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DISSECTING AXES OF SUBORDINATION: THE NEED FOR A STRUCTURAL ANALYSIS

DARREN LENARD HUTCHINSON*

INTRODUCTION

A noted criminal trial of defendant Richard Lee Bednarski in Dallas, Texas, serves as a compelling example of the vulnerability of gays, lesbians, bisexuals, and transgender individuals in the judicial system. In this case, a judge imposed a lenient sentence upon a defendant who was convicted of murdering two gay men. Although the criminal “justice” system in Texas is among the harshest in the nation,¹ the judge offered the following explanation: “I put prostitutes and gays at about the same level, and I’d be hard put to give somebody life for killing a prostitute.”² The judge further stated that “had (the victims) not been out there trying to spread AIDS, they’d still be alive today,”³ and that “[t]hese two guys that got killed

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1. See Andrew Hammel, *Discrimination and Death in Dallas: A Case Study in Systematic Racial Exclusion*, 3 TEX. F. ON C.L. & C.R. 187, 227 n.336 (1998) (citing numerous sources analyzing harshness of the Texas criminal justice system, which is attributable, among other reasons, to the state’s system of elected judgeships); see also Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75, 77 n.21 (1999) (examining numerous statistical factors and indicating that the criminal system in Texas is the “toughest” in the country).

2. Lisa Belkin, *Texas Judge Eases Sentence for Killer of Two Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at A8.

3. Larry Rowe, *Gays Discouraged by Report Clearing Dallas Judge of Bias*, DAILY TEXAN (Univ. of Texas-Austin), Nov. 2, 1989, at 8 (altered text in original).

wouldn't have been killed if they hadn't been cruising the streets picking up teen-age boys,"⁴ and "I don't care much for queers cruising the streets. I've got a teen-age boy."⁵ The judge made these statements despite the fact that the record did not contain conclusive evidence that the victims were killed while seeking sexual contact and despite witness testimony that the assailant and his friends "had set out to harass homosexuals and entered the victims' car with the intent of beating them."⁶ An investigation by the Texas State Commission on Judicial Conduct cleared the judge of any wrongdoing in the case.⁷ Yet, the judge's comments powerfully illuminate the problem that this symposium seeks to analyze — judicial bias against gay, lesbian, bisexual and transgender individuals.

I view the problem of judicial bias as a structural matter, rather than as a collection of isolated or atomistic incidents by wayward judges.⁸ In other words, judicial bias is an institutional phenomenon that affects all persons of marginalized backgrounds.⁹ This problem is thus sustained by and related to broader social systems of domination along lines of race, class, gender and sexuality. In the Dallas case, for example, the judge's comments implicate sexuality, class, and gender hierarchy: the judge marginalized the lives of gay men, lesbians, and poor women (or "prostitutes").

Accordingly, this Essay urges scholars in the field of law and sexuality to conduct a structural analysis of judicial bias. This Essay addresses two important issues related to the task of unveiling and challenging the institutional nature of anti-gay bias. In Part II, this Essay explains in greater detail how a structural analysis of judicial bias can lead to a richer understanding of subordination by uncovering the subtle, hidden, and ideological roots and

4. Lisa Belkin, *Report Clears Judge of Bias in Remarks About Homosexuals*, N.Y. TIMES, Nov. 2, 1989, at A25.

5. See Belkin, *supra* note 2.

6. *Id.*

7. See Belkin, *supra* note 4.

8. See Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites?": Race, Sexual Identity and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1378-88 (2000) [hereinafter Hutchinson, "Gay Rights" for "Gay Whites?"] (discussing the unequal treatment of gays and lesbians in the judicial system); see also Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 602 (1997) [hereinafter Hutchinson, *Out Yet Unseen*] (arguing that negative stereotypes of homosexuals impact judicial decision making).

9. See generally Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1717 (2000) (noting, for instance, that racism is a structural failure of the judicial process).

manifestations of oppression. Part III argues that law and sexuality scholars must conduct a multidimensional reading of judicial heterosexism—that is, in order to appreciate fully the structural dimensions of judicial bias against gay, lesbian, bisexual, and transgender individuals, we must recognize that this bias exists as part of a larger system of domination along race, gender, and class lines.

I. “HOMOPHOBIA” VS. “HETEROSEXISM”: MORE THAN A QUESTION OF TERMINOLOGY

The first matter I wish to attend involves the “naming” of this symposium: “Homophobia in the Halls of Justice.” This portion of my Essay seeks to complicate that terminology. When I think of homophobia, I envision a very emotional, angry, frightened, and perhaps violent reaction to gay, lesbian, bisexual, and transgender people.¹⁰ Certainly that type of pronounced emotional animus persists in our society today.¹¹ Nevertheless, this animus-based characterization does not offer a full portrait of sexual domination because it obscures the structural or institutional dimensions of heterosexist domination.¹² Rigid sexuality hierarchies normalize — and render invisible—heterosexuality; they also stigmatize nonheterosexual identities and practices.¹³ These hierarchies are constructed in law, politics, social interaction, history, and economics.¹⁴ While overt manifestations of anti-gay bigotry are common, gay, lesbian, bisexual, and transgender persons more often

10. See Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 149 & nn.103-05 (1992) (describing “homophobia” as a hatred of gay men and lesbians and referring to literature discussing the terminology).

11. See James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 LAW & SEXUALITY 1, 3-4 (2001) (noting that antigay violence still exists in states that no longer have laws prohibiting homosexual intimacy).

12. See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 18-20 (1999) [hereinafter Hutchinson, *Ignoring the Sexualization of Race*] (discussing the structural nature of subordination); see also Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1467 (1992) (explaining that violence against lesbians and gays serves as a mode of power for the control of human sexuality).

13. Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 12, at 19 (discussing the political role of homophobic violence).

14. See *id.* at 4 (“In a heterosexist society, heterosexuality serves as the transparent norm that shapes ideology, politics, culture and social relations.”); see also MICHAEL WARNER, *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* xxi (Michael Warner ed., 1993) (“Het[erosexual] culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community and as the means of reproduction without which society wouldn’t exist.”).

suffer from hidden, institutional, and subtle norms that render them unequal in political, legal, and social contexts.¹⁵ The homophobic label, which implies a conscious and overt bias, obscures the existence of heterosexism—or institutionalized domination of gay, lesbian, bisexual, and transgender individuals.¹⁶

By discussing heterosexism, I do not wish to dismiss the pervasiveness of homophobia: open homophobia remains an obstacle for gay, lesbian, bisexual, and transgender individuals, both inside and outside of the legal system. A recent child custody case decided by the Alabama Supreme Court illustrates the persistence of virulent homophobia among the nation's jurists. In *Ex parte H.H.*,¹⁷ the Alabama Supreme Court sustained a trial court's ruling that declined to modify a custodial order awarding a father physical custody of his children over the objection of their lesbian mother.¹⁸ The court's decision rests formally on sterile civil procedure grounds, namely, that the trial court had a superior knowledge of the evidence and that the court of appeals improperly re-weighed the evidence on appeal.¹⁹ Chief Justice Moore, however, wrote separately and justified the decision on the grounds that the "mother of the minor children not only dated another woman, but lived with that woman, shared a bed with her, and had an intimate physical and sexual relationship with her."²⁰ In a colorful, and even more homophobic passage, Chief Justice Moore argues that the trial court was correct in denying physical custody to the mother because:

Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our

15. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 12, at 10.

16. See Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195 (1988). Law argues that:

In popular culture, opposition to homosexuality is often characterized as "homophobia." That term suggests a fear of homosexuals and an individual pathological hatred of them. Although some individuals are indeed homophobic, heterosexism is a much broader phenomenon, structured into basic familial, economic and political relationships. Heterosexism shapes the lives, choices, beliefs and attitudes of millions of people who experience neither fear nor hatred of gay and lesbian people.

Id. See also Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 547-49 (1990) (distinguishing homophobia from heterosexism).

17. 2002 WL 227956 (Ala. Feb. 15, 2002).

18. See *id.* at *14.

19. *Id.* at *3-*4 (finding that the court of appeals improperly substituted its own judgment for the wisdom of the trial judge).

20. *Id.* at *5. (Moore, C.J., concurring).

laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.²¹

Chief Justice Moore's decision, along with numerous statistical and anecdotal reviews, demonstrates the presence of homophobia among the nation's jurists.²² Emotional acts of homophobia, however, do not exist separately from the political and ideological structures that support them.

One could, however, offer a slightly "positive" reading of the Alabama decision: eight justices of the Alabama Supreme Court refused to join in Chief Justice Moore's rant on the perils of homosexuality and decided the case largely on procedural grounds.²³ Decades of anti-heterosexist political action has undoubtedly engendered positive changes in the way judges approach gay, lesbian, bisexual, and transgender litigants. Perhaps the justices who joined the lead opinion, unlike Chief Justice Moore, felt uncomfortable making open expressions of homophobic bias—or even do not subscribe to such bias.²⁴ Yet, these possibilities should not distract us too much. As feminist and critical race theorists have painstakingly demonstrated, the attainment of formal equality under the law does not translate into complete equality for subordinate groups.²⁵ In fact,

21. *Id.* (Moore, C.J., concurring).

22. See Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 799-800 (1979) (offering one of the earliest and most exhaustive studies of judicial homophobia); see also Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation and Dissemination Efforts*, 41 WAYNE L. REV. 1, 37 n.135 (1994) (asserting that homophobia is rife throughout the legal system); Lawrence Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: "Queer Baiting" from the Bench*, 3 POL. BEHAV. 31 (1981).

23. Jennifer Gerarda Brown and Nancy Polikoff raised this point during the symposium. See Symposium, *Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System* (Mar. 26, 2002) (transcript on file with the *American University Journal of Gender, Social Policy & the Law*).

24. See Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 951-69 (1996) (arguing that judicial decisionmaking is becoming more progressive on gay and lesbian equality issues).

25. See Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384 (1988) ("The removal of formal barriers, although symbolically significant to some, will do little to alter the hierarchical relationship between Blacks and whites until the way in which race consciousness perpetuates norms that legitimate Black subordination is revealed."); see also Alan David Freeman, *Legitimizing Racial Discrimination Through*

“neutral” legal principles can support oppressive social hierarchies.²⁶ Anti-heterosexist activists and scholars, therefore, must seek to illuminate the subtle and institutionalized discriminatory practices and ideologies that operate to marginalize women, persons of color, the poor, and gay, lesbian, bisexual, and transgender persons.

II. MULTIDIMENSIONALITY: THE COMPLEX FABRIC OF IDENTITY AND OPPRESSION

Any effort to portray comprehensively the effects of heterosexism in the legal system must grapple with the “multidimensional” nature of subordination.²⁷ Several gay, lesbian, bisexual, and transgender theorists have begun to explicate the ways in which race, class,

Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1050 (1978) (arguing that antidiscrimination law fails to reach structural forms of racism).

26. See LEARNED HAND, *THE BILL OF RIGHTS* 70 (1958).

[J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as “arbitrary,” “artificial,” “normal,” “reasonable,” “inherent,” “fundamental,” or “essential,” whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.

Id. See also Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1152-53 (1993) (“Facially neutral laws cannot redress most racism, because of the cultural background against which such laws operate. But even if we could somehow control for this, formally neutral rules would still fail to redress racism because of certain structural features of the phenomenon itself.”); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 89 (1995) (arguing that the legal realist indeterminacy thesis “implied that the rules of law could not constrain judges' choices since it was the judges who chose which rules to apply and how to apply them” and that “since such choices were necessarily based on the judges' beliefs about what was right, it was the judges' personal value judgments that consciously or unconsciously formed the basis of their decisions.”); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 237 (1989) (“In male supremacist societies, the male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all.”); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984) (“Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral.”).

27. See generally Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001); see also Hutchinson, *“Gay Rights” for “Gay Whites?”*, *supra* note 8, at 1360 (claiming that a multidimensional view of racial discrimination is beneficial to the equality struggle for gay and lesbian equality); Hutchinson, *Out Yet Unseen*, *supra* note 8, at 602 (offering multidimensionality as an alternative to hegemonic queer theories).

gender, and sexuality interact to frame heterosexist discrimination.²⁸ The failure of anti-heterosexist scholars and activists to engage questions of race, class, and gender has led to the articulation of inadequate and incomplete theories of equality.²⁹ The child custody paradigm helps to illuminate how heterosexism interacts with “other” axes of domination. In *Bottoms v. Bottoms*,³⁰ for example, the Virginia Supreme Court upheld an award of custody to a maternal grandmother over the objection of the mother of the child, who is a lesbian.³¹ The United States Supreme Court has consistently held that biological parents have a fundamental right to the custody and control of their children.³² Accordingly, courts will grant custody to

28. See Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1410 (1998) (explaining that the theory of “intersexuality” encompasses the notion of how the intersection of race, class and gender work in tandem to give rise to heterosexism); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of “Sexual Orientation,”* 48 HASTINGS L.J. 1293, 1294-98 (1997) (arguing that “heterosexist hegemony” in the normative lifestyle controls throughout cultural constructs such as law, theory, and politics); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25, 32-46 (1995) (discussing the impact of gender upon heterosexism); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1274-80 (1997) (expressing concern that race, class, and gender are typically viewed as isolated factors, despite the fact that they actually intermingle and create a nexus of social construction).

29. See *supra* notes 22-23 and accompanying text.

30. 457 S.E.2d 102 (Va. 1995).

31. See *id.* at 108-09.

32. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (explaining that “the liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.”); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (reasoning that “our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (reiterating that “we have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (stating that “the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (asserting that “it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (holding that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of

third parties over the objection of biological parents only upon a showing that the parent is “unfit.”³³ Third parties face an extraordinarily difficult burden when they seek to satisfy this standard.³⁴ Despite the deployment of this heightened standard by Virginia courts,³⁵ the trial court in *Bottoms* granted the grandmother’s petition.³⁶ In homophobic language, the trial court held that Sharon Bottoms’ lesbian status rendered her an unfit parent:

Sharon Bottoms has admitted that she is living in an [sic] homosexual relationship. She is sharing her bed with her female lover. Examples given were kissing [and] 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.³⁷

children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (holding that “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own”).

33. See Thomas L. Fowler & Ilene B. Nelson, *Navigating Custody Waters Without a Polar Star: Third-Party Custody Proceedings After Petersen v. Rogers and Price v. Howard*, 76 N.C. L. REV. 2145, 2145 (1998) (discussing state caselaw finding that the biological parent’s right is paramount unless there is a showing of unfitness); Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 846 (1997) (“At the very least, for custody to be awarded to a third party over a parent, it must be shown that continued custody with the parent actually would be detrimental to the child.”). As Strasser argues:

Despite near universal judicial testimonials to the child’s welfare and best interest, most states do not apply a pure best interest standard to resolve custody disputes between biological parents and third parties. Instead, most states follow the traditional parental rights doctrine. In general, this doctrine permits an award of custody to a nonparent only if the parent is shown to be unfit or to have abandoned the child or to have relinquished custody voluntarily.

Id. at 846-47.

34. See Strasser, *supra* note 33, at 846-47 (commenting on the difficulty third parties face when they seek an award of custody over the objection of biological parents). Strasser argues that:

It is extremely difficult for a nonparent to wrest custody away from a parent. Because the nonparent ‘bears a heavy burden of persuasion,’ it may not even suffice to establish that the parent intentionally abused or neglected the child. Thus, grandparents, who have no greater claim to custody than other third parties usually will be unable to establish that they, rather than either of the parents, should have custody.

Id.

35. See *Bottoms*, 457 S.E.2d at 104 (“In a custody dispute between a parent and non-parent, ‘the law presumes that the child’s best interests will be served when in the custody of its parent.’”) (quoting *Judd v. Van Horn*, 81 S.E.2d 432, 436 (Va. 1954)).

36. See *id.* at 102.

37. *Bottoms v. Bottoms*, 444 S.E.2d 276, 279 (Va. App. Ct. 1994) (numerous ellipses omitted), *rev’d*, 457 S.E.2d 102 (Va. 1995).

The trial judge's homophobia clearly influenced the decision in *Bottoms*.³⁸ Nevertheless, isolating sexuality as the single operative bias in *Bottoms*, as many pro-gay and lesbian activists have done, precludes a richer analysis of the case. Other dimensions of subordination, particularly class and gender hierarchies, also influenced the outcome of the case. Only a multidimensional reading can provide a complete analysis.

In affirming the award of custody to Sharon Bottoms' mother, the Virginia Supreme Court legitimated the trial court's consideration of Bottoms' lesbian identity.³⁹ Thus, homophobic bias clearly impacted the high court's decision. Yet, the court also deployed gender and class biases. It held that:

She [Sharon Bottoms] 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.⁴⁰

This portion of the court's ruling demonstrates that broader social stereotypes, other than homophobia, also influenced the decision in *Bottoms*. The court's description of Sharon Bottoms relied upon social stereotypes that portray poor, single mothers, especially those who depend upon public assistance to help care for their families, as "irresponsible" parents.⁴¹ The court utilized a variety of stereotypes, including gender, class, and sexuality-based negative imagery, to justify its ruling.⁴²

38. See Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341, 341-43 (1995) (arguing that the trial court and appellate decisions in *Bottoms* reflect judicial homophobia); see also Stephen B. Pershing, "Ertreat Me Not to Leave Thee:" *Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL RTS. J. 289, 289-90 (1994) (criticizing the trial court decision in *Bottoms*).

39. See *Bottoms*, 457 S.E.2d at 108 ("Conduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth; thus, that conduct is another important consideration in determining custody.").

40. *Id.*

41. See Linda McClain, "Irresponsible" *Reproduction*, 47 HASTINGS L.J. 339, 345 (1996) (discussing stigmatization of poor and teenage parents); see also Martha A. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 285-86 (arguing that contemporary social theorists "construct single motherhood as dangerous and even deadly, not only to the single mothers and their children, but to society as a whole"); Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 25 (1993) ("Underlying the current campaign against poor single mothers is the image of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check. In society's mind, that mother is Black.").

42. See Hutchinson, *Out Yet Unseen*, *supra* note 8, at 595 (exploring the gender

In order to describe and counter anti-lesbian bias, scholars and activists must recognize the multidimensional nature of subordination.⁴³ Not only do advocates of gay and lesbian equality often fail to analyze the complexity of subordination, their works might actually reinforce systems of domination. Several prominent proponents of same-sex marriages, for example, have explicitly argued that two-parent marital households provide superior living environments for children.⁴⁴ These proponents contend that marriage “civilizes” gay men by dampening their presumably “promiscuous” passions.⁴⁵ These arguments legitimate a conservative discourse that stigmatizes poor women, especially poor women of color, who are parents outside of the construct of marriage.⁴⁶

Heterosexist jurists have also invoked racial, gender, and class stereotypes to deny equal protection to gay, lesbian, bisexual, and transgender litigants.⁴⁷ These courts have deployed a “special rights” rhetoric, which portrays gays and lesbians as wealthy, well-educated, and politically powerful.⁴⁸ The special rights discourse compares gays and lesbians with persons of color and finds that the former are too distinct from the latter to qualify for civil rights protection.⁴⁹ In the context of constitutional law, this “gay as privileged” stereotype has resulted in a denial of heightened scrutiny of gay and lesbian equal

and class dimensions of *Bottoms*).

43. See Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. CAL. REV. L. & WOMEN'S STUD. 183, 187 (1994) (arguing that “the project of theorizing lesbian inequality requires a contextualized understanding of how gender and sexual orientation, as well as such other markers as race, class and ability, interact to figure differently identified lesbians at different locations in a complex matrix of subordinating systems differently”).

44. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 112-13 (1996) (arguing that children raised in gay and lesbian households are just as socially and psychologically adjusted as children raised in different-sex or single-parent households); see also ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995).

45. See Eskridge, *supra* note 44, at 83-84 (recognizing the argument that lesbians, unlike gay men, have achieved a balance of sexual freedom and interpersonal commitment more easily). *But see* Hutchinson, *Out Yet Unseen*, *supra* note 8, at 594 (critiquing this view, specifically with regard to the stigmatizing effect on gay men and gay male sexuality).

46. See sources cited *supra* note 41.

47. See generally Hutchinson, “*Gay Rights*” for “*Gay Whites*,” *supra* note 8, at 1378-82 (discussing courts’ stereotypical treatment of gay and lesbian equal protection plaintiffs)

48. See *id.* at 1372-75 (discussing the “special rights” rhetoric).

49. See *id.* at 1372-73 (discussing the comparative dimension of “special rights” discourse); see also 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, 291-92 (1994) (critiquing the search for sameness in equality debates).

protection claims.⁵⁰ Several federal courts of appeals and other tribunals have held that gays and lesbians possess too much political power to qualify for judicial solicitude; these courts have then upheld anti-gay discriminatory practices.⁵¹ In *Romer v. Evans*,⁵² a majority of the Supreme Court evaded the opportunity to address the issue of heightened scrutiny of heterosexist policies; instead, it invalidated Amendment 2 to the Colorado constitution on “rational basis” grounds.⁵³ Amendment 2 made it illegal for the state or any of its subdivisions to implement laws or policies that protect gay and lesbian individuals from discrimination.⁵⁴ As I have analyzed elsewhere, however, Justice Scalia’s dissent addressed the heightened scrutiny question and vividly portrayed the special rights rhetoric.⁵⁵ Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that “those who engage in homosexual conduct . . . have high disposable income . . . [and] possess political power much greater than their numbers both locally and statewide,” and they use this power to achieve “full social acceptance of homosexuality.”⁵⁶ At least three justices of the Supreme Court were prepared to join several courts of appeals and utilize a race and class-conscious rhetoric to deny equal protection to gay, lesbian, bisexual, and transgender litigants. It is imperative, therefore, that anti-heterosexist advocates begin to dissect the different axes of oppression and identity that emerge in juridical discourse and to consider how these strands of subordination operate to the detriment of gay, lesbian, bisexual, and transgender litigants.

50. See Hutchinson, “Gay Rights” for “Gay Whites,” *supra* note 8, at 1378-82 (discussing the deployment of “special rights” discourse in equal protection jurisprudence).

51. See *High Tech Gays v. Defense Indus. Sec. Clearing Office*, 895 F.2d 563, 574 (9th Cir. 1990) (holding that “homosexuals are not without political power; they have the ability to and do attract the attention of lawmakers”); see also *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (citing magazine and newspaper articles and concluding that “homosexuals are not without political power”); *Dean v. District of Columbia*, 1992 WL 685364 (D.C. Super. Ct. 1992) (holding that “[g]ays and lesbians are . . . a political force that any elective officeholder may ignore only at his or her peril”), *aff’d*, 653 A.2d 307 (1995).

52. 517 U.S. 620 (1996) (invalidating a constitutional amendment prohibiting all legislative, executive, and judicial action designed to protect gays, lesbians and bisexuals from discrimination).

53. See *id.* at 635 (holding that Amendment 2 fails rational basis review).

54. See *id.* at 624 (discussing the requirements of the amendment).

55. See Hutchinson, “Gay Rights” for “Gay Whites,” *supra* note 8, at 1381-82 (critiquing Justice Scalia’s dissent in *Romer*).

56. *Romer*, 517 U.S. at 645-46.

CONCLUSION

This symposium has provided the space to explore compelling legal, social, and political problems. Judicial heterosexism potentially affects all gay, lesbian, bisexual, and transgender individuals involved in the court system; judicial heterosexism is also a product of broader societal heteronormativity. In their quest to understand and respond to judicial heterosexism, scholars must not only recognize its institutional nature, but must also treat it as an institution with multiple dimensions: heterosexism is irreversibly intertwined with racism, patriarchy, class oppression and other forms of domination. By incorporating these insights into their analyses, legal scholars can engage in a more contextualized response to the problem of judicial bias.