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Sexual Orientation: *A Plea for Inclusion*

Sharon E. Rush†

Either we learn a new language of empathy and compassion, or the fire this time will consume us all.¹

I. INTRODUCTION

One purpose of this essay is to increase the awareness of lesbians', gay men's, and bisexuals'² perspectives in legal analysis. Another is to suggest ways in which the similarities in the differences all "outsiders"³ face can be used to unify our efforts to achieve equality. "Pooling" our differences fortifies and strengthens the attack on hegemony and presents a more unified front for change. It also invites a more honest account of oppression, exposing more vividly how widespread biases and prejudices operate to preserve power in favored groups.

Most importantly, this essay calls for an exploration of the commonalities of our differences to bring us closer to constructing a "paradigm of cooperative rights." Certainly, a vital aspect of such a paradigm is to be more inclusive of different subordinated groups' perspectives in exploring hegemony in our writing. An inclusive approach to scholarship obviates a

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† Visiting Professor, The Cornell Law School, 1994–95. Professor, University of Florida College of Law. This essay stems from a work-in-progress that was started while I was visiting at American University, Washington College of Law in 1993–94. It has been improved by the suggestions of my dear colleagues and friends, Michael Diamond, Wendy Fitzgerald, Alyson Flourmoy, Elizabeth McCulloch, Nell Newton, Jane Schukoske, and Walter Weyrauch. I also benefitted from the comments I received from participants at the Berkeley Women's Law Journal Symposium on "Excluded Voices." I also want to thank Acting Dean Claudio Grossman and Associate Dean Andrew Popper of American University, as well as Dean Russell K. Osgood of Cornell for giving me the institutional support I needed to write this. Finally, Bill Reynolds (Cornell '95) and Geoff Boehm (Boalt Hall '96) provided excellent research and editorial assistance.

¹ CORNELL WEST, RACE MATTERS 13 (Vintage Books 1994) (1993).

² Although a definition of "homosexuality" is inexact, by the terms "lesbians" and "gay men," I refer to people who form their primary romantic love relationships with people of the same sex. Accordingly, "bisexuals" are able to form romantic love relationships with both men and women.

³ "Outsiders" include, but are not limited to, lesbians, gay men, bisexuals, women, people of color, physically and mentally challenged persons, persons with AIDS, children, older persons, poor persons, homeless persons, immigrants, and religious minorities.

dilemma many members of subordinated groups face—the need to promote one part of themselves over another. A paradigm of cooperative rights sees, for example, a Black lesbian as a person of color, a woman, and a woman who chooses another woman as her lover. It acknowledges that a focus upon only one, or even two, of these parts of a Black lesbian's identity is unfair to the individual, and also provides an incomplete and inadequate analysis to achieve equality for Black lesbians with members of favored groups. In short, a paradigm of cooperative rights understands that a Black lesbian's liberation depends upon dismantling at least three institutions of oppression: homophobia, racism, and sexism.

Although this essay does not attempt to construct the definitive paradigm, it is an invitation to scholars to become part of a cooperative and collaborative effort toward that end. In turn, a collaborative effort to create a paradigm of cooperative rights will increase our understanding of each other as we learn about the common sources of oppression. It also may help us to know what we need to put in place of the hegemony that we deconstruct. The value of inclusive scholarship is the greater understanding of subordination it brings so that our paradigm of cooperative rights transcends the limitations of hegemony and works as a liberating system for all people.

II. WRITING FROM DIFFERENT PERSPECTIVES

In Professor Cheryl Harris' article, "Whiteness as Property,"⁴ she describes the property interest whites have in being white and argues that policies, such as affirmative action, that take into account the "race factor," are necessary to overcome the whiteness privilege that promotes the continued subordination of Blacks and other persons of color. I want to share how her important article also inspired me to think about possible ways in which scholarship can be more inclusive of different outsider perspectives.⁵

Professor Harris' article is an example of what I shall call "gender or race sensitive" scholarship because it is concerned with educating whites about, and articulating for the Black community, how property rules operate on a whiteness privilege to the continued subordination of Blacks. It is a critique of hegemony from a Black woman's perspective as a critical race scholar.

"Gender or race sensitive" scholarship evolved as a reaction by white women and people of color within the academy to the initial critical legal studies movement's assumption of a white male normative standard in deconstructing hegemony. The (white) feminist critics argued that the criti-

⁴ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

⁵ Admittedly, focusing on her piece is somewhat arbitrary; many other articles or books would also illustrate my points. Nevertheless, her article offers a significant contribution to scholarship, and the suggestions that I want to make here in no way detract from the excellence of her piece.

cal legal studies movement should be more sensitive to gender differences in its critique of traditional legal analysis. Similarly, scholars of color pointed out to critical legal scholars as well as feminist legal scholars that their critiques assumed a white normative standard. The (white) feminist critics and critical race theorists, then, eventually joined together to remind all scholars of the need to be more sensitive to the importance and relevance of gender and race in legal analysis.

More recently, lesbians, gay men, bisexuals, Jews, the physically challenged, and other outsider groups have joined the discussion. Their predominant theme is that both traditional and “gender or race sensitive” scholarship rely on other normative standards, such as heterosexuality, Christianity, and able-bodiedness. These outsider scholars argue that reliance on such norms without qualification discounts their experiences or renders them irrelevant.

Scholars who are moving the discussion beyond gender and race are building on themes developed by “gender or race sensitive” scholars. In contrast, “gender or race sensitive” scholars generally remain insensitive in their writing to the oppressive forces operating on other outsider groups. Professor Harris’ article, for example, would be more effective in critiquing hegemony if the author had taken a more inclusive approach.

Professor Harris begins her article by describing how her grandmother “passed for white” and got a job in a department store, trying to earn a living as a single mother in Chicago during the days of migration of Blacks from the South to the North.⁶ Professor Harris’ grandmother often had to listen to her co-workers tell racist stories without being able to speak out against their racism for fear of giving herself away and losing her much needed job.⁷

As powerful as Professor Harris’ story is, she makes it even more powerful by including an analysis of whites’ conquests of Native Americans and their land from the perspective of whiteness as property. Professor Harris’ inclusion of the Native Americans’ story fits into her theory that one’s race has property value. Like Blacks, of course, Native Americans also suffer from the greater valuation of whiteness over any other color.

Without detracting from the extremely important point in her article that whiteness is property, I think that Professor Harris’ analysis also applies outside the context of race and is relevant to all people who fall outside the dominant culture. Professor Harris’ story made me realize that people often pass for something they are not. Sometimes this may be a conscious choice,⁸ but often the person may be unaware that he or she is

⁶ Harris, *supra* note 4, at 1710.

⁷ *Id.* at 1711.

⁸ However, it is not really a “choice” when lesbians, gay men, and bisexuals choose to conceal their sexual orientation. Rather, circumstances often do not allow them to be “out” without facing repercussions. Professor Harris states this with respect to Blacks choosing to pass as white: “The decision to pass as white was not a choice, if by that word one means voluntariness or lack of

being mislabelled. I remember one incident a few years ago in which I was chatting with two colleagues, Miriam and Janet (fictitious names). We were talking about parenting and Miriam, who prided herself on her "good" parenting skills, remarked, "At least I raised my son to marry a woman, and my daughter to marry a man."

I was not sure what assumptions Miriam was making about my or Janet's sexual orientation (and neither of us was married to a man). If she assumed we were lesbian or bisexual, then her comment was an indictment of our parents' parenting skills. It also reflected her judgment that in order for me or Janet to be a good parent, our children would have to be heterosexual (and marry).

On some level, Miriam may have known that her comment offended us. Or maybe she was just being insensitive, failing to understand that her comment was homophobic.⁹

Alternatively, Miriam could have assumed that Janet and I are heterosexual. Like Professor Harris' Black grandmother who was light enough to pass as white, Janet and I somehow fit Miriam's image of what heterosexual women look like. She also assumed that as heterosexuals, we would be allies with her in her homophobia.

Neither Janet nor I said anything in response to her comment. We were caught off guard, and it is difficult to respond to such comments.¹⁰ Moreover, because Janet was not tenured, she preferred to keep her sexual orientation a private matter. Frustrated and angry, we became co-conspirators against the lesbian, gay, and bisexual community.

Thus, like Blacks who have had to pass as white, lesbians, gay men, and bisexuals deny a significant part of themselves in order to keep their families together, avoid eviction from their homes, avoid being fired from their jobs, and avoid being beaten or killed in a homophobic world. Nor is the phenomenon of passing limited only to Blacks, lesbians, gay men, and bisexuals. Historically, Jews passed as Christians to avoid extermination in the Nazi concentration camps, or to avoid the consequences in this country of McCarthyism. Occasionally, women have denied their femaleness to take advantage of opportunities available only to men. Mentally and physically challenged persons often attempt to hide their disabilities to avoid the stigma generally associated with being disabled. The reader probably could add to this list.

compulsion. The fact of race subordination was coercive and circumscribed the liberty to self-define." *Id.* at 1743-44.

⁹ Professor Charles Lawrence has related how our prejudices often work on us even subconsciously or without much thought. See generally Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁰ Many authors have written about how difficult it is for victims of "hateful speech" to respond. See, e.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 1982 HARV. C.R.-C.L. L. REV. 133; Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2337-41 (1989).

An acknowledgment in Professor Harris' article that people other than Blacks and Native Americans are also discriminated against because they fall outside normative standards would have strengthened her attack on hegemony. It would have drawn out some of the similarities in our experiences, without diminishing the important message that whiteness is property. Moreover, inclusion of others' experiences may have motivated readers, especially readers who are not Black or Native American, to relate Professor Harris' message to their own lives. In reality, the writer who taps into the readers' personal experiences is more likely to create greater understanding and empathy with Blacks, Native Americans, and other people of color. In turn, those readers may be more sympathetic to and supportive of efforts and policies, such as affirmative action, to help achieve racial equality.

III. BYPASSING THE INCLUSIVE SCHOLARSHIP ROUTE

Although my goal in this essay is to convince readers that inclusive scholarship is valuable, I also think it is worthwhile to explore why an author might choose to be more focused on his or her own group's subordination to the virtual exclusion of others.

A. General Neglect of Others

Authors may be unaware of similarities in differences among subordinated groups, or they may be uncomfortable talking about members of other groups. These are legitimate and understandable concerns. As scholars, our writing is limited by our race, gender, sexual orientation, religion, and other characteristics that give us our identities. When we choose to write about the oppression of people who are "different" from us, we run the risk that our analysis will be limited and perhaps even wrong. Nevertheless, we need to take chances and invite discussion about what it is like to be Latina, or lesbian, or Jewish, or otherwise outside the dominant culture.

B. The Uniqueness of Racial Subordination

Some scholars believe that racial discrimination is different from other types of discrimination. Admittedly, the history of Black slavery and profound race discrimination tells a uniquely compelling story. This is one possible way to explain the disagreement some people have over comparing the current military ban on lesbians and gay men to the military ban on Blacks that existed until 1948. People who are offended by the comparison suggest that discriminating against Blacks on the basis of race, an immutable characteristic, is unequivocally wrong and immoral. In contrast, they argue, to be lesbian, gay, or bisexual is a choice (and an immoral one at

that).¹¹ Moreover, whereas Blacks were literally the property of white slave owners, lesbians, gay men, and bisexuals have not experienced the conditions of slavery. For these and other reasons, some consider analogizing the plight of lesbians, gay men, and bisexuals to that of Blacks not only inapt, but offensive.

This argument makes some sense, especially given the backlash people of color and others are facing as outsiders try to achieve equality.¹² Moreover, some people might fear that if efforts were made to eliminate or reduce the discrimination against lesbians, gay men, and bisexuals, then less effort will be put into eliminating race discrimination.

Notwithstanding how compelling a group's history of discrimination is, a reliance on that alone without any regard for other groups fails to account for the fact that members of one group can belong to other groups. For example, many Blacks may also be members of other outsider groups. Anti-essentialist scholars have rightly pointed out that efforts by different groups to achieve equality are necessarily intertwined. For example, anti-essentialists have questioned the assumption made by many white feminist scholars that there is something essential about being a woman that legitimizes discussions of the subordination of women without regard to other factors like race.¹³ The assumption that race is an essential characteristic that should be discussed without consideration of other factors fails for the same reason. We cannot focus solely on isolated parts of ourselves to the exclusion of other parts of ourselves. A partial critique of hegemony, although educational, fails to tell a complete story of subordination in this country, and a complete story is much more honest and compelling.

C. The "Tit-for-Tat" Approach

Finally, an author may focus solely on race because experience teaches that other subordinated groups often omit the experiences and perspectives of Blacks from their scholarship, especially when it is to their advantage to dissociate themselves from Blacks. Furthermore, the many incidents when white "allies" have failed to live up to their commitment to end racial dis-

¹¹ See Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 403 n.39 (1994) (quoting an articulation of this position by former chairman of the Joint Chiefs of Staff, Colin Powell).

¹² E.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991) (arguing that feminist movement's success has created backlash against women); see, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1992) (arguing for a return to traditional education exclusive of diversity goals of more liberal educators).

¹³ See, e.g., BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981); ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); 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. 138, 154-57 (exploring whether there is an "authoritative universal voice"); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

crimination may lead Black scholars to feel they have been abandoned to fight their own battle. The group may feel that endeavors to be inclusive in its effort to dismantle hegemony will divert its energy and otherwise look foolishly altruistic.

IV. THE IMPORTANCE OF INCLUSIVE SCHOLARSHIP

Although this reasoning is understandable, an exclusive approach makes outsider scholarship less powerful or rich than it otherwise could be. Inclusive scholarship ought to be a preferred method of writing for at least three reasons.

First, many members of one subordinated group also identify themselves with other subordinated groups. We should try to avoid the mistakes of earlier critical legal scholars, such as feminist critics whose writing assumed all women are white. Clearly, many women are women of color; some women are lesbians; some are poor; some are physically challenged; some are non-Christian, and so on. The causes and effects of hegemony on subordinated people often are intertwined so that it is impossible to identify a particular bias. For example, the "mannish looking" Black woman does not get the job but it is difficult to say why. A willingness to chisel away at one form of discrimination, say patriarchy, does not necessarily translate into a willingness to do away with other forms, like heterosexual hegemony, or racial hegemony, or class hegemony, or any of the other subordinating forces. At a minimum, an exclusive approach promotes the marginalization of subordinated groups whose voices are less powerful than the more vociferous outsider groups. Closely related, it is important to understand that not all members of a group think like each other, although being a member of a group does inform one's view of the world.

A second reason inclusive scholarship ought to be the preferred method of writing is that an integrated approach to understanding subordination makes it more likely that oppressive forces can be identified and eliminated. As a nation, we cannot be successful at ending subordination unless we all acknowledge the problem, recognize that we share the problem, and agree to help solve it. A piece-meal critique of hegemony is not only baffling, but also vulnerable to individual or group denial of systemic problems.¹⁴ Unless all subordinated people are included in dismantling oppression, any reconstructed society will have "outsiders" built into it. Thus, efforts to come together in our quests for equality increase the likelihood that we can create a paradigm of cooperate rights, transcend the limitations of hegemony, and reconstruct a more equal and just society for all subordinated people.

¹⁴ I thank my colleague, Wendy Fitzgerald, for these observations.

Third, inclusive scholarship ought to be preferred because it emphasizes the fundamental concepts of liberty, democracy, equality, and human dignity and shows that subordination of one group by another because of one's race, sex, sexual orientation, religion, wealth, or health is inconsistent with those concepts. Although the Constitution guarantees such freedoms to all persons, constitutional interpretation is less than exact, and thus far, lesbians and gay men have been read out of the Constitution.¹⁵

V. LESBIANS', GAY MEN'S, AND BISEXUALS' PARTICIPATION IN INCLUSIVE SCHOLARSHIP

For lesbians, gay men, and bisexuals, who form a small minority in this country, an exclusive approach to scholarship can be particularly limiting. Just as whites enjoy a property interest in whiteness, heterosexuals enjoy a valuable interest in being members of the dominant culture with respect to sexual orientation. The tremendous disparity in treatment between heterosexuals and homosexuals based upon sexual orientation makes it imperative that lesbians, gay men, bisexuals, and heterosexuals write about how wrong it is to value heterosexuality over homosexuality. It is necessary to speak out against homophobia in order to dispel myths about what it means to be lesbian, gay, or bisexual, and ultimately, to achieve equality with heterosexuals.

Many segments of society spend tremendous energy and resources trying to stop the lesbian, gay, and bisexual civil rights movement.¹⁶ Many members of society who do not identify with those extreme efforts to subordinate lesbians, gays, and bisexuals nevertheless are willing only to allow them partial citizenship status. Members in this group think that it is okay to be lesbian, gay, or bisexual but only as long as certain lines are not crossed that challenge the heterosexual norm. The lesbian who wants to teach public school, for example, might come into conflict with members of this group over her lesbianism and their beliefs about what is good for their children. It seems that very few heterosexuals are truly accepting of lesbians, gay men, and bisexuals.

Moreover, the ideas and thoughts of lesbians, gay men, and bisexuals are valuable in the larger reconstruction effort. The discrimination they face on a daily basis informs their view of what is partially wrong with hegemony. Their plea to be included is both an offer to help the reconstruction efforts and an assertion that they are entitled to participate in those efforts.

¹⁵ *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia anti-sodomy statute as applied to homosexuals). See Anne Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1101-02 (1988).

¹⁶ Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905-06 (1993) (exploring recent attempts by "some right-wing, fundamentalist Christian groups" to enact anti-gay legislation).

VI. A PLEA FOR HELP

Lesbians, gay men, and bisexuals need heterosexuals to help them achieve equality. This essay is a plea for their help. Heterosexuals, even if they belong to subordinated groups such as women and people of color, have a significant advantage over lesbians, gay men, and bisexuals. They are recognized as human beings who have cognizable rights.

Many heterosexuals are hesitant to speak out on issues surrounding sexual orientation because they do not want to be labelled homosexual. Being considered homosexual not only stigmatizes one, but also can result in the loss of one's job, family affection, safety, or general social good will. Thus, the risks that a heterosexual must take to speak out on behalf of lesbians, gay men, and bisexuals, in many ways, are more personal and much greater than they are for any of us to speak out on behalf of other subordinated groups of which we are less likely to be labelled members. However, if heterosexuals feel the stigma of being labelled lesbian, gay, or bisexual, then they may develop the motivation to fight homophobia.

As difficult as it is for heterosexuals to join in the lesbian, gay, bisexual civil rights movement, there is no hope that equality will be achieved unless they do. Heterosexuals are the dominant group, and they have the power to redefine the dominant culture so that differences in sexual orientation are accepted and valued.

VII. CONCLUSION

White women and people of color have made significant scholarly contributions toward a better understanding of patriarchy and racial hegemony. Other outsider scholars, such as lesbians, gay men, and bisexuals, also are beginning to speak out about how hegemony subordinates them to the dominant culture. In reading about subordination from the different perspectives of outsider groups, it is apparent that we all share a common pain of exclusion. This essay is a plea for all subordinated people to explore the sources of our common pain of exclusion from the power and privilege generally enjoyed by members of the dominant culture. As scholars who write about subordination and discrimination, we can begin this unified effort by writing about the commonalities in our differences. Because lesbians, gay men, and bisexuals suffer from such invidious discrimination, they need the help of others to help deconstruct heterosexual hegemony.

Although we should press to have values like liberty, democracy, and equality apply to lesbians and gay men,¹⁷ as guaranteed in the Constitution, it may be that the hope for achieving equality now lies in leaders with moral

¹⁷ See generally CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

vision.¹⁸ As inclusive scholars, we have an opportunity, not just to educate ourselves and others about the commonalities in our differences, but also to implore our leaders to assume stronger leadership roles. We need to show our leaders that our present system lacks a vision about how to end subordination of all people. If we can impress upon each other as well as our leaders how much we have in common, then perhaps we all will be less timid about doing the right thing, consistent with human dignity, when the opportunities arise.

¹⁸ WEST, *supra* note 1, at 60-61 (describing “race-transcending prophetic leaders” as leaders who have “personal integrity and political savvy, moral vision and prudential judgment, courageous defiance and organizational patience”).