the affluence of the overall gay community.¹⁸⁷

Therefore, even if the poor have access to such surveys, they are less likely than the wealthy to reveal their sexual orientation. Thus, Marcossou's critique suggests a positive relationship between *wealth* and the ability to *come out*—or to identify oneself publicly as “lesbian” or “gay.”¹⁸⁸

Researchers are attempting to conduct studies that correct the sampling bias of the earlier surveys and that more accurately portray the economic condition of gay and lesbian people. One recent survey, controlling for gender, has found “little noticeable difference” between gay and heterosexual incomes.¹⁸⁹ In addition, a University of Maryland researcher has conducted a survey that focuses on the participants’ “sexual behavior” as opposed to requiring participants to identify themselves as “gay” or “lesbian.” This study finds that the incomes of “behaviorally” gay and lesbian individuals are *lower* than their heterosexual counterparts—when education, occupation, and gender factors are controlled.¹⁹⁰

The connection between economic security and the opportunity to lead an *openly* gay or lesbian lifestyle means that gays and lesbians of color, who are disproportionately poor, will face greater obstacles com-

187. Marcossou, *supra* note 182, at 160 n.69 (citing *Gay Workers Earn Less in Same Job, University of Maryland Study Finds*, Daily Lab. Rep. (BNA) No. 156, at A9 (Aug. 16, 1994)). See also De Witt, *supra* note 182, at A14 (assumption of gay wealth “based on market research that had focused on white, high-income homosexuals”) (quoting conductor of survey that found gay and lesbian incomes less than heterosexual incomes); Elliot, *supra* note 182, at D1 (controlling for gender, study found “little noticeable difference” in incomes of gays, lesbians and heterosexuals); Russell, *supra* note 182, at 45 n.48.

188. Cf. VAID, *supra* note 9, at 256 (“middle-class and wealthy gay people are far more likely to be visible than are working-class and poor queers”).

189. Elliot, *supra* note 182, at D1.

190. VAID, *supra* note 9, at 255 (citing M.V. Lee Badgett, *Economic Evidence of Sexual Orientation Discrimination* (Nov. 1993) (unpublished manuscript)); Marcossou, *supra* note 182, at 160-61. Additional surveys are required to determine the full impact of class on sexual orientation discrimination and vice versa.

ing out. Indeed, gays and lesbians of color have stated that racial, gender, *and* class oppression force them to conceal their sexual orientation because they fear the "horrible risk . . . [of] further disenfranchise[ment]."¹⁹¹ Their testimony underscores the need for multidimensional gay and lesbian liberation theory and political action. Moreover, because the notion of gay and lesbian wealth renders appeals for "gay rights" hollow in some circles, gay and lesbian legal theorists must be careful not to affirm—and must make it a priority to deconstruct—this perception in their work.¹⁹² Furthermore, because the "gay and lesbian" wealth stereotype evolves from race- and class-biased statistics—statistics that are often contrasted with the low-income levels of the presumedly distinct population of "people of color"¹⁹³—it may more subtly reflect society's views of white gays and lesbians or a perception that all gays and lesbians are white. In either event, gay and lesbian legal scholars must analyze and discuss both racism and poverty, and how these forces constrain one's ability to "come out," in order to challenge effectively this harmful construct.

In addition to discussing gay and lesbian romance, Fajer attempts to support his argument that gays and lesbians form long-term relationships by stating that "in the last several years, gay male sexual practices have altered dramatically as more accurate information about the transmission of HIV has become available."¹⁹⁴ This statement ignores the experiences of many gay and bisexual men of color, who have persistently lacked access to effective sources of AIDS prevention information (particularly during the early history of the epidemic when Fajer's article was published) and, thus, have not "dramatically" changed their sexual behavior—specifically by failing to adopt "safe-sex" techniques.¹⁹⁵

191. Marta A. Navarro, *Interview with Ana Castillo*, in CHICANA LESBIANS, *supra* note 9, at 122 (quoting Ana Castillo). See also Patrice Gaines-Carter, *Festival Will Celebrate the Pride of Being Black and Gay*, WASH. POST, May 24, 1991, at C1 (black gays and lesbians express "fear that a public acknowledgement of homosexuality would add to the discrimination they routinely face as blacks in employment and other areas"); Dorothy Gilliam, *Coming Out of Closet Is Tougher for Blacks*, WASH. POST, July 14, 1980, at C1 (citing black homophobia and employment concerns as reasons why black gays and lesbians remain in the closet).

192. See Robson, *supra* note 12, at 182 (criticizing gay and lesbian legal theorists for failing to "effectively counter[]" the perception of gay and lesbian wealth).

193. See, e.g., Duncan, *supra* note 185, at 406-09.

194. Fajer, *supra* note 162, at 561.

195. In 1990, a study conducted by the National Task Force on AIDS Prevention found that nearly one-half of gay and bisexual black men continued to engage in anal intercourse without condoms. See Malcolm Gladwell, *Many Black Gays Missing Message on "Safe Sex,"* WASH.

The stated purpose of Fajer's discussion of long-term, monogamous gay and lesbian relationships is to counter the stereotype of "gay people as being empty and promiscuous, devoid of love, warmth, commitment, or stability."¹⁹⁶ Fajer, however, fails to consider the impact of racism and class inequality upon this and other "gay" stereotypes. Fajer also does not question whether racism and class inequality may limit, or even preclude, gays and lesbians of color and the poor from escaping negative "gay" constructs or, as a threshold matter, whether these stereotypes even apply to them. Such an examination of race and class, even if only brief and tentative, would have enriched Fajer's analysis because racial and class hierarchies create numerous stereotypes that impact gays and lesbians of color and that inform heterosexual—and gay—society's perception of them.¹⁹⁷ For example, under racial hierarchy, blacks are considered sexually deviant—promiscuous and predatory. This racial stereotype may interact with and reinforce notions of gay promiscuity. As a result, the "common" assumption of "gay" promiscuity may have *particularized* effects on people of color. It may, therefore, require an analysis of racism—rather than *generalized* claims problematizing "gay" promiscuity—to be disarmed.

For example, the negative reaction to Riggs' film *Tongues Untied* was particularly vitriolic and racially charged. Many of the responses arose after the film's broadcast by the Public Television Service.¹⁹⁸ For instance, one journalist offered the following editorial:

The program twice declares, "Black men loving black men is the revolutionary act"

It proceeds to show us how, with a trip through society's sewers. Its actors and the producer, Marlon T. Riggs, *preen* to rap music, *preach* in free verse and *dance*. They also *climb*

POST, June 14, 1990, at A17. That figure was more than 2.5 times higher than that of the gay male population as a whole. *Id.* The conductors of the study stated that their findings "demonstrate[] that the traditional methods of promoting 'safer sex,' which have led many white gays to change their behavior dramatically, have failed to reach the black community." *Id.* (emphasis added). The conductors also cited "an urgent need for more culturally specific education, risk reduction training and ongoing support" *Id.*

196. Fajer, *supra* note 162, at 550.

197. Gays and lesbians of color face homophobic stereotyping by heterosexuals (of all races) and racist stereotyping by whites (of all sexualities).

198. See generally Verne Gay, "Tongues" Showing Splits PBS Stations, NEWSDAY, July 16, 1991, at 46; David Mills, Cry of "Tongues Untied": Controversial Documentary on Gay Blacks, WASH. POST, July 19, 1991, at B1; Frank J. Priol, TV Film About Gay Black Men Is Under Attack, N.Y. TIMES, June 25, 1991, at C13.

into bed together naked.¹⁹⁹

To this viewer, black "rap music," poetry, dance, and sexual diversity are threatening and *connected*—they all exist within "society's sewers." Together, they render *Tongues Untied* "the most explicit, profane program ever broadcast by a television network."²⁰⁰ Thus, both racial and sexual bias, instead of an *isolated* notion of "gay" promiscuity, frame this viewer's disapprobation of the film.

In addition, Patrick Buchanan appropriated images from *Tongues Untied* for use in a 1992 presidential campaign advertisement. The advertisement criticized then President George Bush and the National Endowment for the Arts, which awarded Riggs a \$5,000 grant to produce the film.²⁰¹ The advertisement presented men dancing in slow-motion.²⁰² A voice accompanying the altered scene²⁰³ announced that "[t]his so-called art has glorified homosexuality, exploited children and perverted the images of Jesus Christ."²⁰⁴ Interestingly, the advertisement presented one of the few scenes from the film that features white men.²⁰⁵ Given Buchanan's negative record on issues of racial and sexual subordination,²⁰⁶ it is likely that he *whitened Tongues Untied* to

199. Dick Williams, *PBS Fare Tonight Shatters Bounds of Taste, Morality*, ATLANTA CONST., July 16, 1991, at 17 (emphasis added). The references in *Tongues Untied* to "black men loving black men" as a "revolutionary act" are not directly related, or limited, to sexuality—but to broader notions of black male mutual support, collective responsibility, and resistance to negative racial constructs and disempowerment. The phrase is taken from an essay by the late Joseph Beam who characterized "love" between black males as a necessary response to the social and economic "barriers to our loving" and as "an autonomous agenda . . . which is not rooted in any particular sexual, political, or class affiliation, but in our mutual survival." Joseph Beam, *Brother to Brother: Words from the Heart*, in *IN THE LIFE*, *supra* note 9, at 242.

200. Williams, *supra* note 199, at 17.

201. See Renee Loth, *Buchanan Says Bush Funded Obscene Art; Ad Uses Clip From Film on Gay Blacks*, BOSTON GLOBE, Feb. 27, 1992, at 14.

202. See Susan Yoachum, *Buchanan Calls AIDS "Retribution,"* S.F. CHRON., Feb. 28, 1992, at A1.

203. The original scene was not in slow-motion.

204. Yoachum, *supra* note 202, at A1.

205. This fact was not frequently noted in the media, and when it was, it was dismissed without a discussion of its possible relevance. See, e.g., *National Public Radio Transcripts*, Mar. 20, 1992 ("You know, the segments of the ad that are shown on the air are not black homosexuals. They're white homosexuals, but that aside . . .").

206. Buchanan has made several statements and supported policies evidencing his animosity toward racial and sexual diversity. During a 1991 interview on *This Week With David Brinkley*, Buchanan expressed hostility toward the immigration of people of color into the United States: "I think God made all people good. But if we had to take a million immigrants in, say, Zulus next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?" Maureen Dowd,

prevent the public from perceiving his criticism of the film as a product of both racial *and* sexual intolerance. Buchanan's advertisement visually manipulated society's fear and hatred of a "white male homosexual" in order to suppress black gay cultural expression. Buchanan effectively employed homophobia to marginalize and subordinate black people and to reinforce racism *and* homophobia. In response, Riggs criticized Buchanan for "exploit[ing] . . . race and sexuality to win high public office."²⁰⁷ Riggs argued that "[b]ecause . . . *Tongues Untied* affirms the lives and dignity of black gay men, conservatives have found it a convenient target, despite the awards and popular and critical acclaim it received after its broadcast . . . on public television."²⁰⁸

The homophobic and racist responses to *Tongues Untied* demonstrate the varying application, diverse impact, and multiple layers of seemingly "common" gay and lesbian stereotypes. The racial complexity of sexual stereotypes may require gay and lesbian legal theorists and civil rights attorneys to challenge racial hierarchy when they analyze and litigate discrimination claims of gays and lesbians of color.

In a subsequent article, Fajer recognizes and explores the dangers of essentialism in legal theory.²⁰⁹ He argues that essentialism can be avoided if

[w]e . . . tell stories about ourselves, not so much to show how we are representative of our group, *but how the society makes*

Buchanan's Alternative: Not Kinder or Gentler, N.Y. TIMES, Jun. 15, 1992, at A1; E.J. Dionne Jr., *Is Buchanan Courting Bias? Equivocaltons on Duke Pose Questions About Attitude*, WASH. POST, Feb. 29, 1992, at A1. Buchanan also stated that Jack F. Kemp, former Secretary of Housing and Urban Development and 1996 Republican Vice Presidential candidate, had "gone native," mocking Kemp's policies on behalf of people of color and the poor. Dowd, *supra*. See also (Buchanan called Chinese leader Deng Xiaoping an "85-year-old chain-smoking Communist dwarf"; Buchanan referred to Bush campaign strategist who lobbied on behalf of Japanese trade consortium as a "geisha girl of the new world order"); Dionne, *supra* (reporting charges of anti-semitism made against Buchanan). Buchanan has also claimed that AIDS is nature's "awful retribution" against gays, Dowd, *supra*, and has called gays "sodomites" and "the pederast proletariat." Dionne, *supra*.

Buchanan also emerged as a candidate in the 1996 presidential election. He sparked more controversy over racism following reports that several members of his campaign staff had ties to white supremacist organizations. See Douglas Frantz & Micheal Janofsky, *Buchanan Drawing Extremist Support, and Problems, Too*, N.Y. TIMES, Feb. 23, 1996, at A1. The co-chair of Buchanan's campaign, Larry Pratt, resigned amidst such allegations. See Richard L. Berke, *Buchanan Co-Leader Quits Under Fire*, N.Y. TIMES, Feb. 16, 1996, at A27.

207. Marlon T. Riggs, *Meet the New Willie Horton*, N.Y. TIMES, Mar. 6, 1992, at A33.

208. *Id.*

209. See Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1853-55 (1994).

*essentializing assumptions about us because of the groups to which we belong. These stories do not purport to show that all members of the group behave a certain way. Instead, they demonstrate that people commonly believe members of a group behave in specific ways . . .*²¹⁰

Although Fajer acknowledges that people within groups do not necessarily "behave a certain way," he focuses on countering the "common beliefs" about members of these groups²¹¹ and on challenging the "monolithic view of gay life."²¹² Fajer's emphasis on "common beliefs," "essentializing assumptions," and "monolithic views" of "gay" life, and his silence on issues of race, distort the culturally, racially, and class contingent nature of these assumptions and the different ways in which heterosexuals treat and perceive gays and lesbians due to race, class, gender, and other inequities. The notion of gay and lesbian wealth (versus a "common" image of impoverished communities of color) and the collision between Julio Rivera's Latino ("macho") and gay ("effeminate") statuses, for example, demonstrate the shifting nature of these seemingly "essentializing" assumptions and reveal that many of these prejudices may really reflect heterosexual society's negative perceptions of *white* gays and lesbians (or, possibly, a perception that all gays and lesbians are white). Furthermore, stressing the universality of homophobic assumptions may obscure the fact that these assumptions interact with, rely upon, and reinforce other negative constructs (such as racial stereotypes).²¹³ Thus, even if a homophobic society believes "all" gay people are promiscuous, this stereotype may support racial hierarchy and pose *particular* problems for gays and lesbians of color. Buchanan's use of homophobic images to suppress *black gay* people and perpetuate racial subordination illustrates this multidimensional aspect of gay and lesbian stereotypes.²¹⁴

The negative assumptions about gays and lesbians rely upon—and are constructed in a context of—racial and class hierarchy. As a result,

210. *Id.* at 1854 (emphasis added).

211. *See id.*

212. Fajer, *supra* note 162, at 533 n.101 (emphasis added).

213. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN & GAY STUDIES READER* 239 (Abelove et al. ed., 1993) ("To equate lesbian existence with male homosexuality because each is stigmatized is to deny and erase female reality once again.")

214. The interlocking gender, class, and sexual biases informed the trial court and the Virginia Supreme Court in *Bottoms*, *see supra* note 139, further demonstrate the need for a multidimensional deconstruction of homophobic stereotypes.

they may have particularized racial and class effects. Therefore, narrow theories that stress the "common," "monolithic," or "essentializing" nature of the stereotypes do not adequately depict or confront their complexity.²¹⁵

b. "Core" Experiences

Even those scholars who generally oppose essentialism in critical legal theory may wish to guard, momentarily, sexuality discourse from racial and class deconstruction. Lesbian theorist Patricia Cain, for example, has criticized feminists for "fall[ing] into the 'essentialist trap'" by ignoring lesbian reality and attempting "to build a grand or totalizing feminist theory from the perspective of only a few women."²¹⁶ Cain also recognizes that attempts to develop a "lesbian legal theory" "appear to embrace the concepts of essentialism" that sparked her earlier critique of feminism.²¹⁷ Cain further notes that "[l]esbian perspective and lesbian experience are no more monolithic than woman's perspective and woman's experience."²¹⁸ Cain, however, feels "much more comfortable challenging the monolithic and universal character of 'woman' than of 'lesbian.'"²¹⁹ Cain also argues that the category lesbian and lesbian theory "should be protected" from anti-essentialist criticism.²²⁰ Cain attributes her reluctance to problematize lesbian theory to the following two factors. First, Cain argues that "[t]he category lesbian is too young to be destabilized."²²¹ Second, Cain contends that there is a "core lesbian experience that creates lesbian identity."²²² Neither explanation convinces me that lesbian theory should be insulated from a multidimensional analysis.

215. As Audre Lorde has argued:

The white women with hoods on in Ohio handing out KKK literature on the street may not like what you have to say, but they will shoot me on sight. (If you and I were to walk into a classroom of women in Dismal Gulch, Alabama, where the only thing they knew about each of us was that we were both Lesbian/Radical/Feminist, you would see exactly what I mean).

.LORDE, *An Open Letter to Mary Daly*, in *SISTER OUTSIDER*, *supra* note 9, at 70:

216. Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994) [hereinafter *Risk of Essentialism*]. See also Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERK. WOMEN'S LJ. 191, 206-07 (1990) (criticizing feminist essentialism).

217. Cain, *Risk of Essentialism*, *supra* note 216, at 43.

218. *Id.* at 43-44.

219. *Id.* at 44.

220. See *id.* at 68.

221. *Id.* at 56. See generally *id.* at 56-61.

222. *Id.* at 61. See generally *id.* at 61-69.

Cain contends that the category lesbian is a “new” construct, appearing in time after both “woman” and “homosexual.”²²³ Cain observes that the lesbian subject is currently undergoing a “primary deconstruction” aimed at dismantling the negative lesbian image “created by the heterosexist and homophobic patriarchal systems.”²²⁴ According to Cain, “[t]he positive image of lesbians that is emerging as a result of this first tier deconstruction is still new and fragile, too new and fragile for me to want to start tearing it up under a second tier deconstruction process, into race and class and other chards.”²²⁵ Cain compares the “positive” reconstruction of the category lesbian with blacks’ attempts, during the civil rights movement, to redefine blackness in order to dismantle its negative, racist construction.²²⁶

Although I am sensitive to the need for a non-homophobic image of lesbianism, Cain’s arguments do not substantiate her claim that lesbian theory should remain isolated—at least for the moment²²⁷—from racial and class critiques. First, lesbian theory has already undergone significant racial and class critiques.²²⁸ Thus, Cain’s concerns appear untimely. In any event, Cain fails to explain how a narrow construction of lesbianism—freed from the troubling “fragmentation” of racial and class analysis—produces a “positive image” of lesbians. The construction of an “essential” lesbian is likely a “positive” process only for those women whose life experiences happen to fit within its narrow contours. Furthermore, if women of color and the poor must wait to introduce their “second tier” issues of racial and economic injustice into lesbian theory, then the theory will merely replicate dominant structures of oppression by marginalizing poor women, women of color, and issues of racial and class oppression. Therefore, lesbian theory should

223. See *id.* at 56-57.

224. *Id.* at 58 (citing CELIA KITZINGER, *THE SOCIAL CONSTRUCTION OF LESBIANISM* (1987); E.M. ETTORRE, *LESBIANS, WOMEN AND SOCIETY* (1980)).

225. *Id.* at 58-59. “Gay man of color” and “lesbian of color” are even newer “postmodern” categories than “gay” and “lesbian,” yet I have not argued that these terms or the growing theories surrounding them should escape deconstruction. In fact, I have “invited” and “encouraged” such criticism. See *supra* note 14.

226. See Cain, *Risk of Essentialism*, *supra* note 216, at 59.

227. Cain does not specify when the door should be opened for racial and class critiques within lesbian theory.

228. See *supra* note 105. See also Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 118 (Michael Warner ed., 1993) (discussing racial critiques of gay and lesbian theory and politics and observing that “lesbian women of color played a pivotal role in [1980s feminist anti-essentialism] and implicated the lesbian community in the race issue”).

not evolve in separate tiers—with racial and class analysis relegated to a secondary, unspecified, future phase of construction.²²⁹

Finally, Cain does not advance her argument by comparing the “positive” construction of “lesbian” with the redefinition of blackness during the civil rights movement. Despite its attempt to create an affirming image of blackness, the civil rights movement suffered not only from white resistance, but also because black leadership and members of the black community constructed black politics and identity around sexism, homophobia, and “black heterosexual maleness.”²³⁰ As a result, “black power” often became an oppressive concept for black lesbians, gay men, and heterosexual women.²³¹ Lesbian and gay legal

229. The false image of gay and lesbian wealth and its negative impact upon gay and lesbian struggles for legal and political equality, *see supra* pp. 605-08, provides just one reason why lesbian theory should not delay, even for a moment, class and racial analysis. As Ruthann Robson has observed,

Not only does the dissipation of class analysis in lesbian and “queer” legal theory result in a lack of resistance to commodification and the maintenance of heterosexist structures, it also results in our failure to adequately respond to those who advocate our demise

The portrait of lesbians and gay men as economically privileged serves New Right rhetoric in at least two ways. First, the depiction taps into class resentments and anxieties. Second, economic advantage counters any claim that lesbians and gay men are discriminated against. *Yet our own rhetoric has often not effectively countered these falsehoods.*

Robson, *supra* note 12, at 183 (emphasis added).

230. *See* HOOKS, *AIN'T I A WOMAN?*, *supra* note 13, at 94-99 (describing failures of civil rights movement due to homophobia and sexism within the black community); LORDE, *Learning from the 60's*, in *SISTER OUTSIDER*, *supra* note 9, at 134 (same).

231. HOOKS, *AIN'T I A WOMAN?*, *supra* note 13, at 98 (“While the 60s black power movement was a reaction against racism, it was also a movement that allowed black men to overtly announce their support of patriarchy.”); LORDE, *supra* note 230, at 137 (“Black women were told that our only useful position in the Black Power movement was prone. The existence of Black lesbians and gay people was not even allowed to cross the public consciousness of Black America [sic].”). Black gay activist Bayard Rustin, for example, organized the 1963 “March on Washington,” but this fact was suppressed by leadership in the civil rights movement. *See* Henry Louis Gates, *Blacklash?*, *THE NEW YORKER*, May 17, 1993, at 44 (“because of his homosexuality . . . Rustin was prevented from being named director of the 1963 march”); Gilmore, *supra* note 12, at 236 (Rustin “was dismissed by some other leaders of the civil rights movement partly because of his sexual orientation”). Gates attributes the *closeting* of Rustin’s role in the march to a fear that his gayness “would be used to discredit the mobilization.” Gates, *supra*, at 44. *See also* GOMEZ, *Because Silence Is Costly*, in *FORTY-THREE SEPTEMBERS*, *supra* note 9, at 71 (discussing Rustin’s “working quietly” in civil rights movement due to fears of white homophobia). While this “accommodation” might have reflected the fear of a white homophobic backlash, it also evolves from a narrow definition of black liberation—one that excludes sexual freedom and the liberty of black gays and lesbians. Had the civil rights movement not been defined around heterosexual needs, black leaders would not have viewed Rustin’s sexuality and white homophobia as potential threats to the *validity* of the movement. Rather,

theorists should not repeat these harmful mistakes.

Cain's second reason for temporarily accommodating lesbian essentialism—that a “core lesbian experience” exists—also fails. By “core” experience, Cain “means an experience that is central to who we are as lesbians, an experience that shapes our individual identities in a way that causes us to identify as lesbians, and that unifies lesbians as a category.”²³²

Cain seeks to discover the core lesbian experience despite her seemingly contradictory challenge against feminist essentialism. Cain has argued that the “category ‘woman’ should remain open, should be destabilized, so that all women might claim some piece of it. We should not embrace definitions that are so fixed that we exclude some women. *Nor should we require a single core experience of all individuals to be included in the class, because there is no core experience that includes all women.*”²³³ If lesbians of color and poor lesbians are in fact “women,” then inclusion of their racial and class concerns within feminism and the “open” category woman, compels a concomitant openness of lesbian theory and the category “lesbian.”

Cain does not reconcile her conflicting positions. Instead, she defines the core of lesbian experience as “the emotional and erotic attraction to another woman and the recognition that this attraction has occurred.”²³⁴ Cain contends that this moment of self-discovery is

these issues would have been a central part of racial politics and of blacks' resistance to the *many ways* in which they were marginalized in American society. The suppression of sexual difference to advance purported racial freedom thus reflects an essentialist view that sexuality is separable from and unconnected to racial identity, subordination, and liberation. A multidimensional racial struggle, by contrast, would have exposed and challenged the potential use of white homophobia to advance racist agendas and to subordinate the march. See Kendall Thomas, “*Ain't Nothin' Like the Real Thing*”: *Black Masculinity, Gay Sexuality and the Jargon of Authenticity*, in REPRESENTING BLACK MEN 66 (Marcellus Blount & George Cunningham eds., 1996) (“[T]he heteronormative vision of racial identity that would exclude the expression of sexual difference among African-Americans does not exorcise but rather incorporates the ideology of white supremacy into the very body of black America, and with it the phobic conceptions of black sexuality *as such* that white supremacy has always insinuated.”) (emphasis in original). Thus, a multidimensional politics would not have required black gays and lesbians to suffer further marginalization in the name of black racial advancement. Cf. Crenshaw, *Mapping the Margins*, *supra* note 13, at 1295 (“Although collective opposition to racist practice has been and continues to be crucially important in protecting Black interests, an empowered Black feminist sensibility would require that the terms of unity no longer reflect priorities premised upon the continued marginalization of Black women.”).

232. Cain, *Risk of Essentialism*, *supra* note 216, at 62.

233. *Id.* (emphasis added).

234. *Id.* at 66. Cain reasons that “[i]f a lesbian is someone whose emotional and erotic attention is directed toward another woman, then how can any self-identified lesbian not claim

transformative because "[o]nce we realize the truth of our attraction, we realize our difference from the rest of the world and our lives are different from that moment on."²³⁵

While it is probably indisputable that all self-identified "lesbians" discover they have a "lesbian" intimate attraction, this fact does not eliminate race and class issues from lesbian experience, nor does it render this process the "central" moment in lesbian lives. Indeed, the centrality of this discovery to lesbian experience will likely depend upon the very race and class factors that Cain believes lesbian theorists should, for the moment, ignore.²³⁶ For example, while some women may "realize [their] difference from the rest of the world" when they discover their lesbian attraction, lesbians who are poor or of color likely encounter marginalization and exclusion long before this moment occurs.²³⁷ Consequently, their discovery of same-sex intimacy may not be *the* event that renders them "differen[t] from the rest of the world." Under a multidimensional framework, the homophobic oppression that results from a woman's self-identification as a lesbian is just *one* important (or "central") aspect of being a lesbian.²³⁸ Racial and economic injustice are also core and central experiences of lesbian existence²³⁹ and, thus, require *immediate* analysis in lesbian theory.

Race and class also impact women *after* they discover their lesbian identity, and these forces create varying lesbian perspectives. Although Cain acknowledges this point,²⁴⁰ her desire to shield lesbian theory from racial and class deconstruction means that such differences would indefinitely go untold.

Cain correctly states that "[s]ome degree of generalization is neces-

this core experience of having her own attention be so captured?" *Id.* at 65.

235. *Id.*

236. See Spelman, *supra* note 13, at 139 ("Someone might tell me that we have something in common, but even if I agree, I may find that utterly insignificant in terms of my identity and plans for action.")

237. See Gomez, *supra* note 116, at 938 (stating that when she discovered the isolation that homophobia causes, she "was already struggling with another reality—black skin—that was immensely more devastating in [her] daily life.")

238. See Arriola, *Gendered Inequality*, *supra* note 12, at 133 ("Women are oppressed in many ways, and sexuality is only one of them.")

239. As this Article has argued, these factors also shape homophobia.

240. See Cain, *Risk of Essentialism*, *supra* note 216, at 69 ("Once a woman discovers that she is a lesbian, she begins to develop a lesbian perspective on life. That perspective varies based on the life that each individual lesbian lives, her specific circumstances, her geographic location, and her economic security.")

sary to theorize."²⁴¹ Cain, however, implies that generalizations and a focus on "commonalities" are critical for the construction of a meaningful—even authentic—lesbian theory. She argues that "[a]lthough we certainly know that there must be differences amongst us, lesbian theory must be based on our commonalities. Otherwise, the theory might be interesting, *but it would not be lesbian.*"²⁴²

I share Cain's opinion that the discussion of racial and class differences among lesbians is an "interesting" project. I do not believe, however, that discussion of these differences merely adds "color" to lesbian theory. Rather, such a discourse is crucial for the construction of a theory that adequately responds to the needs of women of color and the poor. Furthermore, it is not inconceivable to discuss both differences and similarities concurrently, during the same phase of theorizing.²⁴³ Nevertheless, because gay and lesbian theorists have focused so extensively on sameness, to the nearly complete exclusion of difference, they probably should intensely focus on issues of racial and class diversity in order to fill the holes in their theories.

Concentrating on these differences, moreover, does not neutralize the "lesbian" character of lesbian theory, as Cain implies. Instead, a multidimensional analysis permits us to examine how racial and economic subordination affect poor *lesbians* and *lesbians* of color and how an essentialist lesbian theory is itself grounded upon racial and class privileges and the experiences of white and economically advantaged lesbians. Thus, to theorize about the needs of women of color and the poor is no less "lesbian" than the construction of a theory devoid of racial and class analysis, one that likely reflects whiteness and economic privilege.

Multidimensionality, therefore, does not destroy the category lesbian (or gay) or disturb its usefulness as a basis for theorizing. Instead, it merely attempts to make explicit the multiple dimensions (*e.g.*, race and class) of the category and to examine how these dimensions should (and do) affect gay and lesbian legal theory, public policy, and political agendas.²⁴⁴

241. *Id.* at 50.

242. *Id.* at 61 (emphasis added).

243. Indeed, this Article discusses both. See *supra* pp. 567-83 (discussing vulnerability of all gays and lesbians to homophobic violence but highlighting differences supplied by racial and class inequality); *supra* note 95 (recognizing failure of state to protect gays and lesbians from domestic violence but pinpointing possible racial and class differences in this heterosexist practice); *supra* pp. 609-12 (discussing assumption of gay and lesbian promiscuity but analyzing racial complexity of this stereotype).

244. See PHELAN, GETTING SPECIFIC, *supra* note 105, at 140 ("Coalition cannot be simply the

B. Essentialist Political Agendas

Gay and lesbian legal theorists must also carefully analyze the construction of gay and lesbian political discourse because gay and lesbian civil rights litigation and legal analysis often evolve from and parallel arguments advanced and agendas pursued in gay and lesbian political activism.²⁴⁵ My examination of gay and lesbian political discourse reveals that it, like gay and lesbian legal theory, fails to engage critically issues of racial and class subordination and privilege. Consequently, gay and lesbian political agendas may conflict with, or fail to include, the goals of gays and lesbians of color. For example, Martin Ornelas, a member of LLEGO, the National Latina/Latino Lesbian and Gay Organization, complains that issues of Latino gays and lesbians are often excluded from mainstream gay and lesbian political agendas.²⁴⁶ Ornelas expresses an interest in gay and lesbian agendas that include intersecting issues of racism, poverty, and homophobia, such as substance abuse and the lack of educational opportunities among gay Latinos.²⁴⁷

strategic alignment of diverse groups over a single issue, nor can coalition mean finding the real unity behind our apparently diverse struggles. Our politics must be informed by affinity, . . . not simply because we are not all alike, but because we each embody multiple, often conflicting identities and locations.” (citing Donna Haraway, *A Manifesto for Cyborgs*, in *FEMINISM/POSTMODERNISM* (Linda J. Nicholson ed., 1990)).

245. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993) (discussing historical nexus between gay political action and civil rights litigation). The politics of homophobia also constrain gay and lesbian legal reform efforts. See, e.g., *infra* p. 626 (discussing how societal and state homophobia limited efforts to end the exclusion of gays and lesbians from the military).

246. See David James Rose, *Coming Out, Standing Out: Hispanic American Gays and Lesbians*, *HISPANIC*, June 1994, at 44.

247. *Id.* Ornelas also injects issues of race, national origin, and, perhaps, nationalism into the debates surrounding the exclusion of gays and lesbians from the military. He

asks Hispanic gays and lesbians to contemplate whether they are prepared to patrol the Mexican border with the National Guard or shoot down their lesbian and gay compañeros the next time the U.S. government decides to invade Panama, Nicaragua, or Cuba. “Are we expected to join a prior list of issues that does not reflect our realities?”

Id. Accord TOMMI A. MECCA, *BETWEEN LITTLE ROCK AND A HARD PLACE* 125-27 (1993) (criticizing gay military movement and arguing that gays and lesbians should instead advocate for civilian employment, anti-poverty, and social welfare programs); Colman McCarthy, *Equality for Warriors: A Phony Gain*, *WASH. POST.*, May 11, 1993, at C10 (criticizing feminist and gay efforts to join military on grounds that military supports abusive foreign policy); David Tuller, *Some Lesbians, Gays Don't Like Focus on Military Ban Issue*, *S.F. CHRON.*, July 12, 1993, at A4 (reporting that some gays and lesbians oppose struggle to end military's anti-gay/lesbian

1. *Race and Sexuality*

As Ornelas' comments suggest, gay and lesbian political agendas may not fully capture the interests of gays and lesbians of color in racial and economic equality. Indeed, several prominent commentators in gay and lesbian politics have even argued that racial and class struggles should have *no* role in gay and lesbian liberation.

Richard Mohr, for example, urges "gay organizations" not to "build[] coalitions with other groups," including "blacks" and "women."²⁴⁸ Mohr contends that such efforts are "[u]nnecessary and . . . a wasteful drain on the movement."²⁴⁹ Mohr dismisses the expectation of political success from such strategies as "a communist fantasy."²⁵⁰ Mohr also claims that blacks' and women's "groups' fights are not gays' fights."²⁵¹

Mohr seemingly does not contemplate—or he considers irrelevant—the existence of black gay men, black lesbians, and lesbians in general. To these individuals, feminism and antiracism are not "wasteful" frolic. Rather, these political movements are crucial to their "fight" for liberation. Furthermore, if, as Mohr contends, "[c]oming out is the fundament of gays' existence as political creatures,"²⁵² then gay and lesbian politics *must* combat racial and class inequality—because racism and poverty constrain gays and lesbians and limit their ability to reveal publicly their sexual identities.²⁵³

Mohr attempts to defend his narrow conceptualization of gay politics by claiming that "[t]he black movement achieved its political successes without coalitions of the dispossessed."²⁵⁴ Mohr's assertion misstates history. Although the civil rights movement responded primarily

policies because of military's "history of supporting authoritarian regimes and of helping overthrow elected leaders in Latin America and other regions"). Thus, Ornelas' comments regarding the appropriateness of political challenges to the military's ban on gays and lesbians also reflect a conservative/liberal divide within gay and lesbian politics.

248. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 328 (1988).

249. *Id.*

250. *Id.* at 329.

251. *Id.*

252. *Id.* at 327. For a discussion of the importance and complexity of "coming out," particularly for people of color, see GOMEZ, *supra* note 231, at 169 ("[A]n individual's need to come out of the closet and name her/himself sexually is not only part of a political strategy, but is, more fundamentally, at the core of accepting adulthood and validating one's own experience.").

253. *See supra* pp. 608.

254. MOHR, *supra* note 248, at 329.

to the oppression of black people, much of the activism it generated involved a coalition of black, Jewish, labor, and Latino groups.²⁵⁵ Mohr's statement also ignores the failure of the civil rights movement to advance the particular needs of black lesbians, gay men, and heterosexual women—due to its construction of blackness around heterosexuality and maleness.²⁵⁶ A narrow "gay" politics further marginalizes gay and lesbian people of color by repeating the errors of antiracism.

Bruce Bawer, a gay cultural critic, similarly challenges the necessity of multilayered gay political struggle. In his excoriating review of *Virtual Equality*, Bawer argues that sexism, racism, and economic injustice are "issues yes—but gay issues?"²⁵⁷ In addition, Marshall Kirk and Hunter Madsen consider antiracist, poverty, and feminist concerns "superfluous issues" to "gay" liberation.²⁵⁸ To Kirk and Madsen, coalitional and multidimensional politics detract from gay political issues.²⁵⁹

Mohr, Bawer, Kirk, and Madsen offer a narrow gay politics—a politics devoid of antiracist, poverty, and feminist concerns. This singular politics responds only to the needs of individuals who do not suffer racial, class, or gender exclusion—namely, white, male, middle- and upper-class persons. Although these authors contend that race, class, and gender detract—or are separate—from gay politics, the political vision they prescribe rests firmly upon racial, class, and gender

255. See Anthony E. Cook, *God-Talk in a Secular World*, 6 YALE J.L. & HUMAN. 435, 450 (1994) ("[T]he liberal coalition of the Civil Rights movement consisted of a precarious alliance of Blacks, Jewish and Christian progressives, and the progressive wings of labor, white women's groups, young white college students, and intellectuals."); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 56 (1995) ("In the 1960s, many achievements of the civil rights movement were gained through a coalition of African-American, labor, Latino, Jewish and other progressive organizations.")

256. See *supra* pp. 615-16 & n. 231.

257. Bruce Bawer, *Under Glass*, N.Y. TIMES, Oct. 29, 1995, § 7, at 24 (emphasis added). Bawer has also expressed a distaste for gay and lesbian multiculturalism. See BRUCE BAWER, A PLACE AT THE TABLE 37 (1993) (describing creation of a "queer people of color media production company" and the publication of an "anthology of lesbian, gay and bisexual Asian/Pacific writers" as "constricting" and as "Balkanization"); *id.* at 216 (dismissing scholarly research on the links between gender, class, race, and sexuality as "[p]olitically correct and multiculturalist rhetoric"). Bawer is not alone in his dismissal of gay and lesbian multiculturalism. See Andrea Lewis & Robin Stevens, *At the Crossroads: Race, Gender and the Gay Rights Movement*, ETHNIC NEWSWATCH, Apr. 30, 1996, at 22 ("There is more resistance to conscious efforts to integrate [racially] the movement and its organizations. It's somehow become viewed as political correctness rather than as a sound strategy.") (quoting white gay activist Eric Rofes).

258. See MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 90s 180 (1989).

259. See *id.*

privilege. Thus, by portraying coalitional and multidimensional politics as “non-gay,” the authors falsely imply that their own essentialist politics is authentic and pure, *i.e.*, not contaminated by race and class; they also deny the racial, class, and gender privileges upon which their own political theories reside.²⁶⁰ A multidimensional gay politics that confronts racial, class, and gender subordination is no less valid or “gay” than a politics grounded upon racial, economic, and male privilege.

Although several members of the gay political community explicitly reject the importance of incorporating antiracist and poverty concerns in gay and lesbian politics, issues of racial and class subordination are more often marginalized by omission, silence, and neglect. The white gay political response to the work of white gay photographer Robert Mapplethorpe provides an excellent example of the neglectful absence of racial discourse in gay and lesbian politics. The controversy also illustrates the potential tension between antiracist politics and essentialist gay and lesbian political agendas.

In the late 1980s several museums, members of Congress, and the National Endowment for the Arts attempted to censor Mapplethorpe’s work, some of which contained “homoerotic” themes.²⁶¹ Many gay and lesbian activists rallied behind Mapplethorpe, charging the censors with discrimination on the basis of sexual orientation and insensitivity to free expression.²⁶² Both *prior to* and during the conflict with the censors,

260. The authors’ denial of the racial basis for their theories perhaps results from a tendency of many whites not to perceive that they even have a “race.” HARLON DALTON, *RACIAL HEALING* 109 (1996). Dalton explains that “*race obliviousness* is the natural consequence of being in the driver’s seat. We are all much more likely to disregard attributes that seldom produce a ripple than we are those that subject us to discomfort. . . . For most whites, race—or more precisely, their own race—is simply part of the unseen, unproblematic background.” *Id.* (emphasis added). See also HOOKS, *AIN’T I A WOMAN*, *supra* note 13, at 138 (“[T]he dominant race . . . reserves for itself the luxury of dismissing racial identity while the oppressed race is made daily aware of their racial identity.”). Barbara Flagg has also written extensive analyses on “the *transparency phenomenon*: the tendency of whites not to think about whiteness or about norms, behaviors, experiences or perspectives that are white-specific.” Barbara J. Flagg, “*Was Blind But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 956 (1993) (emphasis added). See also Barbara J. Flagg, *Changing the Rules: Some Preliminary Thoughts on Doctrinal Reform, Indeterminacy, and Whiteness*, 11 BERKELEY WOMEN’S L.J. 250 (1996); Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935 (1995); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Decisionmaking*, 104 YALE L.J. 2009 (1995); Barbara J. Flagg, *On Selecting Black Women as Paradigms for Race Discrimination Analyses*, 10 BERKELEY WOMEN’S L.J. 40 (1995). These arguments also apply to class, sexuality, and gender.

261. See Alan Artnet, *The Eye of the Storm: Mapplethorpe’s Unblinking Vision Sparked a Continuing Battle Over Art*, N.Y. TIMES, Dec. 31, 1989, at C4.

262. *Id.* See also Christopher Knight, *Censorship and Photography’s 150th: Controversy Over*

however, political activists in the gay and lesbian community failed to engage in a substantial conversation around the racial issues implicated by Mapplethorpe's work.²⁶³

A significant dialogue on race did emerge among some black gay activists, however. While they did not align themselves with the censors of Mapplethorpe's work, many black gay men were disturbed by Mapplethorpe's photographic *display* of black men, which they believed reinforced racist sexual stereotypes. Essex Hemphill, for example, argues that Mapplethorpe's "work *artistically* perpetuates racial stereotypes constructed around sexuality and desire. In many of his images, Black males are only shown as parts of the anatomy—genitals, chests, buttocks—close up and close cropped to elicit desire."²⁶⁴ Similarly, Isaac Julien and Kobena Mercer comment that "Robert Mapplethorpe's catalogue *Black Males* . . . appropriates the conventions of porn's racialized codes of representation, and by abstracting its stereotypes into 'art,' [Mapplethorpe] makes racism's phantasms of desire respectable."²⁶⁵ Pervasive race-sex stereotypes may have dictated that the identity and emotions—elements of personhood—of the black male models in Mapplethorpe's work escape presentation.²⁶⁶ Rather, the ste-

Serrano and Mapplethorpe Works Overshadows Observances of the Form's Sesquicentennial, L.A. TIMES, Dec. 17, 1989, at 5; Andrew L. Yarrow, *Action Is Condemned by Artists and Institutions*, N.Y. TIMES, July 27, 1989, at C18.

263. By criticizing the absence of a noticeable white gay and lesbian political discussion of the racial aspects of Mapplethorpe's work, I do not intend to suggest that this work should have been censored, nor do I wish to argue that an individual *should* oppose the content of the work or conclude that Mapplethorpe is "racist." Rather, I wish to argue that by failing to engage in a rigorous discussion of the issues of race and sexual representation *implicated* by Mapplethorpe's work, gay and lesbian political leaders marginalized—or treated as insignificant—issues of race.

264. HEMPHILL, *Does Your Mama Know About Me?*, in CEREMONIES, *supra* note 9, at 38 (emphasis in original).

265. Isaac Julien & Kobena Mercer, *True Confessions: A Discourse on Images of Black Male Sexuality*, in BROTHER TO BROTHER, *supra* note 9, at 169. Black gay opinion on this issue, however, was not uniform. In fact, one of Mapplethorpe's models, Ken Moody, stated that he did not believe that the artist's work perpetuated the "exploitation" of black men. See KOBENA MERCER, *Reading Racial Fetishism*, in WELCOME TO THE JUNGLE: NEW POSITIONS IN BLACK CULTURAL STUDIES 197 (1994) (quoting television interview with Moody). Furthermore, Mercer subsequently changed his position and argued that Mapplethorpe and his work do not subordinate, but rather elevate, black men by presenting them in art. See *id.* at 194-204. Moody's opinion and Mercer's flip-flop, however, do not affect my position. I have not argued that Mapplethorpe is racist or that we should condemn his work. Rather, I have only argued that his work presents "issues" of race and that silence on these issues reflects the general marginalization of race in the gay and lesbian political community.

266. See Jane Caputi & Helen Vann, *Imperfect Moments: The Mapplethorpe Debate*, S.F. CHRON., Feb. 21, 1990, at A19 (Mapplethorpe's obscuring of the faces of many of his black

reotypical notion of black male "sexual prowess," presented through phallogentric imagery, assumes centrality.²⁶⁷

Thus, black gay criticism of Mapplethorpe's exhibition did not stem from a homophobic drive to censor. Instead, it emanated from an historical concern regarding the negative representation and stereotyping of black male sexuality. Such concerns exist beyond the Mapplethorpe controversy. Julien and Mercer, for example, observe that "in the gay subculture . . . [b]lack men . . . [are] confined to a narrow repertoire of types—the super-sexual stud and the sexual savage on the one hand, the delicate and exotic 'Oriental' on the other."²⁶⁸ Unless the gay and lesbian community begins to engage in discourse around issues of race and sexual representation, its ability to form political coalitions across racial groups—to the extent that it even considers such coalitions important—will be limited. Mapplethorpe's work provided an excellent opportunity to begin such a dialogue.

2. Race versus Sexuality

While the Mapplethorpe controversy exemplifies the potential for conflict around omitted issues of race and sexuality in gay and lesbian communities, the Broadway musical *Miss Saigon* has engendered direct conflict on these issues. In 1991, the Lambda Legal Defense and Education Fund sponsored a benefit of *Miss Saigon*, a musical that portrays a romance between a white American soldier and a Vietnamese woman during the Vietnam War. The benefit sparked protests by Asian gay and lesbian groups which believed the play perpetuated stereotypes of Asian men as "villains" and Asian women as "docile" and the sexual objects of white men.²⁶⁹ Despite the protests, the benefit took place

subjects reinforces dominant structures of racism).

267. See HEMPHILL, *supra* note 264, at 38 (in Mapplethorpe's work "[t]he penis becomes the identity of the Black male, which is the classic racist stereotype presented as Art in the context of a gay vision") (emphasis in original); Julien & Mercer, *supra* note 265, at 169 (in Mapplethorpe's "'Man in Polyester Suit,' the dialectics of fear and fascination in colonial fantasy are reinscribed by the centrality of the black man's 'monstrous' phallus").

268. *Id.* at 169. See also Rose, *supra* note 246, at 44 ("Latino gays are [often] eroticized and . . . fetish[ized] by gay white men") (quoting Philadelphia activist and writer Roberto Vasquez-Pacheco).

269. Aileen Jacobson, *Protest Planned for "Saigon" Opening*, NEWSDAY, Apr. 10, 1991, at 57. These protests, however, were not limited to the Asian gay community nor to New York. See Kari Granville, *Protests Aside, "Miss Saigon" Show Goes On*, L.A. TIMES, Apr. 13, 1991, at F3 (reporting coalition of Asian, theatrical, legal, women's, and anti-racist gay groups opposed to New York Broadway opening); Thomas Walsh, *"Saigon" Arrival Brings Storms of Protest and Anger*, BACK STAGE, Apr. 19, 1991, at 3 (same); Mike Steele, *The Other Side of the Story: "Miss Saigon" Hits a Nerve Among Asians*, STAR TRIB., Jan. 9, 1994, at 1F (reporting criticism

because, as Thomas Stoddard, then the Executive Director of Lambda, explained, the organization "was too far along in ticket sales Canceling . . . would have resulted in 'a diminution of our program, our ability to fight discrimination directly.'"²⁷⁰ Thus, the Asian groups' interests in racial equality threatened to diminish the "fight" against gay and lesbian discrimination—essentially constructed. The true aim of the Asian groups' protests was to challenge negative racial and gender constructs of Asian men and women. Under a framework that views racial liberation necessary for, rather than separate from, complete sexual equality, this antiracist goal does not threaten to "diminish," but rather *strengthens*, the "fight" against gay and lesbian discrimination. Had gay and lesbian advocates developed a greater consciousness of, and sensitivity towards, issues of racial and gender subordination (and if Asians had greater representation within gay and lesbian organizations), the *Miss Saigon* conflict would likely have not occurred.²⁷¹

Recently, the most volatile public conflict between race and sexuality has occurred in political discourse surrounding the military's discriminatory policy against gays and lesbians. During the 1992 presidential campaign, candidate Bill Clinton promised to repeal the policy.²⁷²

surrounding opening of show in Minneapolis).

The Broadway production of the musical, however, generated racial controversy *before* the Lambda benefit. The controversy arose when the play's director cast a caucasian male as the Eurasian lead character without allowing auditions for the role. See Mervyn Rothstein, *Equity Will Reconsider "Miss Saigon" Decision*, N.Y. TIMES, Aug. 10, 1990 at C3. People of color claimed that the decision limited acting opportunities for Asians. See, e.g., Paul Winfield, *Equity Was Right the First Time*, N.Y. TIMES, Aug. 18, 1990, § 1, at 25. The governing board of Equity, an actors' union, voted to reject the musical's Broadway application. See Rothstein, *supra*. Equity, however, subsequently reversed its decision amidst charges of discrimination. See Mervyn Rothstein, *Equity Reverses "Saigon" Vote and Welcomes English Star*, N.Y. TIMES, Aug. 17, 1990, at A1.

270. Jacobson, *supra* note 269, at 57 (quoting Thomas Stoddard). A future showing to benefit the Lesbian and Gay Community Services Center of New York City, however, was cancelled after the protests. *Id.*

271. Vaid comments that gay and lesbian organizations need to pay closer attention to how "messages" are interpreted by members of different racial groups. She opines that had Lambda engaged in such an inquiry prior to scheduling the *Miss Saigon* benefit, this, possibly, "would have led them early to conversations with the Asian gay and lesbian community. Such conversations, held while the event was still in the planning stages, could have saved the organization a great deal of pain." VAID, *supra* note 9, at 304. Eventually, after meeting with Asian groups, Lambda stopped selling tickets to the musical, sent ticket holders a statement from the *protestors* explaining why they believed the musical affirmed racial stereotypes, and offered ticket holders the opportunity for a refund. Jacobson, *supra* note 269 at 57. Stoddard stated that the experience was "unbelievably painful." *Id.*

272. Michael Isikoff, *Gays Mobilizing for Clinton As Rights Become an Issue*, WASH. POST, Sept. 28, 1992, at A1.

Clinton's announcement, during the early days of his presidency, that he would keep his campaign promise sparked outrage and opposition from military officials, members of Congress, and the public.²⁷³ Gay and lesbian groups countered this criticism by comparing the military's anti-gay policy to its earlier policies of racial exclusion and arguing that both forms of discrimination are unjust.²⁷⁴

Many blacks, particularly heterosexual males, criticized the analogies.²⁷⁵ Two observations can be made regarding the black responses to the race-sexuality analogies. First, black responses attempt to engage issues of racial hierarchy that the analogies obscure. Second, black responses stem from homophobia and from a disregard for gay and

273. See, e.g., Peter Applebome, *Military People Split Over Ban on Homosexuals: Army Ranks Are Split, As in Society*, N.Y. TIMES, Jan. 28, 1993, at A16; Jeffrey Schmalz, *Gay Groups Regrouping for War on Military Ban*, N.Y. TIMES, Feb. 7, 1993, at A6; Eric Schmitt, *Months After Order on Gay Ban, Military Is Still Resisting Clinton*, N.Y. TIMES, Mar. 23, 1993, at A1; Bernard E. Trainor & Eric L. Chase, *Keep Gays Out*, N.Y. TIMES, Mar. 29, 1993, at A15. President Clinton eventually retreated from his promise and instead implemented a policy dubbed "Don't Ask, Don't Tell, Don't Pursue." Under this policy, "homosexual conduct" remains prohibited; a statement demonstrating a "propensity" to engage in homosexual conduct (e.g., "coming out") gives rise to a presumption of homosexual conduct (and thus a basis for discharge), and the military will, allegedly, no longer actively seek to discover and discharge gay and lesbian troops. See *Able v. United States*, 880 F. Supp. 968, 976-77 (E.D.N.Y. 1995), *rev'd*, 88 F. 3d 1280 (2nd Cir. 1996); Thomas L. Friedman, *Accord Is Reached on Military Rules for Gay Soldiers*, N.Y. TIMES, July 17, 1993, at A1; Michael R. Gordon, *Pentagon Spells Out Rules for Ousting Homosexuals; Rights Groups Vow a Fight*, N.Y. TIMES, Dec. 23, 1993, at A1. The military, however, has, reportedly, continued to "ask" some of its members to disclose their sexual orientation. See Philip Shenon, *Armed Forces Still Question Homosexuals*, N.Y. TIMES, Feb. 27, 1996, at A1 (reporting results of interviews with service members and review of Pentagon documents).

274. See, e.g., Lisa Keen, *The Fears Are Unjustified*, WASH. POST, Jan. 31, 1993, at C7; Art Pine, *Gay Issue Quietly Spreads Rifts Through Civil Rights Groups, Lobbyists: High Profile Black and Latino Groups Are on Sidelines in Battle to End Military's Ban on Homosexuals*, L.A. TIMES, Jan. 29, 1993, at A20; Eric Schmitt, *Pentagon Aides to Study Option of Segregation for Gay Soldiers*, N.Y. TIMES, Jan. 31, 1993, at A1.

275. See, e.g., Lynne Duke, *Drawing Parallels—Gays and Blacks: Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, WASH. POST, Feb. 13, 1993, at A1; Susan Feeney, *Echoes from the Past: Sides at Odds over Parallel of Military Integration, Gay Ban*, DALLAS MORNING NEWS, May 23, 1993, at J1; David Lightman, *To Congressman, Military's Gay Ban Not Like Racial Bias*, HARTFORD COURANT, Aug. 16, 1993, at A1; Joe Rogers, *Spare Us the Comparisons Between Gays and Blacks*, WASH. TIMES, July 29, 1994, at A21; Lena Williams, *Blacks Reject Gay Rights Fight As Equal to Theirs*, N.Y. TIMES, June 28, 1993, at A1. Black opinion on this issue, however, was not uniform. Many individual blacks—including Coretta Scott King and Jesse Jackson—as well as the NAACP, spoke out against the military's anti-gay policy. See Williams, *supra*, at A1. In fact, a New York Times/CBS News Poll conducted in February 1993—during the height of controversy surrounding the military ban—indicated that 53 percent of blacks, compared to only 40 percent of whites, supported legislation guaranteeing equal rights for gays and lesbians. See *id.*

lesbian rights.

A review of the black responses reveals that blacks are troubled that white gays, by comparing their experiences with discrimination to those of blacks, trivialize the impact of racial subordination *and* privilege in the lives of blacks and white gays.²⁷⁶ For example, Joe Rogers, staff counsel to United States Senator Hank Brown, opines that "to the best of my knowledge, no group in America, save Native Americans, can claim comparison to the unfortunate, aching and miserable experience of slavery and segregation suffered by African-Americans."²⁷⁷ Rogers compares "the behavior of homosexuality, which a person may practice or not" to race, which is immutable.²⁷⁸ Rogers asserts that gays and lesbians can, much like "chameleons," "pass through life and selectively shield themselves from criticism, praise, negative attitudes or other perceptions."²⁷⁹ Finally, Rogers relies upon misleading statistics which purport to demonstrate that gays and lesbians have much higher levels of wealth and formal education than the general population and, even more so, blacks.²⁸⁰ Rogers concludes that "[f]he obvious differences are key and show a hint of the baselessness of the comparisons."²⁸¹

Rogers, like many other blacks, expresses a concern that analogies between racism and homophobia obscure racism and racial privilege. Some blacks, not unlike other Americans, believe that because white gays can conceal, or even change, their sexual orientation, they, unlike blacks, may evade societal exclusion and take advantage of racial hierarchy. Although their statements dangerously overstate the fluidity of sexual orientation and the wealth of the gay and lesbian community and imply a lack of harm in concealing one's sexual orientation,²⁸² these critiques, nevertheless, raise legitimate²⁸³ and important discussions re-

276. *VAID*, *supra* note 9, at 187 ("To a large extent, black resentment at our use of the racial analogy arises from the persistence of racism, despite the best efforts of a seasoned movement to eradicate it."); *Gates*, *supra* note 231 at 42.

277. Rogers, *supra* note 275, at A21.

278. *See id.*

279. *Id.*

280. *Id.* *See supra* pp. 605-08 (discussing misleading nature of surveys that purport to demonstrate "gay" wealth).

281. Rogers, *supra* note 275, at A21.

282. *See Schacter*, *supra* note 104, at 299 ("Far from the innocuous safe haven pictured by opponents of gay rights, the closet exacts a high price in self-esteem, emotional health, and access to the community.")

283. There is no conflict in my observation that these responses are at the same time inaccurate and "legitimate." I have also argued that gay and lesbian theory is "essentialist" and that

garding the racial and economic privileges of white gays and lesbians.

A multidimensional framework, however, could challenge Rogers' essentialist assertion that all gays and lesbians are wealthy and, thus, buffered from subordination. Such a framework could also destabilize Rogers' depiction of the black community as a monolith of poverty and oppression—and *heterosexuality*. Indeed, despite the existence of class stratification and privilege within black communities, *all* blacks, including *Senate Counsel Rogers*, are entitled to civil rights protection due to their vulnerability—albeit varying—to racial discrimination. Although privilege exists in gay and lesbian communities, civil rights protection is necessary to secure the interests of the more marginalized (and even privileged) sectors of these communities.

While some of the black responses to the race-sexuality analogies represent a legitimate attempt to problematize gay and lesbian essentialism, some of them flow from a disapprobation of homosexuality and an opposition to gay and lesbian rights.²⁸⁴ Rogers' comments, for example, are blatantly homophobic and antagonistic to gay rights. Similarly, former Joint Chiefs of Staff Chairman Colin L. Powell disagrees with both the analogies and the lifting of the military ban because, he argues, "[h]omosexuality is not a benign . . . characteristic such as skin color . . . It goes to one of the most fundamental aspects of human behavior."²⁸⁵ Powell conflates homosexual status and "behavior" and concludes that "homosexuality" is "threatening" (*i.e.*, not "benign") and, therefore, incompatible with military service.²⁸⁶ Moreover, Lieutenant General Calvin A. H. Waller, a retired army officer, believes that there is a "fundamental difference between being black and being gay" and that "[w]hen gays want to openly have their lifestyle foisted upon soldiers and airmen . . . I draw the line."²⁸⁷ Contextually, these homophobic and essentialist responses illuminate the marginalization and invisibility of black gays and lesbians within black communities.²⁸⁸

it marginalizes and subordinates people of color, yet I have not dismissed it as completely wasteful.

284. See VAID, *supra* note 9, at 187 ("[S]ome of the [black community's] anger at the analogies stems from homophobia"). As this Article demonstrates, a critique of gay and lesbian essentialism need not lead to a wholesale rejection of gay and lesbian rights.

285. Duke, *supra* note 275, at A1 (ellipses in original).

286. See *id.*

287. *Id.* (emphasis added). See also Williams, *supra* note 275, at A1 ("I believe God loves the individual homosexual, but He hates the homosexual lifestyle.") (quoting Lester James, a Washington, D.C. minister).

288. See generally Cheryl Clarke, *The Failure to Transform: Homophobia in the Black Community*, in HOME GIRLS, *supra* note 9, at 197-208; Marlon Riggs, *Black Macho Revisited: Reflec-*

Gay and lesbian rebuttals to the black critiques of the analogies include acceptance of the anti-essentialist portion of the criticisms,²⁸⁹ dismissal or disbelief of black rejection of gay rights,²⁹⁰ and general assertions that gays and lesbians, despite the incompleteness of the analogies, still deserve civil rights protection.²⁹¹ In none of these retorts, however, do gay and lesbian activists employ a multidimensional lens to frame issues of sexual subordination. For example, throughout the debates on the military's policy, many activists and other opponents of the policy made narrow appeals to patriotism, equal citizenship, and excellency in service to support their opposition to the homophobic policy.²⁹² The possible economic impact of the military's anti-gay and lesbian policy, however, was largely omitted from the debates—despite the fact that “[t]o the poor, the working class, and people with moderate means . . . the armed forces represent a chance for a good education, a steady job, a decent income, and health care benefits.”²⁹³ Some racial critics have also indicated that the military's “gay” ban may have a disparate impact upon people of color.²⁹⁴ Information on the possible

tions of a SNAP! Queen, in *BROTHER TO BROTHER*, *supra* note 9, at 253-57; Thomas, *supra* note 231, at 55-67.

289. Williams, *supra* note 275, at A12 (“I know I’ve had privileges that black gay men do not have.”) (quoting Thomas Stoddard).

290. Responding to an article reporting black criticism of the analogies, Kevin M. Cathcart of Lambda Legal Defense and Education Fund commented that “[t]he inference that a false dichotomy exists between the black and gay communities is misleading and offensive.” Kevin M. Cathcart, *Gay Cause Is the Same As Black Cause*, N.Y. TIMES, July 10, 1993, at A18.

291. *See id.* (“Oppression, no matter what its shape, does harm to all of humanity.”); Williams, *supra* note 275, at A1 (“oppression has many faces”) (quoting Thomas Stoddard).

292. *See* VAID, *supra* note 9, at 173 (Campaign for Military Service, a gay political group formed for the purpose of challenging the military's anti-gay policy, “appealed to patriotism, duty, and gay and lesbian valor”); E.J. Dionne, Jr., *Isn't Bigotry A Sin?*, WASH. POST, Apr. 27, 1993, at A17 (by challenging military policy “homosexuals are [not] demanding . . . protection for ‘bizarre’ behavior, but the ability to do something we admire: To put their lives on the line for their country. There is no more basic expression of full citizenship.”); Andrew Sullivan, *Gay Values, Truly Conservative*, N.Y. TIMES, Feb. 9, 1993, at A21 (“The values that gays in the military are espousing, patriotism and public service, are traditional values. And the effect that ending the ban could have on the gay community is to embolden the forces of responsibility and integration.”); Tracy W.J. Thorne, *Senate Hearings Mirror a Distorted Image; Gays in the Military: The Criterion Should Be Conduct, Just As in the Business World*, L.A. TIMES, May 7, 1993, at B7.

293. VAID, *supra* note 9, at 153.

294. *See* Eaton, *Homosexual Unmodified*, *supra* note 12, at 72 n.38 (“[S]cattered accounts suggest that the military's discharge practices may follow a racial pattern.”) (citing RANDY SHULTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* 337, 352 (1993) (observing that lesbian purge aboard Navy's *Norton Sound* targeted eight of the ship's nine black women among a total of nineteen women investigated for lesbianism, and noting that three of eight women actually indicted were black)); Lewis & Stevens, *supra* note 257, at 22 (“[I]f you

racial effects of the ban was completely missing from the military debates. The absence of an integrated—rather than analogical and external—discussion of racism in the context of the military debates echoes the general lack of knowledge about, animosity for, and ambivalence towards the meaning of race in gay and lesbian politics.

The activists' refusal to challenge racial and class subordination while insisting upon using racial analogies troubles many gays and lesbians of color. Urvashi Vaid has observed that the gay and lesbian community's

use of racial analogies is suspect, coming as it does from a movement deeply splintered over the relevance of racism to the fight against homophobia. Interestingly, even those who believe that the racial justice movement should be completely distinct from the gay rights movement often draw analogies in order to defend gay rights.²⁹⁵

Charles Fernandez similarly notes that "it's troubling to witness a white-dominated movement compare its gains and grievances to those of communities of color [O]ne cannot help but appreciate the irony of [sic] white-led movement with limited racial consciousness turning around and appropriating ethnicity and the stigma of race as

watched the media and looked at all of the poster children—the people in the military kicked out because of the ban and filing cases against the military—they were white officers and they were almost all men. But when you look at the numbers, the ban actually disproportionately affects enlisted personnel not officers. So there is a class distinction, and it affects people of color and women proportionately more." (quoting Mike Perez of the United States Students Association, an organization that lobbied against the ban).

295. VAID, *supra* note 9, at 186. Vaid recounts several instances where her attempts to incorporate an antiracist agenda in gay politics were met with stiff resistance by white gays and lesbians. *See, e.g., id.* at 274-306. As this Article argues, such resistance to antiracism and racial diversity is a problem in the gay and lesbian political community. *See* David W. Dunlap, *Three Black Members Quit AIDS Organization Board*, N.Y. TIMES, Jan. 11, 1996, at B2 (reporting resignation of three black members from board of directors of Gay Men's Health Crisis, the country's largest AIDS legal and social services organization, due to organization's alleged insensitivity toward people of color and issues of racism); Charles Fernandez, *Undocumented Aliens in Queer Nation*, in LESBIANS, GAY MEN AND THE LAW, *supra* note 108, at 239 (criticizing racism in the gay and lesbian community); Lewis & Stevens, *supra* note 257 (describing racial conflicts within gay and lesbian organizations); Valdes, *supra* note 158, at 354 n.1252 (discussing dissolution of San Francisco chapter of Queer Nation, a gay and lesbian political organization, due to, among other things, "allegations of racism . . ."). Vaid is also correct in observing that individuals hostile or opposed to incorporating racial struggle within gay rights may themselves invoke racial suffering in order to defend gay rights. *See, e.g., MOHR, supra* note 248, at 188-211; BAWER, *A PLACE AT THE TABLE, supra* note 257, at 85-87.

legitimizing tools."²⁹⁶ Thus, the lack of an agenda for racial and class equality in gay and lesbian politics may have also influenced the critical black response.²⁹⁷

3. *Beyond Analogies*

Clearly, the race-sexuality analogies have failed as a political strategy. This failure results, *in part*, from the very nature of the analogies. By comparing "blacks" and "gays" (or racism and homophobia), users of the analogies, in addition to omitting black gay people, purport to equate, or to locate similarities between, the historical experiences of the two groups (really, white gays and black heterosexuals). In so doing, they ignore a legacy of racial and class hierarchy—of racial and economic privilege and subordination. Consequently, under the analogies the white gay child of a white slaveowner—or even a white gay slaveowner—occupies the same (or lower) social position as a black heterosexual slave: the former is stripped of his or her racial and class privileges; the suffering of the latter is distorted. Andrew Sullivan, for example, argues that the oppression of (white) gays and lesbians is not

less intense than that against, say, heterosexual blacks. . . . There was no slavery for homosexuals, for example; but even slaves, if they were heterosexual, were occasionally allowed the right to marry the person they loved. That right was often preemptorily taken away, but when it was, the hideousness of the injustice was clear. But that injustice is unavailable to homosexuals, because they haven't even been deemed eligible for the institution of marriage in the first place; they have always been, from one particular perspective, beneath slaves. And they still are.²⁹⁸

Sullivan's comparison completely obfuscates the oppression of slav-

296. Fernandez, *supra* note 295, at 241.

297. The virtual absence of black gays and lesbians in the military discourse likely results from this narrow focus of gay rights. For example, Perry Watkins, a black soldier who is one of a few gays to receive a favorable adjudication in a lawsuit challenging the military's anti-gay policy, *see Watkins v. United States*, 837 F.2d 1428 (9th Cir. 1988), *amended*, 847 F.2d 1329, *different results reached on reh'g*, 875 F.2d 699 (9th Cir. 1989) (*en banc*), *cert. denied*, 498 U.S. 957 (1990) (finding military estopped from barring Watkins' re-enlistment solely on basis of sexual orientation), claims that he was not asked by the "anointed leadership" of the gay and lesbian community to contribute to the public debate on the ban. Williams, *supra* note 275, at A1 (quoting Watkins). Watkins also notes that racism within the gay and lesbian community "is a big problem." *Id.*

298. SULLIVAN, *supra* note 145, at 154-55.

ery. It also *purposefully* erases "homosexual" slaves.²⁹⁹ Slave marriages, like same-sex unions, had no legal significance.³⁰⁰ Thus, from this "particular perspective," white gays and lesbians are not, as Sullivan contends, "beneath slaves." In addition, slave women—whether married or not—were "property" and frequently subjected to sexual assault by white men.³⁰¹ Furthermore, slaves were often compelled to "breed," not to fulfill their own interests in raising children, but to bring economic gain to slaveowners.³⁰² Moreover, because slaves and their offspring could readily be sold if their masters so desired, slave families were inherently unstable. Finally, the treacherous institution of slavery persisted for over two centuries in the United States—despite "the hideousness of the injustice." Thus, the concept of a "humanizing" slave marriage seems rather strained and inconceivable.³⁰³ Accordingly, Sullivan's comparison of white gay experience to slavery distorts the latter's brutality.³⁰⁴

In addition to obscuring a *history* of racial and class hierarchy, the analogies ignore the *persistence* of racial inequality. By employing the analogies as a plea to obtain civil rights, gay and lesbian political activ-

299. See *id.* (comparing "homosexuals," for which "there was no slavery" to "heterosexual blacks").

300. See HOOKS, *AIN'T I A WOMAN*, *supra* note 13, at 43.

301. See *id.* at 25-43.

302. *Id.* at 39-42.

303. Because "married" slaves remained the objects of dehumanization, the social benefits of marriage that Sullivan himself finds most compelling—stable environments for "rearing" children and commitment between two adults, see Andrew Sullivan, *Here Comes the Groom: A Conservative Case for Gay Marriage*, *NEW REPUBLIC*, Aug. 28, 1989, at 22—were either non-existent or subject to the control and direction of slaveowners, not the slaves.

304. Sullivan is not alone in his comparison of contemporary gay and lesbian experiences to slavery. Several gay and lesbian legal theorists, attorneys and political activists have compared the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 1039 (1986) (denying gay male's due process challenge to Georgia's sodomy statute on the grounds that there is no "fundamental right" to engage in "homosexual sodomy"), with its decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding that blacks—whether enslaved or "free"—are not United States citizens and, thus, are entitled to no Constitutional liberties). See, e.g., David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 *HARV. C.R.-C.L. L. REV.* 319, 323 (1994) ("*Bowers* is to the growing gay rights movement what . . . *Dred Scott v. Sandford* was to the abolitionists."); Gilleman, *supra* note 104 ("*Bowers v. Hardwick* should be recognized as the outcome of a deep and virulent prejudice against homosexuals, fully equal to the prejudice against blacks exhibited by the Supreme Court in *Dred Scott v. Sandford*."); *Ban on Homosexual Activity Is Upheld*, *THE RECORD*, July 1, 1986, at A1 ("Twenty-five years from now, [Bowers] will be viewed as the *Dred Scott* case of the gay rights movement.") (quoting Thomas Stoddard); *Powell Wavered on Sodomy Ruling*, *CHI. TRIB.*, July 14, 1986, at A3 ("Opponents of the *Bowers* ruling have compared it to the famous *Dred Scott* decision in 1857.").

ists and legal theorists imply that blacks, as a group, have attained the political, economic, and legal equality that white gays now seek (e.g., blacks have equality under "the law," but white gays are "beneath slaves").³⁰⁵ Despite some civil rights gains, blacks and whites remain *unequal*,³⁰⁶ and legal remedies to narrow this gulf—at least symbolically—are being rethought,³⁰⁷ repealed,³⁰⁸ reformed,³⁰⁹ and subjected to greater judicial scrutiny.³¹⁰ The analogies overlook this static inequality between blacks and whites and the growing hostility toward public policies enacted to narrow this inequality.

In order to avoid the failures of the analogies, gay and lesbian legal theorists and political activists should advocate sexual equality by addressing the many harms sexual subordination causes. These harms require legal and political remedies for their own sake—without reference to the rights and injuries of black heterosexuals. Furthermore, these harms are not universal but are varied—due to race, class, gender, and other influences. Thus, multidimensionality provides a more effective and accurate framework for discussing these harms. Instead of conceptualizing race as separate from and oppositional to sexuality

305. See Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 683 (1996) (discussing the race and sexuality analogies and observing that "[b]ecause the African-American civil rights movement has been so metaphorized and removed from its historical context, the gains of that struggle tend to be exaggerated").

306. For example, in 1992 the poverty rate of whites and blacks was 11.6% and 33.3%, respectively. See Robert Pear, *Poverty in U.S. Grew Faster than Population Last Year*, N.Y. TIMES, Oct. 5, 1993, at A20 (reporting Census Bureau findings). See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (2d ed. 1995) (discussing social and economic inequality between blacks and whites).

307. *Clinton Plans a Review of Affirmative Action Programs*, N.Y. TIMES, Feb. 24, 1995, at A17 (announcing executive review of federal affirmative action programs).

308. B. Drummond Ayres, Jr., *California Board Ends Preferences in College System*, N.Y. TIMES, July 21, 1995, at A1 (reporting decision of California Board of Regents to revoke race and gender affirmative action programs for admitting students, hiring professors, and awarding contracts); *Pentagon Halts an Affirmative Action Rule*, N.Y. TIMES, Oct. 22, 1995, at 22 (reporting revocation of a Department of Defense affirmative action contracting policy for "disadvantaged" and "minority-owned" businesses).

309. Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1 (reporting enactment of welfare "reform" law that, *inter alia*, terminates federal guarantee of welfare benefits, shifts spending authority to states in block grant regime, reduces federal welfare funding by \$55 billion—\$24 billion of which represents cuts in the Food Stamp program—imposes work requirements on recipients, and provides for a five-year lifetime limit on benefits).

310. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (reviewing Congressionally mandated affirmative action programs under "strict scrutiny" rather than intermediate review previously utilized).

(and, thus, susceptible to comparison), multidimensionality examines the interactions of these statuses to highlight the diverse harms gays and lesbians face. Multidimensionality portrays these harms without diminishing—but rather, acknowledging and *emphasizing*—the importance of race and other sources of empowerment and disempowerment. Thus, multidimensionality provides a methodology for moving beyond the failed analogies while recognizing—rather than distorting—the true impact of race.³¹¹

* * *

Gay and lesbian legal theory and politics do not evolve from the social realities of Julio Rivera, Venus Xtravaganza, the victims of Dahmer, and the scores of other poor and people of color within the gay and lesbian community. Rather, gay rights discourse arises from an artificial world where racism, sexual subordination, and class oppression resist convergence, or where their convergence is ignored. By excluding issues of racial and class subordination from analysis, gay and lesbian legal theorists and political activists negate the experiences of people of color and the poor and give centrality to the experiences of race- and class-privileged individuals. Consequently, they create harmful conflicts with antiracist agendas and people of color and propose theories that inadequately explain and confront (if at all) the subordination of the poor and racially marginalized. Part IV of this Arti-

311. Professors Jane Schacter and Margaret Russell have written insightful articles on the essentializing nature of the race-sexuality analogies. While Schacter notes that the analogies “erase[] ‘vertical’ differences within a group” (e.g. denies the existence of black gays), Schacter, *supra* note 104, at 295, she focuses primarily on how the attempt to equate racism and homophobia “erases ‘horizontal’ differences across the spectrum of legally protected groups,” *id.*, and thereby creates a rigid “singular definition of discrimination,” *id.* at 298. Schacter concludes, as I have, that the analogies do not “serve . . . the cause of gay civil rights . . .” *Id.* at 315.

Margaret Russell recognizes that the analogies may obscure the potency of racism and marginalize gays and lesbians of color. Russell, *supra* note 186, at 35. Russell, however, believes that the analogies may help build coalitions between people of color and gays and “help to uncover the intersectional experiences of those who are racial and sexual minorities . . .” *Id.* I am not as optimistic on this issue as is Russell. Because gay and lesbian political activists often ignore or even reject the importance of antiracist struggle, it is unlikely that their use of the analogies will lead them to build coalitions with people of color. Furthermore, the “dominant” gay and lesbian community has failed to “uncover” the experiences of gays and lesbians of color directly—by affirmatively seeking to understand their lives and the general diversity of gay and lesbian existence. Therefore, it is doubtful that the analogies, which actually place a wedge between racial and sexual statuses, will lead them to an integrated understanding of gay and lesbian identity.

cle urges gay and lesbian legal theorists and political activists to engage in a dialogue regarding the nexus between racial, class, and sexual subordination so that gay and lesbian legal theory and political action may effectively mediate the needs of all gay and lesbian people.

As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self. But this is a destructive and fragmenting way to live.³¹²

312. LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER*, *supra* note 9, at 120.

IV. CREATING A MULTIDIMENSIONAL GAY AND LESBIAN LIBERATION DISCOURSE

A. *Confronting the Skeptics*

When I discussed the themes of this Article and the general theme of multidimensionality with colleagues and friends, some of them questioned the need for multidimensional analysis. One such individual raised this issue and suggested, for example, that had the police in the Dahmer and Rivera tragedies acted on sexual bias alone, the same results would likely have occurred. Thus, this person argues that a multidimensional analysis “simply does not matter,” or it is just an “interesting,” academic enterprise. This criticism is problematic for at least five reasons.

First, as this Article has argued, it is highly unlikely that the results of these scenarios would have been the same if the victims had been white and wealthy and their assailants poor people of color.³¹³ Under racial and class hierarchies, poor people of color—particularly black and Latino men—are considered “criminal.” Therefore, it is difficult to conceive of them as “victims,” rather than predators, and thus worthy of any assistance or protection.³¹⁴ One should not expect this element of racial hierarchy to vanish simply because the individual person of color is gay or lesbian and, therefore, vulnerable to homophobia. Such reasoning implies that sexual orientation eclipses, or otherwise overshadows, race and class statuses and that race and class are irrelevant features of sexual subordination. Accordingly, if the races of the victims and assailants in the Rivera and Dahmer tragedies were inverted, a different police response might have occurred.

Second, legal *scholars*, as such, must search for “the truth” and present it in their work. To the extent that essentialism distorts reality, it conflicts with this scholarly mission. While essentialism is often necessary in order to contain and focus a discussion, the *systematic* exclusion of issues of race and class from gay and lesbian legal theory hinders the academic search for truth and renders our theories incomplete and inaccurate. Thus, it is both intellectually dishonest and “unscholarly” to cling to essentialism even if in certain instances the presence of

313. See *supra* note 95.

314. See *supra* p. 570.

multiple forms of discrimination does not affect the outcome of a particular discriminatory act.

Third, by marginalizing issues of race and class, gay and lesbian essentialism replicates patterns of social exclusion—racism, sexism, economic oppression, people of color, women, and the poor remain irrelevant. Scholars who are committed to racial, gender, class, as well as sexual justice, should endeavor not to perpetuate social domination in their work.

Fourth, this criticism centralizes the importance of overt, individual “acts” of discrimination and diminishes the relevance of structural barriers to equality. While an isolated act of discrimination may possibly result from a single form of bias, people’s life choices and experiences are undoubtedly shaped by the interaction of numerous structures of power and disempowerment.³¹⁵ Essentialism obscures this reality.

Finally, even if a single source of subordination could have produced the same results in the events detailed in this Article (which I doubt), this fact would not preclude the occurrence of *other* scenarios that implicate multiple forms of inequality.³¹⁶ When we consider the stark reality of poverty and racism, it becomes troubling—and even impossible—to deny the vulnerability of gays and lesbians of color and the poor to specific harms. For example, poor gay and lesbian people of color face barriers—due to racial and class inequality—in leading openly gay lives and in obtaining physically safe and meaningful opportunities for economic gain. Economic status, in addition to affecting one’s ability to “come out” and to lead a life free of violence, impacts a variety of other gay and lesbian legal and political concerns—including access to health care (especially in the midst of an epidemic of AIDS and HIV). Thus, if “coming out,” physical safety, and access to healthcare are indeed important issues in gay and lesbian politics and legal equality, gay and lesbian legal theorists and political activists *must*

315. Indeed, as several critical race and feminist theorists have observed, racial animus (or “discrimination”) is not even required for a policy or action to have a negative impact on an oppressed social group. Rather, the negative impact may result when facially neutral policies perpetuate social inequality caused by past and present acts of discrimination and subjugation. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Roberts, *supra* note 13, at 1419.

316. Even if multiple oppressions at times exist in fragments, independent of one another, I do not believe that analysis of these instances should dominate gay and lesbian theory or preclude multidimensionality—given the prevalence of intertwined oppressions and the fact that we all have multiple identities (e.g., race, gender, sexual identity). In any event, they certainly should not provide the foundation for theories explaining the subordination of gays and lesbians of color and the poor.

analyze and confront racial and class subordination.³¹⁷

To recognize multidimensional oppression, however, is not to suggest that *every* negative event in the lives of poor gay people of color results from a plethora of subordinating forces. Rather, it merely acknowledges that in most instances, multiple sources of disempowerment affect their lives in *concrete* ways. Accordingly, it is imperative that gay and lesbian legal theorists and political activists adopt a multidimensional framework for analyzing and combatting sexual subordination.

B. *Sources of Multidimensional Thought: Critical Race Theory and Feminist Legal Theory*

Lesbian theorists and a small group of race theorists have introduced anti-essentialism into gay and lesbian legal theory. The most extensive anti-essentialist critiques in equality jurisprudence, however, have occurred in critical race theory and feminist legal theory.³¹⁸ Women of color, and other scholars, writing in these areas have generated a sizeable body of literature that analyzes “intersectional” oppression, specifically racism and sexism, and that exposes the inadequacies of essentialist theories of equality. These critics argue for the development of equality theories that confront multiple forms of disempowerment—theories that respond to the complexity of subordination. Their scholarship has greatly informed this Article and offers gay and lesbian scholars and activists guidance for the task of recentering gay and lesbian political discourse and legal theory away from essentialism and toward multidimensionality.

Kimberle Crenshaw, for example, explores the interactions of race and gender utilizing “intersectionality.” Crenshaw states that “[i]n examining the intersections of race and gender, I engage the dominant assumptions that these are essentially separate”³¹⁹ In addition, Mari Matsuda observes that “working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping

317. See VAID, *supra* note 9, at 271 (gay and lesbian activists must become involved in debates around “raising the minimum wage, welfare reform, AFDC programs, free school lunches, immigration, poverty, and other issues that affect gay and lesbian families and individuals—but do not affect the middle-class people who are most involved in our movement.”).

318. See, e.g., sources cited *supra* note 13.

319. Kimberle Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 114 (Gordon et al. eds., 1993) [hereinafter *Beyond Racism*].

us to realize that no form of subordination ever stands alone.³²⁰ Matsuda encourages legal scholars to "ask the other question," that is, to examine what multiple forms of subordination a particular act or structure of exclusion may involve.³²¹ Similarly, Angela Harris, criticizing "the attempt to extract an essential female self and voice from the diversity of women's experience," argues that the survival of feminist legal theory depends upon its proponents' ability "to root out and examine [their] differences"³²² Harris thus argues that feminist legal scholars must "subvert [legal theory] with . . . accounts of the particular, the different, and the hitherto silenced."³²³ Finally, Elvia Arriola

rejects the idea of arbitrarily separating out categories to address discrimination in our society. Instead [she] understands discrimination as a problem that arises when multiple traits and stereotypes constructed around them converge in a specific harmful act. Traditional categories then become points of departure for a deeper, more subtle analysis that explores the historical relationships between certain special groups, as well as an individual's experience within each of these groups.³²⁴

These critics challenge legal scholars and activists to endeavor toward discovering the multiple perspectives of the oppressed by employing "intersectionality,"³²⁵ "multiple consciousness,"³²⁶ and "holistic"³²⁷ liberation theories. They counter, moreover, the notion that we can adequately examine or dismantle any one form of subordination without considering its interaction with other sources of disempowerment.³²⁸

320. Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (citing SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (1988)).

321. See *id.* ("When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?'").

322. Harris, *supra* note 13, at 615.

323. *Id.*

324. Arriola, *Gendered Inequality*, *supra* note 12, at 141.

325. See generally Crenshaw, *Demarginalizing the Intersection*, *supra* note 13; Crenshaw, *Mapping the Margins*, *supra* note 13; Crenshaw, *Beyond Racism*, *supra* note 319, at 111-32.

326. Mari Matsuda, *When the First Quail Calls: Multiple Consciousness As Jurisprudential Method*, 11 WOMEN'S RIGHTS L. REP. 7, 9 (1989) (multiple consciousness "is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed").

327. Arriola, *Gendered Inequality*, *supra* note 12, at 139-41.

328. See Crenshaw, *Mapping the Margins*, *supra* note 13, at 1252; Matsuda, *supra* note 320,

Their scholarship therefore serves as a model for moving gay and lesbian legal theory away from essentialism.

C. *Multidimensionality: An Extension of Intersectional Analysis*

This Article prescribes multidimensionality for gay and lesbian legal theorists. I see multidimensionality as a methodology by which to analyze the impact of racial and class oppression (or other sources of social inequality) upon sexual subordination and gay and lesbian experience and identity and to cease treating these forces as separable, mutually exclusive, or even conflicting phenomena. Multidimensionality exposes the various layers of social power that inform heterosexism and homophobia. Multidimensional analysis also reveals the multiple dimensions of social identity categories and offers a comprehensive framework for conceptualizing sexual subordination that neither “destroys” nor “fragments”³²⁹ our lives.

Multidimensionality does not require *every* piece of scholarship to reflect *everyone's* personal histories. This is an impossible task. Rather, multidimensionality demands that we make explicit the racial and class (and other) assumptions that undergird our theories, realize these assumptions might (and likely do) limit the application of our theories, strive to discover the vast differences among individuals in oppressed social groups, and learn how these differences should (and do) affect theory and politics. Ultimately, I view multidimensionality as a discursive project aimed at unveiling the complexity of subordination and identity and reshaping legal theory to reflect and respond to this complexity.

The extensive, pre-existing body of anti-essentialist legal scholarship on race and gender and on the general connections between multiple oppressions is most commonly referred to as “intersectionality” by commentators, including Kimberle Crenshaw, its most notable theorist (and, perhaps, founder). Some readers may then wonder why I have chosen a new term—“multidimensionality”—to represent my analysis. I have done so for the following reasons.

First, I believe that the terms “gay,” “lesbian,” “woman,” “person of color,” “racism,” “sexism,” and “homophobia” possess *multiple di-*

at 1190.

329. LORDE, *supra* note 312, at 120.

mensions and contextual layers. "Gay," for example, has racial, gender, and class dimensions. Therefore, "gay" may describe a poor, Latino male, a black, lesbian feminist, or a white, middle-class male—depending on the context of its usage. I also believe that these various dimensions are inextricably and forever intertwined. Multidimensionality accurately captures this reality.

"Intersectionality," by contrast, *subtly* implies a convergence, particularly in the lives of people of color, of otherwise separate and independent categories. The term "intersectionality" thus suggests a separability of the host of identities and forces that define social groups and social power. I therefore prefer multidimensionality because it more effectively captures the inherent complexity and irreversibly multilayered nature of *everyone's* identities and of oppression. While the term intersectionality suggests a separability of identities and oppressions, the scholarship in this area has *forcefully* taught us otherwise. Crenshaw, for example, wishes "ultimately" to "disrupt the tendencies to see race and gender as exclusive or separable categories."³³⁰ Accordingly, she views "intersectionality" as a "*provisional*" or "*transitional* concept that . . . can be replaced as our understanding of each category becomes *more multidimensional*."³³¹ Viewed in this context, multidimensionality is not a wholly alternative paradigm. Rather it can be seen as drawing upon, extending, and developing intersectionality by pushing legal theorists and political actors toward a "more multidimensional" understanding of social identity categories and subordination.

D. *Reconstructing Gay Rights*

*Willing*³³² gay and lesbian scholars and political activists may also

330. Crenshaw, *Beyond Racism*, *supra* note 319, at 114.

331. *Id.* (emphasis added).

332. Although I hope this Article will educate (and even persuade) gay and lesbian legal theorists and political activists of the need for a broader gay and lesbian liberation, the absence of multidimensional resistance in gay and lesbian politics and legal theory does not result merely from a lack of information on the connections between race, class, and sexual orientation. Rather, racial and class subordination issues are missing from gay and lesbian liberation discourse because these issues and the people they most directly affect—people of color and the poor—have been historically and continually marginalized and ignored in our society. Narrow equality theories and political resistance also result because theorists and activists fail to acknowledge their own racial and class privileges and how these privileges shape their discourses. Ultimately, recognition of privilege and subordination still may not engender changes in theory and politics. See DALTON, *supra* note 260, at 115 ("It is one thing to recognize that one has White skin privilege. It is quite another to do something about it."). Multidimensional theory

adopt multidimensionality and analyze the diverse ways in which race and class frame sexual subordination and how this reality should impact legal analysis. While this Article provides some illumination on the subject, it is intended to serve primarily as the source of a more helpful and accurate jurisprudential paradigm and as an invitation for continued examination and discussion.

The solution to the exclusion of people of color and the poor from gay and lesbian legal theory and political discourse, however, "does not merely entail arguing for the multiplicity of identities or challenging essentialism generally."³³³ Rather, once gay and lesbian legal scholars and political activists have collected data on the "differences" in gay and lesbian experiences supplied by racial and class hierarchies, they should, ultimately, re-assess their theories and activism and begin to reconstruct them to reflect these differences.³³⁴

By resting their theories and activism upon difference, gay and lesbian scholars and activists may then conduct a "deeper, more subtle analysis" of power inequality *between* gays, lesbians, and heterosexuals and *within* the population of gays and lesbians. For example, a multidimensional framework that examines the links between racial, class, gender, and sexual inequality destabilizes claims that "the gay man" is an "insider." Rather, this supposed "insider" may actually be an "outsider" excluded from structures of power by his race, class, *and* sexual orientation. Multidimensionality also calls into question the policies and legal remedies hailed by commentators as vital for gay and lesbian equality. Legalized same-sex marriage, for example, may have little impact upon poor gay and lesbian people of color struggling, for economic or other reasons, to conceal their sexual orientation (and therefore hardly thinking about "going to the chapel"). Multidimensionality thus exposes the inefficiencies and domination that result from centering the liberation of *all* gay men and women around the privileged "insider gay male" experience.

If gay and lesbian legal theorists and activists focus upon difference and upon multiple forms of disempowerment, they will begin the im-

thus cannot answer the difficult political and sociological questions of "whether" and "how" the gay and lesbian community (and society in general) can begin to appreciate, and positively respond to, the need for racial and economic justice, a deeper restructuring of society, and a more egalitarian distribution of power.

333. Crenshaw, *Mapping the Margins*, *supra* note 13, at 1298-99.

334. *Id.*; SPELMAN, *supra* note 13, at 172 ("[W]e should not be surprised if certain assumptions at the heart of much feminist theory will have to be discarded or revised if the experiences of women of color are to be taken as seriously as those of white middle-class women.").

portant project of including people of color and the poor in gay and lesbian liberation discourse. This process may help ease tensions between white gays and people of color as antiracism is no longer viewed as separate from or threatening to gay and lesbian civil rights.³³⁵ Finally, a multidimensional gay and lesbian political agenda that seeks to improve the lives and reduce the invisibility of the scores of economically subordinate gay and lesbian people, could destabilize destructive perceptions of a monolithically wealthy (*i.e.*, privileged) gay and lesbian community, one undeserving of civil rights protection.

The process of exploring and *giving voice* to differences, however, is not without risks.³³⁶ This process involves an interrogation of repressed, volatile issues—the perpetuation of racial, gender, and class privileges within gay and lesbian communities, the silencing of gays and lesbians of color and the poor, and the inadequacy or extreme limitations of painstakingly planned and well-supported legal and political agendas—such as same-sex marriage. Nevertheless, because these issues limit the effectiveness of gay and lesbian liberation discourse, their discussion must be part of any inquiry undertaken to strengthen it. Only then can we begin to design theories and politics that accurately reflect our multiple needs and experiences.³³⁷

[S]uddenly she saw her hands and thought with a clarity as simple as it was dazzling, "These hands belong to me. These my hands." Next she felt a knocking in her chest and discovered something else new: her own heartbeat. Had it been there

335. See PHELAN, *GETTING SPECIFIC*, *supra* note 105, at 145 ("If we challenge the grand narratives of race, class, gender and sexuality in favor of more local and specific analyses, we find that our allies are everywhere."); HARRIS, *supra* note 13, at 615 ("[t]he discovery of shared suffering is a connection more illusory than real; what will truly bring and keep us together is the use of effort and imagination to root out and examine our differences"). *But see* ARRIOLA, *Gendered Inequality*, *supra* note 12, at 134 ("Giving voice to minority perspectives is a valid, yet delicate and possibly dangerous endeavor."); MATSUDA, *supra* note 320, at 1191 (including "other forms of subordination [within racial struggle] risks breaking coalition").

336. See ARRIOLA, *Gendered Inequality*, *supra* note 12, at 134; MATSUDA *supra* note 320, at 1191.

337. As bell hooks opines, "any progressive political movement grows and matures only to the degree that it passionately welcomes and encourages, in theory and practice, diversity of opinion, new ideas, critical exchange, and dissent." BELL HOOKS, *Censorship from Left to Right*, in *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 66-67 (1994). *See also* PHELAN, *GETTING SPECIFIC*, *supra* note 105, at 145-46 (stating that a "deessentialized identity politics" "privilege[s] no one axis of oppression. Instead, the space is opened simultaneously for a multiplicity of claims and struggles. Without a [universal] theory to tell us what and who belongs where, we have to begin to talk and listen, to endure conflict and welcome shared achievements.") (emphasis added).

all along? This pounding thing? She felt like a fool and began to laugh out loud³³⁸

V. CONCLUSION

The examples of multidimensional oppression presented in this Article will appear extreme to some readers. A sampling of contemporary vital social statistics, however, confirms that in communities burdened by multiple forms of disempowerment, the "wages of sin"—*death*—are indeed "visible everywhere."³³⁹ Although the new and evolving gay and lesbian legal theory has engendered important discussions surrounding power inequality, its proponents' failure to interrogate issues of racial and class subordination makes it impossible for them to propose solutions to the multilayered "sins"—homophobia, racism, economic injustice, and patriarchy—gay and lesbian people face. Ultimately, an essentialist and narrowly focused gay and lesbian liberation denies the benefits of freedom—*life*³⁴⁰—to persons who suffer multiple forms of oppression.

While a small number of gay and lesbian activists and scholars in non-legal disciplines are presently constructing a healthy anti-essentialist discourse that continues to develop and unfold, most participants in gay and lesbian legal theory have yet to explore substantially how racial

338. TONI MORRISON, *BELOVED* 141 (1988).

339. BALDWIN, *supra* note 18, at 20. For example, blacks and Latinos account for nearly one-half of AIDS cases although they represent only 21% of the overall population. *See* NAT'L COMM'N ON AIDS, *AIDS: AN EXPANDING TRAGEDY—THE FINAL REPORT OF THE NATIONAL COMMISSION ON AIDS* 5 (1993). In addition, the infant mortality rate among blacks is twice the rate for whites, *see Death Rates for Minority Infants Were Underestimated, Study Says*, N.Y. TIMES, Jan. 8, 1992, at A14 (reporting results of federal study), and among Native Americans and Puerto Ricans, the infant mortality rate exceeds the rate for whites by 50% and 40%, respectively, *see* Malcolm Gladwell, *Life Expectancy of Black Males Falls to 64.9*, WASH. POST, Apr. 9, 1991, at A5 (citing Department of Health and Human Services study). Furthermore, due to rising rates of AIDS and homicide, in 1991 the life expectancy of black males *declined* to 64.9 years, compared to 72.3 years for white men. *See id.* Also, in 1992, the poverty rate of whites, blacks, and Latinos was 11.6%, 33.3%, and 29.3%, respectively. *See* Pear, *supra* note 306, at A20. *See also* sources cited *supra* notes 42-44 (reporting poverty, employment and educational statistics for Latinos). *See generally* HACKER, *supra* note 306. Also, I note that several of the writers whose work inspired this Article—Marlon Riggs, Essex Hemphill, and Audre Lorde—suffered untimely deaths.

340. *See* MORRISON, *supra* note 338, at 141. This excerpt describes former slave Baby Suggs' passage into freedom. At the moment Baby Suggs enters free territory, she experiences life—her heart starts beating.

and class subordination and privilege shape gay and lesbian experiences and how these forces should and do inform their analyses. By *speaking* the theme of multidimensionality into gay and lesbian legal theory, I wish to initiate a dialogue regarding the diversity of gay and lesbian experience, from which a theory more reflective of our social reality might emerge.

