Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics

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A fiery dissent rages within the body of identity politics and civil rights theory. The participants in this discourse have lodged fundamental (as well as controversial) charges. Most frequently, these critics argue that the enormous cadre of political activists, progressive lawyers and legal theorists engaged in the particulars of challenging social inequality lack even a basic understanding of how the various forms of subordination operate in society because they fail (or refuse) to realize that systems of oppression do not stand in isolation. Furthermore, these critics have argued
that anti-oppression scholars and activists actually replicate social hierarchy in their scholarship and activism because they render invisible and subordinate already marginalized individuals. The specific contestations of which I speak began to assume an organized form at various points in the late twentieth century. During the post-civil rights era, the "second wave" of feminism, and after the ascen-

Theory out of Coalition, 43 STAN. L. Rev. 1183, 1189 (1991) ("As we look at... patterns of oppression, we may come to learn, finally and most importantly, that all forms of subordination are interlocking and mutually reinforcing."); Kimberle Williams Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. Rev. 1241, 1242 (1991) (arguing that "[f]eminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains"); Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. Rev. 1037, 1090 (1996) ("It is crucial to recognize that various forms of oppression... are intertwined. Oppressions of gender intersect with other oppressions, including those of race, sexuality, class and ethnicity."); Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 375 (discussing "interlocking system of oppression based on race and gender that operates to the detriment of all women and all blacks"); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 CAL. L. Rev. 1, 374 (1995) (observing that "oppressions of various sorts always interlock because popular prejudice travels in multiples").

2. Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. Rev. 829, 874 (1990) ("A theory that purports to isolate gender as a basis for oppression... reinforces other forms of oppression."); Trina Grillo & Stephanie Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms), 1991 DUKE L.J. 397, 401 (arguing that feminist theory "perpetuates patterns of racial domination" by, among other things, centralizing "white issues" and "rendering women of color invisible"); Darren Lenard Hutchinson, Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse, 29 Conn. L. Rev. 561, 637 (1997) ("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.").


4. See, e.g., PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 307-09 (analyzing black critiques of feminism during the second wave of feminism). Although similar critiques were made during the first wave of feminism, see Angela P. Harris, Race and
dancy of "gay and lesbian" politics in the 1970s, activists and scholars within these social movements began to contest the very language used to define and describe oppression and the multiple identity categories around which social power and disempowerment are distributed. Driven by personal experience and the demonstrated failure of "traditional" policies and theories, "outsiders" within progressive political movements mounted substantial "internal critiques" of what they perceived as the essentialist and constricted nature of these movements. Women of color and supportive white feminists, for example, argued that feminism and anti-racism obscured or ignored issues relevant to women of color who face both racist and patriarchal oppression and that these political discourses, consequently, reflected the political and social positions of white women and men of color. Likewise, lesbian theorists and activists

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Essentialism in Feminist Theory, 42 STAN. L. REV. 581, 586-87 (1990), those of the second wave were more formalized.

5. 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 divisions between gay men and lesbians during the 1970s and 1980s over the exclusion of feminism and lesbian issues from gay politics) [hereinafter FEAR OF A QUEER PLANET].

6. Caldwell, supra note 1, at 365 (developing critique of anti-discrimination law using personal experiences as a black woman); Margaret Montoya, Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 17 HARV. WOMEN'S L.J. 185 (1994) (developing critique of legal discourse using personal experiences as a Latina).

7. See Regina Austin, Sapphire Bound!, 1989 WIS. L. REV. 539 (criticizing anti-discrimination law for failing to account for the experiences of black women); Crenshaw, supra note 1, at 1241 (criticizing domestic violence policies for ineffectively assisting women of color); Jenny Rivera, Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, 14 B.C. THIRD WORLD L.J. 231 (1994) (criticizing domestic violence policies for ineffectively assisting Latinas); Leti Volpp, (Mis)Identifying Culture: Asian American Women and the "Cultural Defense," 17 HARV. WOMEN'S L.J. 57 (1994) (criticizing failure of criminal law to protect adequately the interests of Asian American women).

8. In this Article, "essentialism," unless otherwise noted, refers to efforts to define a social 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, 640-41 n.4 (1993); Harris, supra note 4, at 584.

9. This scholarship now stands as an extensive and formidable body of literature. See, e.g., GIDDINGS, supra note 4; Hooks, supra note 3; Bell Hooks, FEMINIST THEORY: FROM MARGIN TO CENTER (1984); BELL HOOKS, YEARNING: RACE, GENDER AND CULTURAL POLITICS (1991); MAKING WAVES: AN ANTHOLOGY
countered the respective “maleness” and “heteronormativity”\textsuperscript{10} of gay and lesbian politics and feminism, demanding greater visibility for lesbian issues within these social movements.\textsuperscript{11} More recently, and with greater frequency, gay and lesbian people of color and other commentators have begun to develop a systematic critique of antiracism and gay and lesbian politics, challenging participants in these movements to recognize that they marginalize gays and lesbians of color and reify racism and sexual subordination in their activism and theories.\textsuperscript{12}

10. “Heteronormativity” describes the “normalcy” of heterosexuality. In a heterosexist society, heterosexuality serves as the transparent norm that shapes ideology, politics, culture and social relations. See Michael Warner, Introduction to Fear of a Queer Planet, supra note 5, at xxi (“Heterosexual 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.”). For a general discussion of heteronormativity in social theory, see id. at xxi-xxv.


12. For an extensive compilation of works in this area see Hutchinson, supra note 2, at 563-64 n.12. See also 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, 1314 (1997) (noting emergence of racial critiques of gay and lesbian politics and legal theory).
On a simple, minimally deconstructive level, one might construe the various internal critiques of progressive social movements as seeking only a recognition of the diversity within the populations of marginalized communities. Such a limited interpretation, though correct on one level, would be inaccurate because the majority of these critiques pursue two deeper, more compelling goals. First, the critiques seek to reveal the ways in which "dominant" members of progressive social movements monopolize the political apparatuses of these movements and create hegemonic agendas that reflect their own self-interests and that fail to respond to the needs of less visible and less powerful populations within these "communities." Second, the critiques attempt to alter fundamentally the ways in which political activists, academics, lawmakers, courts and the broader society conceptualize social identity categories and oppression. Specifically, the internal critiques have as a collective goal the formation of more complex, rather than narrow and essentializing, paradigms for responding to issues of social inequity. Accordingly, these critiques have argued that civil rights law and politics should develop "multiple consciousness," "intersectional," "holistic" and "multidimensional" models for responding to the diverse harms faced by members of oppressed communities, many of whom endure multiple forms of oppression which traditional, narrow models fail to (indeed, cannot) take into account.

This Article examines the newest, most undeveloped branch of the internal critiques—the emerging race-sexu-
ality critiques of anti-racism and gay and lesbian discourses. Although gay, lesbian, bisexual and transgendered people of color have for decades been critical of anti-racist, gay and lesbian, and feminist politics, the most sustained and comprehensive writings and other manifestations of this criticism have appeared in the late 1980s and the 1990s, a time in which the “feminist of color” and “lesbian feminist” internal critiques were nearly established, if not entrenched. Furthermore, much of this literature has been produced by scholars and activists outside of the legal academy. Thus, the race-sexuality critiques have not yet constructed a comprehensive analysis of the ways in which anti-racist and gay and lesbian legal discourses, respectively, marginalize issues of heterosexism and racial oppression. Nevertheless, a measurable body of works in this field have begun to reveal and question the heteronormative nature of traditional race scholarship, critical race theory and racial politics and has criticized gay and lesbian legal scholarship and activism for reinforcing racial hierarchy and marginalizing people of color.

My analysis expands the emergent race-sexuality critiques and my own ongoing analysis of racial and sexual oppression by directing the focus of this critical scholarship to anti-racist legal theory and political discourse. My

20. As Steven Seidman notes, many of the women of color who criticized feminist essentialism during the second wave of feminism were lesbians; their critiques also “implicated the lesbian community in the race issue.” Seidman, supra note 5, at 118. For a sampling of early race-sexuality critiques, see LORDÉ, An Open Letter to Mary Daly, in SISTER OUTSIDER, supra note 3, at 66; Barbara Smith & Beverly Smith, Across the Kitchen Table: A Sister to Sister Dialogue, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 113, 120-23 (Cherríe Moraga & Gloria Anzaldúa eds., 1981).

21. See Valdes, supra note 12, at 1314 (discussing recent emergence of race-sexuality critiques).

22. See Hutchinson, supra note 2, at 563 (observing that “concerns” of race-sexuality criticism “remain largely outside of traditional legal fora”).

23. See sources cited supra note 12. I do not wish, however, to overstate the size of this movement, which yet growing, remains relatively small.

24. See Darren Lenard Hutchinson, “Claiming” and “Speaking” Who We Are: Black Gays and Lesbians, Racial Politics, and the Million Man March, in BLACK MEN ON RACE, GENDER AND SEXUALITY: A CRITICAL READER (Devon Carbado ed.) (forthcoming 1999) (examining efforts to “integrate” black and gay identities and criticizing heteronormativity in black politics); Hutchinson, supra note 2 (criticizing essentialism and subordination of the poor and people of color in gay and lesbian politics and legal theory); Hutchinson, supra note 15 (examining the contributions of race-sexuality and other forms of internal criticism to progressive legal discourse).
mission here is to raise and engage, in the context of anti-racism, the compelling observations of the various internal critiques of identity politics. Accordingly, this Article endeavors to demonstrate that anti-racist scholars often exhibit a misunderstanding of (or a lack of concern for) the relationship between racial oppression and other forms of subordination, particularly heterosexism and patriarchy, and that they often perpetuate heterosexism and marginalize gay, lesbian, bisexual and transgendered people of color in their work. As an empirical setting for discussing these claims, this Article examines the social problem of systemic violence against oppressed social groups, the anti-racist and legal responses to this violence, and more generalized discussions of heterosexism and gay and lesbian equality within anti-racist discourse and critical race theory.

The problem of violence against oppressed social groups provides an excellent setting for exploring the multidimensionality of subordination and for developing a challenge to anti-racist essentialism. As this Article reveals, published accounts and available statistical data regarding oppressive violence targeting gay, lesbian, bisexual and transgendered people of color indicate that much of this violence involves the use of sexual subordination to perpetuate racial harms. Despite the deployment of sexualized violence against gays, lesbians, bisexuals and the transgendered of color to further racial oppression, anti-racist theorists have not constructed a substantial critique of heterosexism in their work, nor has the issue of sexual justice for gay, lesbian, bisexual and transgendered people been incorporated into the agendas of most anti-racist political organizations. In fact, several anti-racist theorists have questioned the importance of including sexual identity as a protected category within existing civil rights law.

The exclusion or marginalization of issues of homosexuality from and within anti-racist discourse stands in stark contrast to the vigilance with which anti-racism has historically unveiled and challenged the sexualized nature of racial oppression. Yet, much of the historic attention paid to sexualized racial aggression has centered around heterosexual, usually male, victimization. By responding to heterosexually based racial violence and ignoring homophobic forms of racial violence, anti-racism marginalizes gay, lesbian, bisexual and transgendered people of
color, allows racial oppression to escape the challenge of anti-racist advocacy, and creates a discriminatory and heteronormative model of racial justice.

Although my analysis of the heteronormative nature of anti-racist legal theory arises out of the existing internal critiques of progressive social movements, it also represents both a substantive and conceptual progression in this scholarship. The following analysis reflects a substantive progression in the internal critiques because it offers a comprehensive examination of heteronormativity in anti-racist legal scholarship, thus helping to fill a void in existing work that either omits sexuality from analysis or that fails to analyze the effects of heteronormative racial discourses in the specific contexts of law and legal theory. My analysis also provides a conceptual progression in the internal critiques because it not only seeks to include "excluded" voices (e.g., those of gays, lesbians, bisexuals and the transgendered of color) within equality discourse, but it also closely examines the complexity of every person's experiences with oppression. By considering how heterosexuality, for example, has affected racial subordination and anti-racist discourse, my analysis provides an historical context for examining the sexual dimensions of racial oppression and for including progressive sexual politics within anti-racism. My approach also reveals the discrimination that occurs when the racial and sexual experiences of gays, lesbians, bisexuals and the transgendered of color, unlike those of heterosexuals of color, are omitted from anti-racist theory and activism.

This Article expounds its central claims in three parts. Part I provides a theoretical framework for my analysis, linking it to and distinguishing it from (substantively and conceptually) pre-existing internal critiques of progressive social movements. Next, Part I analyzes incidents of violence against gay and lesbian people of color and relevant statistical data in order to demonstrate the multidimensionality of oppression—specifically, the sexualized nature of racial oppression, the linkage of racism and homophobia, and the harms that homophobia visits upon communities of color. Part II argues that, despite the synergistic relationship between racism and homophobia, participants in anti-racist legal theory and political discourse have failed to challenge adequately heterosexist oppression and have even questioned or dismissed the importance of sexual equality.
as a civil rights goal. Part II also closely examines the historical problem of heterosexually based racial violence in order to amplify my claim that racial violence has a sexual component. Part II then contrasts the sluggish or nonexistent responses of anti-racists to homophobic racial violence and other forms of heterosexism with their vigorous opposition to heterosexually linked racial violence and subordination, demonstrating that anti-racism is constructed around a heteronormative and discriminatory vision of racial justice in which heterosexual status qualifies individuals for anti-racist advocacy. Part II concludes by detailing other problems and inefficiencies that result from the heteronormative construction of anti-racist discourse. Part III examines probable reasons for the disparate responses of anti-racists to heterosexual and homophobic racism, concluding that none of the reasons examined provides sufficient justification for the perpetuation of heteronormativity in anti-racist discourse. Part III closes by discussing the immediate implications of a de-essentialized racial discourse for anti-racist legal theory and for civil rights law.

I. MULTIDIMENSIONALITY: A CHALLENGE TO NARROW CONCEPTIONS OF OPPRESSION AND IDENTITY

A. Multidimensionality and Intersectionality: Similarities and Differences

In a prior article, I argued that scholars and activists engaged in the development of strategies to combat social inequality must recognize the inherent complexity of systems of oppression (e.g., patriarchy, white supremacy and heterosexism) and the social identity categories around which social power and disempowerment are distributed (e.g., race, gender and sexual orientation). Placing legal theory and politics concerning issues of homosexuality and heterosexism at the focal point of my analysis, I asserted that the various social identity categories and systems of oppression are “inextricably and forever intertwined,” that the failure of gay and lesbian legal theorists to interrogate and challenge racial and class subordination produces

25. See Hutchinson, supra note 2.
26. Id. at 641.
essentialist theories that invariably reflect the experiences of class and race-privileged gays, lesbians and bisexuals,\textsuperscript{27} and that gay and lesbian essentialism precludes adequate political, legal and theoretical responses to the contingent and varying effects of heterosexist oppression.\textsuperscript{28} Having demonstrated the experiential diversity of gay and lesbian existence, I urged gay and lesbian legal theorists and political activists to employ "multidimensionality" as a theoretical framework for challenging heterosexist subordination. Within the gay and lesbian context, multidimensionality serves 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."\textsuperscript{29} By offering multidimensionality to law and sexuality scholars, I hoped to provoke a discourse on the intricacy of sexual subordination and to help reshape legal theory to account for this complexity.\textsuperscript{30} More generally, multidimensionality posits that individual acts of discrimination and the various institutions of oppression are complex and multilayered, owing their existence to a host of interlocking sources of advantage and disadvantage.

My analysis arose, primarily, out of an impressive body of feminist and critical race literature that has painstakingly countered the notion that sources of oppression operate in isolation from one another.\textsuperscript{31} This scholarship has criticized, most extensively, feminist and anti-racist legal theory and politics for failing to examine how the convergence of racial oppression and gender hierarchy often creates unique experiences for women of color—experiences that essentialist theories either submerge or fail to explain accurately.\textsuperscript{32} Applying a theoretical approach commonly

\begin{footnotesize}
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\item See id. at 583-635.
\item See id.
\item Id. at 640.
\item See Hutchinson, supra note 2, at 640.
\item See sources cited supra note 9. I explicitly grounded my analysis in this literature. See Hutchinson, supra note 2, at 564 n.13 ("This Article is also greatly inspired by a body of critical race, anti-racist and feminist scholarship that explores the relationship between race and gender.").
\item See sources cited supra note 9. Although other internal critiques exist within legal theory, the race-gender critiques stand as the most developed and extensive. See Valdes, supra note 12, at 1333 ("The analytical tools known as multiplicity and intersectionality were pioneered by critical race feminists to
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referred to as “intersectionality,” these scholars have proposed several public policy and doctrinal reforms that would make civil rights law responsive to the needs and experiences of women of color.\textsuperscript{33}

Although I locate my work on the interlocking nature of race, class and sexuality within established scholarship on the synergistic nature of oppression, I also view my writing as both a substantive and conceptual extension and redirection of this literature. While the multidimensionality paradigm differs substantively and conceptually from the intersectionality scholarship, the insightful observations of intersectional scholars created the conditions for the development and evolution of multidimensionality and of other theoretical extensions and rearticulations of intersectionality.\textsuperscript{34}

My analysis represents a substantive extension of the prevailing literature on the “intersectionality” of oppression because this latter work has been limited, almost exclusively, to understanding and exploring the operation of just two sources of oppression—patriarchy and racism—in the lives of women of color.\textsuperscript{35} My analysis builds upon—yet bring into sharp relief, and to spotlight, the particularized interplay of white racism and androsexism.”); Eaton, supra note 11, at 215 (noting that “much of the commentary and debate about interacting oppressions has focused almost exclusively on the connections between race and gender domination”).

33. See sources cited supra note 9. Some of these arguments have led to judicial and policy reforms. See, e.g., Lam v. University of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994) (“Where two bases for discrimination exist, they cannot be neatly reduced to distinct components ... Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.”) (citing Crenshaw, supra note 9); United States Equal Employment Opportunity Commission, Intersectional Discrimination 6 (1996) (stating that the E.E.O.C. “recognizes intersectional discrimination claims as an enforcement priority” and drawing upon leading legal scholarship on the issue).

34. See Hutchinson, supra note 2, at 641 (describing multidimensionality as “drawing upon, extending and developing intersectionality” rather than serving as “a wholly alternative paradigm”). The evolution of intersectionality was perhaps anticipated by its leading commentator, Kimberle Crenshaw. See Kimberle Williams Crenshaw, Beyond Racism and Misogyny: Black Feminism and 2 Live Crew, in Words That Wound: Critical Race Theory, Assaulitive Speech, and the First Amendment 111, 114 (Kimberle Williams Crenshaw et al. eds., 1993) (describing intersectionality as a “provisional” or “transitional concept that ... can be replaced as our understanding of each category becomes more multidimensional”) (emphasis added).

35. See, e.g., sources cited supra note 9. Although this scholarship explores only gender and racial oppression, many authors within this movement have
differs from—this work because it explores the social meaning of sexual identity (along with race, gender and class), a topic which, recent scholarship notwithstanding, remains largely unexplored in the intersectionality corpus and in legal theory generally. 36

Conceptually, my analysis differs from the pre-existing body of intersectional scholarship because it attempts to complicate the implication of this latter work that social identity categories or systems of oppression only “intersect” in the lives of persons burdened by multiple sources of disempowerment, such as women of color. The idea that “intersecting” systems of oppression only affect limited categories of individuals is implied by statements in several writings in the race and gender line of analysis. 37 These statements, together with the almost exclusive focus the literature has given to experiences of women of color—rather than those of white women and men of color—suggest a limited relevance of intersectionality. 38 Nevertheless, white women and men of color also experience “multi-dimensional” oppression. Men of color and white women, 

recognized that “other” sources of disempowerment affect the lives of women of color. See, e.g., Crenshaw, supra note 1, at 1245 (limiting analysis to race and gender but recognizing that factors “such as class or sexuality . . . are often as critical in shaping the experiences of women of color”).

36. For an extensive listing of race-sexuality scholarship, see Hutchinson supra note 2, at 563 n.12. See also Valdes, supra note 12 (urging law and sexuality scholars to integrate issues of racial subordination into their work); Sheila Rose Foster, The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage, 7 TEMP. POL. & CIV. RTS. L. REV. 319 (1998) (questioning value of same sex-marriage for people of color and the poor); Peter Kwan, Jeffrey Dahmer and the Co-Synthesis of Categories, 48 HASTINGS L.J. 1257 (1997) (offering “co-synthesis” as methodology for exploring relationship between oppressions).

37. See Crenshaw, supra note 9 (arguing that anti-discrimination jurisprudence diminishes the multidimensional experiences of black women); Harris, supra note 4, at 604 (“Far more for black women than for white women, the experience of self is precisely that of being unable to disentangle the web of race and gender—of being enmeshed always in multiple, often contradictory, discourses of sexuality and color.”); see also Kwan, supra note 36, at 1275 (“Central to intersectionality theory is the recovery of the claims and identities of those who, like African American women, are pushed to the margins of the racial discourse because of assumptions of patriarchal normativity, and simultaneously pushed to the margins of the feminist discourse because of assumptions of racial normativity.”).

38. See, e.g., Kwan, supra note 36, at 1275 (“[S]traight white maleness arguably is a multiple identity, but intersectionality theorists would resist the claim by straight white males that theirs is an intersectional subjectivity.”).
however, may not typically conceive of their subordination as a combination of gender and racial hierarchy because “maleness” and “whiteness,” privileged and dominant categories in a patriarchal and white supremacist society, are rarely acknowledged to exist but, nevertheless, form the invisible foundation for social policy, civil rights strategies and critical theory.\footnote{The extent to which whiteness and maleness create privilege, however, depends upon other factors, such as race, sexuality and class. For a discussion of the invisible nature of whiteness, see HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES 109 (1996) (“For most Whites, race—or more precisely, their own race—is simply part of the unseen, unproblematic background.”); Barbara J. Flagg, “Was Blind But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 957 (1993) (examining the “transparency phenomenon” or the “tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific”); Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22, 23 (Leslie Bender & Daan Braveman eds., 1995) (“White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.”); Robert Westley, White Normativity and the Racial Rhetoric of Equal Protection, in EXISTENCE IN BLACK: AN ANTHOLOGY OF BLACK EXISTENTIAL PHILOSOPHY 91 (Lewis R. Gordon ed., 1997) (“To the extent that the dominant group escapes racial or ethnic identification, it is free to act as a value-free norm for the rest of society.”). For an analysis of the invisible nature of maleness, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237-38 (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 . . .”); Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 YALE L.J. 259, 316-17 (1993) (“[T]he law’s incorporation of a male normative standard may be invisible but it is not inconsequential.”) (footnote omitted); Lucinda M. Finley, Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, 64 NOTRE DAME L. REV. 886, 888 (1989) (“The body of law about gender discrimination is widely understood to involve ‘women’s issues’—thus reinforcing the understanding that ‘man’ is a genderless, standard creature who does not have to concern himself with gender issues.”); Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 60 (1988) (arguing that one “project” of feminist legal theory is “the unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory”).

40. See, e.g., Crenshaw, supra note 1, at 1252 (arguing that the “specific raced and gendered experiences [of white women and men of color], although intersectional, often define as well as confine the interests of the entire group”); Harris, supra note 4, at 608 (“This sense of a multiplicitous self is not unique to black women, but black women have expressed this sense in ways that are
ficantly the dimensions of these experiences but have limited their analyses primarily to uncovering the multidimensionality of women of color and their historical experiences with subordination.41

Placing the emergence of intersectionality into an historical context provides a basis for understanding its heavy emphasis on issues of women of color, which, perhaps unintentionally, helped to create a false implication that only women of color experience multilayered subordination. When intersectionality was first introduced to legal theory, there were virtually no analyses of the unique effects of subordination on women of color in feminist legal theory and traditional civil rights scholarship; furthermore, judicial decision-making demonstrated a remarkable misunderstanding of or lack of appreciation for the ways in which women of color were affected by racial hierarchy and patriarchy.42 Thus, by centering their analyses on women of color, the intersectionality scholars filled (and continue to fill) a tremendous void in civil rights jurisprudence.43

While the intersectionality critiques have provided substantial insight into the complexity of oppression, the limited (explicitly and implicitly) nature of the critiques leaves the intersectional paradigm open to a charge that it only applies to a specific category of individuals (e.g., women of color or poor white lesbians).44 Consequently, skeptics can disparage or question the importance of argu-


42. See generally Crenshaw, supra note 1 (discussing marginalization of black women in legal scholarship and judicial opinions).

43. See Kwan, supra note 36, at 1275 (“Intersectionality thus made important contributions in opening up the theoretical framework discussing race in a much more inclusive way.”).

44. See, e.g., Kwan, supra note 36, at 1275 (“[S]traight white maleness arguably is a multiple identity, but intersectionality theorists would resist the claim by straight white males that theirs is an intersectional subjectivity.”).
ments concerning the complexity of oppression and regarding the need for more sophisticated paradigms for confronting social inequality. In the gay and lesbian context, for example, white gay male critic Richard Mohr has dismissed demands by lesbian feminists and people of color that gay political organizations challenge issues of racial subordination and patriarchal oppression and form coalitions with anti-racist and feminist groups. Mohr criticizes such efforts as an "unnecessary and . . . wasteful drain on the movement." Because intersectionality and related scholarship imply that the multiplicity of identity and oppression has limited relevance and significance, these works may actually leave the impression that claims such as Mohr's are correct in a very limited, but troubling, sense. If, for instance, multilayered identities and oppression only implicate women of color and *their* experiences, then an examination of the "intersectionality" of race and gender might indeed be a "wasteful"—or at least less relevant—venture for white women and men of color.

Subsequent to the introduction of intersectionality to legal scholarship, however, feminist and critical race theorists have offered compelling arguments that deconstruct the "transparent" nature of whiteness and maleness in legal discourse. These arguments call into question any suggestion that the complexity of subordination only matters to certain categories of individuals. Once whiteness and maleness (and heterosexuality and upper-class status) are uncovered as important (and "real") social constructs, the notion that the multidimensional nature of oppression and identity has limited application becomes difficult to sustain. When we view whiteness and maleness (and their

45. See Richard D. Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* 328 (1988); see also Marshall Kirk & Hunter Madsen, *After the Ball: How America Will Conquer Its Fear and Hatred of Gays in the 90s*, at 180 (1989) (characterizing feminist, poverty and anti-racist concerns as "superfluous" to gay and lesbian liberation); Bruce Bawer, *A Place at the Table: The Gay Individual in American Society* 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"); see id. at 216 (dismissing scholarly research on the links between gender, class, race and sexuality as "politically correct and multiculturalist rhetoric"); see Bruce Bawer, *Under Glass*, N.Y. Times, Oct. 29, 1995, § 7, at 24 (arguing that sexism, racism and economic injustice are "issues, yes—but gay issues?").

46. See sources cited supra note 39.
resulting privileges) as part of the same landscape of social constructs as "colored" and "female" statuses, then we can also consider how these constructs contribute to the positionality of white women and men of color. If whiteness and maleness impact these groups’ respective experiences as women and as people of color, they too will have multilayered experiences. Stated differently, whiteness undeniably interacts with female status to create multidimensional experiences for white women, and maleness invariably interacts with colored status to create multidimensional experiences for men of color. Accordingly, the reality of multidimensional subordination is generalized, not restricted to specific categories of individuals.

This conceptual distinction—that multilayered experiences are “universal”—between the focus of intersectionality and multidimensionality has important implications for future theorizing on the complexity of oppression. First, this distinction problematizes claims such as Mohr’s by revealing their discriminatory nature. When skeptics reject the need to embrace multidimensional theories of equality, they falsely imply that their own essentialized theories are “authentic” and “pure.” Most likely, however, these theories are in fact multilayered—resting on the transparently multidimensional perspectives of white women and men of color, for example. Mohr’s argument itself reflects white gay male positionality because only those persons who do not encounter racial and gender subordination (but who

47. See Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House, 10 BERKELEY WOMEN’S L.J. 16, 18 (1995) (extending intersectionality to account for the privileged status of whiteness and concluding that “while Professor Crenshaw discusses a woman standing at the single intersection of race and gender, in fact we all stand at multiple intersections of our fragmented legal selves”) (emphasis added).

48. When I describe multidimensional experiences as “universal” or “generalized,” I do not mean to imply a “unitary” experience of subordination. Despite the fact that everyone’s identities and experiences are shaped by a host of factors, oppressed persons will, nevertheless, experience subordination differently.

49. This observation has its roots in the race-gender critiques. See Crenshaw, supra note 1, at 1252 (noting that white women and men of color define experiences of women and people of color, respectively); Harris, supra note 4, at 592 (“[F]eminist essentialists find that in removing issues of ‘race’ they have actually only managed to remove black women—meaning that white women now stand as the epitome of Woman.”). These critiques, however, have not fully engaged the multiple dimensions of white female and male of color experiences.
enjoy racial and gender privilege) could comfortably de-
scribe anti-racist and feminist reforms as “wasteful” and
“unnecessary.” Thus, Mohr’s argument arises out of his
own multidimensional positionality as white, gay and male.

The universality of multidimensional experience thus
presents a difficult question for those who eschew multilayer-
ered theories of equality: if everyone has multidimensional
experiences and if progressive social theories likely already
reflect (though not admittedly) multidimensional perspec-
tives, why should these theories marginalize or exclude
particular classes of multidimensional experiences (e.g.,
those of women of color, gays and lesbians of color, and poor
white gay men) from analysis? By conceptualizing multi-
plicity of experience as a universal concept, multidimen-
sionality compels essentialist theorists to account for the
inherently discriminatory nature of their work, which privi-
leges some multilayered experiences over others. Multidi-
mensionality, thus, pushes legal theorists and political acti-
vists to recognize the multiple and complex ways in which
all individuals experience oppression and construct cate-
gories of identity, to acknowledge that equality theory
already incorporates transparently multidimensional ex-
periences, and to begin reshaping theory and policy to
account for the diversity of harms within oppressed social
groups.

B. Violence as a “System” of Oppression

One of the most powerful manifestations of multidimen-
sional subordination occurs in the historic problem of
violence directed toward oppressed social groups—what I
refer to as “oppressive violence.” In the popular legal and
criminological nomenclature, acts of physical violence
against disfavored groups—people of color, women, gays,
lesbians, bisexuals and the transgendered—are often
labeled “bias-motivated violence,” “bias crimes” or “hate

50. Hutchinson, supra note 2, at 621 (“Although [several white gay critics]
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 privilege.”).

51. See infra pp. 79-100 (discussing how sexualized racial oppression affects
heterosexuals; revealing and questioning disparate responses to heterosexual-
ized and homosexualized racism).
crimes. Such naming of this brutality accurately captures its discriminatory dimension: when committing such violence, the perpetrator singles out "his" victim because she or he is a member of a disparaged social group.

Though accurate to some degree and helpful perhaps in the context of criminal proceedings (where "intent" is often relevant), limiting the description of violence against socially subordinate groups to the "discriminatory" rubric may rest on problematic assumptions that have the effect of masking the systematic, political and structural significance of such violence. The discriminatory label, for example, suggests that this violence occurs as isolated, atomistic and random acts. Yet, as scholars within critical race theory, feminist legal theory and critical legal studies have argued (particularly in the context of antidiscrimination jurisprudence), the perception of social subordination solely as the inappropriate behavior of a few, random, "biased" individuals, distorts its institutionalized, pervasive, enduring and often subtle nature.

The social phenomenon of violence against subordinate groups (like other acts and institutions of domination examined by critical theorists) constructs and reinforces hierarchical social relations—white supremacy, compulsory heterosexuality, patriarchy and class oppression. Kendall Thomas' compelling observations in the context of "homophobic" violence provide a helpful explication of the

52. See, e.g., Frederick M. Lawrence, The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes, 93 MICH. L. REV. 320 (1994).
53. The use of the pronoun "he" is intended to capture the gendered nature of such violence; the prototypical assailant is male. See Lu-in Wang, The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime, 71 S. CAL. L. REV. 47, 51 & n.19 (1997).
54. See Frances Lee Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights, 74 CORNELL L. REV. 993, 1024 & n.129 (1990) (discussing "political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings"); Flagg, supra note 39, at 959 ("Beyond the individual forms of racism that stereotyping, bias, and hostility represent lie the vast terrains of institutional racism—the maintenance of institutions that systematically advantage whites—and cultural racism—the usually unstated assumption that white culture is superior to all others."); see generally Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978) (discussing institutional nature of racism).
structural dimensions of oppressive violence. Thomas understands homophobic violence as a “mode of power” or an “institution” that serves to delimit the boundaries of sexual expression and that contributes to the ideological and political processes which construct homosexuality as subordinate and devalued and heterosexuality as privileged and preferred:

Viewed systemically, the objective and outcome of violence against lesbians and gays is the social control of human sexuality. Homophobic violence aims to regulate the erotic economy of contemporary American society, or more specifically, to enforce the institutional and ideological imperatives of compulsory heterosexuality. Insofar as homophobic violence functions to prevent and punish actual or imagined deviations from heterosexual acts and identities, it carries a determinate political valence and value.

Homophobic violence thus executes (or “enforces”) the political, social and ideological institution of heterosexism; it punishes non-heterosexual practice, and it aims to prevent future challenges to heteronormativity by employing the threat of violence to attach fear and stigma to nonheterosexual intimacy and desire. While Thomas does not interrogate the multidimensionality of homophobic violence (by relating it to other forms of hierarchy), such violence also reinforces social hierarchies of gender and race.

56. Id.
57. Numerous psychological studies have found that oppressive violence creates an environment of fear and paralysis throughout the oppressed group of which the individual victim is a member. See Lawrence, supra note 52, at 346 (“Members of the target community of a bias crime perceive that crime as if it were an attack on themselves directly and individually . . . .”); Wang, supra note 53, at 119-20 (arguing that an act of biased violence “has an especially strong impact on observers who identify with the victim because they feel that they share the characteristic or status that explains the victim’s experience. Those individuals will incorporate into their own assumptive worlds a perception that their very identities render them especially vulnerable to criminal victimization of a particularly devastating kind”). That such violence produces harms that extend well beyond the individual victim lends additional support for a systemic and ideological conceptualization.
Thus, the lesson of critical theory is that violence against oppressed groups serves broad and institutional (rather than isolated and individuated) purposes: to delineate and sustain hierarchical social relations of race, gender, sexuality and class and, thereby, to perpetuate the inequality of marginalized communities.º Concepting oppressive violence as a system of subordination permits us to examine how it, like other structures of domination, shape the experiences of historically oppressed social groups.

C. Oppressive Violence and Multidimensionality

Viewed together, the argument that oppressive violence is a system of subordination, coupled with the reality of multilayered subordination, compels a finding that oppressive violence is multidimensional in nature. In other words, if subordination is multidimensional and if oppressive violence is itself a structure of subordination, then oppressive violence will generate varied effects, due to the reality that its victims are situated in diverse and shifting contexts of racial, gender, class and sexual power. The multidimensional nature of oppressive violence also means that a number of social hierarchies will inform and be reinforced through its occurrence. In the remainder of this

and the Social Meaning of Gender, 1988 Wis. L. Rev. 187; Valdes, supra, note 1; James D. Wilets, Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective, 60 ALB. L. REV. 989 (1997) (arguing that homophobic violence perpetuates gender inequity); I. Bennett Capers, Note, Sex(ual Orientation) and Title VII, 91 COLUM. L. REV. 1158 (1991); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (ruling that prohibition of same-sex marriage constitutes gender discrimination under state constitution). Although heterosexism supports oppressive gender hierarchies, law and sexuality scholars must remember to consider the differences between gay men and women, differences created by the oppression of women in a patriarchal society. See sources cited supra note 2 (criticizing marginalization of lesbians within gay theory).

59. See infra pp. 21-39.

60. See Terry S. Kogan, Legislative Violence Against Lesbians and Gay Men, 1994 Utah L. Rev. 209, 212 (making connection between ideology of homophobia embraced by legal structures and homophobic violence). Similar observations have been made in the context of “sexist” violence. See SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT (1982; see generally SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); Susan Estrich, Rape, 95 YALE L.J. 1087 (1987); R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (1979); see also infra pp. 93-111 (discussing “racial” violence).
section, I will demonstrate this claim through an analysis of reported cases of violence against actual or “perceived as” gay and lesbian people of color and through scrutiny of existing statistical data on “homophobic” violence which suggest that race factors in the commission of such violence and in the public response.

1. A Multidimensional Reading of Oppressive Violence. One of the most graphic examples of oppressive violence against gays and lesbians of color involves the case of Loc Minh Truong, a 55-year-old, working class, Vietnamese American. On the evening of January 9, 1993, as Truong walked along Mountain Street Beach, a popular “gay section” of Laguna Beach, California, he was confronted by a gang of at least eight white teenagers. Two of the youths, Jeff Michael Raines and Christopher Michael Cribbins,
pushed Truong to the beach's rocky terrain, beat him and stomped his head and face repeatedly.\textsuperscript{64} The attack left Truong disfigured and caused serious damage to his left eye; he was later found unconscious on the beach with a sharp rock impaled in the back of his head.\textsuperscript{65} The remaining teenagers watched the attack and failed to intervene on Truong's behalf.\textsuperscript{66} One of the "bystanders" testified to police that the group went to the beach with knowledge that a "sexualized" crime was going to occur.\textsuperscript{67} During the attack, at least one of the perpetrators hurled a sexual epithet.\textsuperscript{68}

In the aftermath of Truong’s attack, governmental officials and local gay and lesbian political activists mounted a vigorous response to the crime. Police arrested the two perpetrators, and one assailant subsequently pleaded guilty to attempted murder, assault and a violation of California's “hate crime” statute; the other pleaded guilty to assault and the commission of a hate crime.\textsuperscript{69} A local public high school sponsored seminars to educate students on the problem of homophobia,\textsuperscript{70} and gay rights organizations provided needed advocacy\textsuperscript{71} and emotional support.\textsuperscript{72}

Despite their laudable efforts, the activists and governmental officials evidenced a fundamental misunderstanding of the operation of oppression—specifically, its multidimensional nature. Prosecutors and police, for example, concluded that race did not factor into Truong's victimization, pursuing the hate crime charge solely as a case of "anti-gay" animus.\textsuperscript{73} Furthermore, while city officials and activists

\textsuperscript{64} See Pinsky & Le, supra note 63, at A1.
\textsuperscript{65} See id.
\textsuperscript{67} See Pinsky & Le, supra note 63, at A1 (reporting police statement that Raines, prior to the attack, invited other youths to "go down to Mountain Street to get some fags").
\textsuperscript{68} See id. ("Cribbins called [Truong] a 'fag' and shoved him against the rocks . . . ." (reporting statement of prosecutors)).
\textsuperscript{69} See Rene Lynch & Doreen Carvajal, Teen Gets 10 Years in O.C. "Gay Bashing Case, L.A. TIMES, Jan. 8, 1994, at A1. The defendants received respective sentences of ten years and one year. See id.
\textsuperscript{71} See id. (reporting that activists and city officials urged public school officials to attend seminars sponsored by gay and lesbian advocacy group).
\textsuperscript{72} See Jeordan Legon, Vigil Held for Man Beaten at Gay Beach, ORANGE COUNTY REG., Jan. 16, 1993, at B11.
\textsuperscript{73} See Byron MacWilliams, Tests Ordered for Men in Laguna Beating,
urged the city to educate youth on the problems of homophobia, there seem to have been no similar demands for the implementation of educational programs on racial discrimination and violence.

Several factors strongly support the public’s homophobic construction of the crime: the sexualized language used by the attackers, the actual confession of homophobic intent by one of the youths, and the commission of the crime in a known gay and lesbian section of the town. Nevertheless, a conclusion that homophobia influenced the crime does not preclude the involvement of racial or other motivations. Only under an essentialist or narrow conception of subordination could strong evidence of anti-homosexual motivation preclude or negate an explanation that includes other forms of oppression concurrently. A multidimensional understanding of oppression and systems of oppressive violence, by contrast, demands close scrutiny of all the possible—indeed, likely—social and political layers of the attack.\(^7\)

Although the “dominant” white responses to the crime dismissed the possible influence of white supremacy, anti-Asian sentiment and patriarchy upon Truong’s victimization, several aspects of the crime strongly suggest the relevance of these systems of domination in the assault. First, the racial backgrounds of the victim and assailants of this admittedly bigoted attack lend credence to a racial interpretation. Because Asian Americans have endured a long history of white supremacist subordination through the institution of oppressive violence,\(^7\) any “hate” crime involving a large group of white men physically and brutally dominating an Asian American likely involves an element of white supremacist motivation. A contrary con-

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\(^7\) See Hutchinson, supra note 2, at 640 (“Multidimensional analysis . . . reveals the multiple dimensions of social identity categories and offers a comprehensive framework for conceptualizing sexual subordination that neither ‘destroys’ nor ‘fragments’ our lives.”); see also Matsuda, supra note 1, at 1189 (“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?’”).

\(^7\) Orange County Reg. (Cal.), Oct. 9, 1993, at B1 (“There was no racial motive for the crimes, according to police.”); see also Pinsky & Le, supra note 63, at A1 (“Prosecutors believe that Raines and Cribbins drove to Laguna Beach along with several others to seek out and attack gays.”).
clusion ignores the persistence of racism and a history of anti-Asian violence.

Furthermore, the assailants’ very conclusion that their victim was “gay” could have resulted from interlocking race, sexuality and gender constructs. Under the landscape of white supremacist and patriarchal stereotypes, Asian American males are constructed as effeminate, asexual and weak. These stereotypes, apart from asexuality, correlate strikingly with popular characterizations of gay men.

Hence, race, gender and sexual stereotypes of Asian American males may have influenced the assailants’ selection of their “gay” victim; they might have believed Truong was gay because he was Asian American and male. Under this interpretation of the crime, Truong’s racial status was sexualized—the sexual (and gendered) stereotyping of Truong was inextricably intertwined with his status as an Asian American male. This “sexualization of race,” here


77. See Richard A. Isay, M.D., 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). These stereotypes may only reflect beliefs about white gay men because men of color, particularly black and Latino males, are typically constructed as masculine, violent and threatening. See Hutchinson supra note 2, at 569-70 (arguing that police did not believe Puerto Rican male was gay due, in part, to conflicting stereotypes of Latino and gay males).

78. See Hutchinson, supra note 2, at 577 (arguing that police may have believed victim of murder was gay due to his Asian American male status); Kwan, supra note 36, at 1276-77 (same); Petersen, supra note 76, at 122 (describing racist attack on Asian American students in which attackers called male victims “faggots”).

79. Other scholars have used similar terms to describe the interaction of race and sexuality in the subordination of people of color. See Charles Herbert Stember, Sexual Racism: The Emotional Barrier to an Integrated Society (1976) (discussing “sexual racism”); see Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2501 (1994) (discussing “racialized sexual hostility” and “sexualized racial hostility”); see generally Sumi K.
Asian American status, likely played a central role in Truong’s subjugation.

One could also draw a conclusion that race mattered in Truong’s attack from the assailants’ admitted adherence to homophobic ideology. Numerous psychological studies indicate that biased individuals typically embrace several forms of bigotry. If these psychological studies are correct, then persons (like Truong’s attackers) who subscribe to homophobic ideology will invariably adhere to racist and sexist ideologies and political agendas as well. Accordingly, the perpetrators’ admitted homophobia supports a determination that they are also white supremacists and that Truong’s attack was, therefore, an act of sexualized racial violence.

Finally, the disfigurement of Truong suggests the crime had a racial dimension. When officials found Truong, he had been so badly beaten that they could not determine his race. Although critical theorists have compellingly disputed biological definitions of race, social constructionist theory still defines race as the “social meaning” attached to biological and morphological features, thus preserving a role for biology and physicality in the social and political

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51. See Dianne Klein, Prejudice Targets Outsiders, But We Are All Victims of Hate, L.A. TIMES, Jan. 14, 1993, at E1 (“Truong’s head was bashed so viciously that for more than a day, police could only venture a guess as to his race. Asian or Latino, they figured, because of his black hair.”).

52. See Ian Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 28 (1994) (“Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.”); see also MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994).

53. See Lopez, supra note 82, at 38-39 (“Race is revealed as historically contingent, socially mediated systems of meaning that attach to elements of an individual’s morphology and ancestry.”).
processes that fabricate racial meaning. The attackers’ concentration of their blows to Truong’s face could have evidenced a desire to stamp out (quite literally) any morphological markers of Asian American (or “non-white”) status. In other words, the attackers may have beaten Truong beyond racial recognition in order to neutralize his “Asian” appearance.

Despite the many ways in which race and gender could have acted together with heterosexism to influence the brutal attack, the public response largely focused on the sexual dimension of the crime. This exclusive focus on sexuality deploys the same problematic essentialism that the internal critiques of social movements have challenged. Additionally, however, it is quite likely that the pernicious “model minority myth” also explains the public’s failure to offer a racial reading of the crime. Under this myth, the economic success of some segments of the Asian American population is cited by whites to negate claims that racism is responsible for the material inequality of other people of color. As numerous scholars have demonstrated, the myth obscures the historical and ongoing oppression of Asian Americans, blurs the vastly different experiences across communities of color and among Asian Americans, and

84. See Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 CALIF. L. REV. 1241, 1264 (1993) (“[T]he model minority myth . . . hurt[s] other racial minorities and poor whites who are blamed for not being successful like Asian Americans.”).

85. See id. at 1258 (“Th[e] history of discrimination and violence, as well as the contemporary problems of Asian Americans, are obscured by the portrayal of Asian Americans as a ‘model minority.’”); Frank Wu, Neither Black nor White: Asian Americans and Affirmative Action, 15 B.C. THIRD WORLD L.J. 225, 246 (1995) (“[T]he model minority myth whitewashes the discrimination faced by Asian Americans.”).

86. See Wu, supra note 85, at 245 (“[T]he model minority myth ignores African-American history. African Americans have had an experience different in kind and not only in degree—in chattel slavery, Jim Crow, and institutional racism—that continues to this day.”).

87. See Chang, supra note 84, at 1259 (discussing economic makeup of Asian American communities and concluding that myth diverts attention from poor sectors of Asian American population); see also Wu, supra note 85, at 245.

[T]he model minority myth blurs and glosses over markedly different patterns among Asian ethnic groups. It enshrines the insult, “they all look alike,” implying that “they all are alike.” Statistically, the socio-economic positions of Vietnamese and other southeast Asian refugee groups resemble the position of African Americans, rather than that of whites.
denies the existence of racism. One consequence of the myth is that people often do not believe, or have difficulty believing, that Asian Americans—viewed as successful and industrious—are victims of racism. Accordingly, the public officials’ failure to make a racial reading of Truong’s victimization could also have stemmed from their adherence to the myth. If acceptance of the model minority myth explains the singular focus of the governmental response to Truong’s beating and the submergence of a racial analysis, then the response itself is white supremacist because it denies the role of racial hierarchy in the subordination of Asian Americans and other people of color.

Although the model minority myth likely explains the omission of a racial analysis in the governmental and gay and lesbian responses to Truong’s attack, essentialism also undoubtedly influenced the singular focus on sexuality. Despite the wide availability and compelling nature of the various internal critiques, many political activists and civil rights theorists continue to cling problematically to essentialism, either because they fail to comprehend or otherwise reject the premises of anti-essentialist criticism. With even

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88. See Chang, supra note 84, at 1264-65 (“The model minority myth plays a key role in establishing a racial hierarchy which denies the oppression of Asian Americans while simultaneously legitimizing the oppression of other racial minorities and poor whites.”).

89. See id. at 1260 (“The successful inculcation of the model minority myth has created an audience unsympathetic to the problems of Asian Americans. Thus, when we try to make our problems known, our complaints of discrimination or calls for remedial action are seen as unwarranted and inappropriate.”); see also Wu, supra note 85, at 246 (“There can be no appreciable racism against Asian Americans, because as the model minority myth posits, they all are well-off or have the ability to overcome discrimination.”).

90. See Chang, supra note 84, at 1260 (explaining that the model minority myth is a “tool of oppression” which “den[i]es the existence of present-day discrimination against Asian Americans” and “legit[i]mizes the oppression of other racial minorities and poor whites”).

91. See William N. Eskridge, Jr. & Sheila Rose Foster, Discussion of Same-Sex Marriage, 7 TEMP. POL. & CIV. RTS. L. REV. 329, 331 (citing panelist William N. Eskridge, Jr. who dismisses class and race critiques of same-sex marriage movement as “articulate but wrong”) (transcript of panel discussion); William N. Eskridge, Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment 82 (1996) (stating that author is “baffled” by feminist, anti-racist and poverty critiques of same-sex marriage); Catharine A. MacKinnon, From Practice to Theory, Or What Is a White Woman Anyway?, 4 YALE J.L. & FEMINISM 13, 20 (1991) (linking racial critiques of feminist theory with the “trivialization of the white woman’s subordination”).
greater relevance to the present discussion, however, the essentialist nature of the responses to Truong's beating is revealed in the legal strategies employed by an attorney, Russell Kerr, who represented Truong in a civil action to recover damages for injuries he sustained during the attack.92

In his civil suit, Truong brought claims for violation of California's civil "hate crimes" statute against the two actual attackers.93 His complaint also alleged that the other youths had a "special relationship" with him, which gave rise to a duty to intervene and prevent the attack.94 The particularities of Truong's "hate crimes" claim demonstrate how essentialism limits Kerr's view of the attack and, more generally, how essentialist conceptions of subordination also plague legal strategies and decision-making.

Kerr pursued the claim strictly as one resulting from a homophobic assault. Kerr logically concluded that homophobia influenced the attack due to its occurrence in a gay area, the sexualized language directed toward Truong, and the youths' confession to a homophobic hate crime. The factor of homophobia, however, should not preclude or eclipse a racial reading of the crime. In fact, the circumstances surrounding the case and the long history of anti-

92. Unless otherwise stated, all factual information regarding Truong's civil suit was obtained during a June 9, 1998 telephone conference I conducted with his attorney Russell Kerr. Kerr, Interview, supra note 63.
93. Kerr, Interview, supra note 63. California civil rights law provides that:
   All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. Cal. Civ. Code § 51.7(a) (Supp. 1988). The law also authorizes suits for damages for the injured party. See Cal. Civ. Code § 52(b) (Supp. 1988) ("Whoever denies the right provided by Section 51.7, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right . . . ."). Truong also pursued a claim of common law battery against the two assailants. Kerr, Interview, supra note 63. The particulars of that claim is not relevant to this discussion.
94. Truong argued that a special relationship was created as a result of the youths joining the two assailants as they journeyed to the beach to commit an act of oppressive violence and by their encouraging and watching the attack. Kerr, Interview, supra note 63. Under certain special circumstances, courts may impose tort liability on individuals who otherwise have no affirmative duty to act under the common law of torts. See W. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984).
Asian violence strongly suggest the operation of white supremacy in Truong's victimization. Nevertheless, Kerr is resolute in his belief that race was irrelevant to the attack, offering the following explanation for his dismissal of race: "they [the youths] did not go to 'Little Saigon' to select a victim; they went to 'Mountain Street Beach.'" Kerr's comments dramatically portray the essentialist treatment of race and sexuality in the Truong case, legal theory and litigation. To Kerr, racism and homosexuality are not simply distinct and unconnected in a theoretical or abstract sense; they also resist convergence physically and geographically. Under Kerr's telling observation, no potential racial victims populate the "gay" Mountain Street Beach, and no targets of homophobia are located within the "colored" Little Saigon. Ultimately, Kerr's analysis erases gay, lesbian, bisexual and transgendered people of color, a population of which his client is possibly a member. Kerr's reasoning also constructs homosexuality and gay geographic "spaces" as white and people of color and spatial communities of color as heterosexual.

Kerr's essentialism is also troubling because it ignores the very history of gay and lesbian politics, through which people of color have recognized and resisted multidimensional oppression. For example, New York City's "Stonewall Riots of 1969," which many scholars point to as a catalyst for the modern "gay rights movement," began when a group of Puerto Rican, black and poor gay, lesbian, transgendered and gender non-conforming individuals resisted
the repeated physical and other forms of harassment they endured from local police. 98

On the particular evening of the riots, police, as they had often done on prior occasions, "raided" the Stonewall Inn (a gay bar) to harass patrons and to arrest individuals, charging them with "lewdness" or "solicitation." 99 People of color, women, the poor and the transgendered were often targeted for arrest and harassment. 100 The oppression that these individuals faced was undeniably multidimensional in nature—resulting from interwoven gender, race, sexuality and class hierarchies. 101 The subordination of people of color by the New York police was a manifestation of sexualized racism: racial and sexual hierarchies rendered them vulnerable to police abuse and constructed their sexual identity as particularly offensive and improper. Although gay, lesbian, bisexual and transgender statuses were generally deemed transgressive and intolerable by the officers, subordinate racial status separated people of color from white gays, lesbians, and bisexual and transgendered individuals. The disparate treatment of gays, lesbians, bisexuals and the transgendered of color suggests that the transgressive sexual practices of people of color might be perceived as particularly deviant and threatening to heterosexual normalcy, a result that is consistent with the legacy of negative stereotypification of the sexuality of people of

98. See Arriola, supra note 97, at 33 ("The Stonewall Riots erupted ... when an unlikely group of revolutionaries, a few Black and Puerto Rican drag queens and butch lesbians, turned a routine bar raid into a street fight with the local police."). For a general account of the riots, see D'Emilio, supra note 97, at 231-33.

99. See Arriola, supra note 97, at 73-74 (discussing the patterns of harassment which took place in New York City gay bars). As Arriola observes, the most minimal behavior qualified individuals for arrest. Id. at 74-75 ("[T]he police would shut down gay bars that allegedly permitted their patrons to flirt, hold hands, kiss, hug, and dance with each other, all in violation of lewd conduct and solicitation statutes.") (citing Eric Marcus, Making History: The Struggle for Gay and Lesbian Equal Rights, 1945-1990, at 64, 75-76 (1992); see also Steven A. Rosen, Police Harassment of Homosexual Women and Men in New York City 1960-1980, 12 Colum. Hum. Rts. L. Rev. 159 (1981)).

100. Arriola, supra note 97, at 74 ("There was an unspoken agreement to arrest transvestites and lesbian butches ... "); id. at 76 (observing that black Puerto Rican patron, Rey Rivera, "was targeted for harassment both as a cross-dresser and as a black Hispanic").

101. Id. at 76 ("The events at the Stonewall Inn in 1969 remind gay people of the need to be wary of goals and strategies that ignore the realities of racism, classism, and sexism in the lesbian and gay worlds.").
Thus, the Stonewall rioters, these early radicals from gay and lesbian communities and communities of color, responded to a multidimensional system of sexualized racial violence and harassment directed toward them by the "protective" arm of the state. A "racial" reading of the Stonewall Riots provides an historical context for the problem of violence against gay, lesbian, bisexual and transgendered persons of color; this historical framework problematizes an essentialist interpretation of Truong's victimization that leaves no room for a conclusion that white supremacy influenced the commission of the attack.

Thus far, my analysis has focused on the inefficiencies associated with the responses to Truong's attack by legal actors and, to a lesser extent, the predominately white gay and lesbian community. Given the many racial dimensions of the crime, however, one should also expect a significant presence of anti-racist activists and people of color reacting to the crime. The only visible anti-racist involvement in the politicization of Truong's crime was by a few members of the Asian American community, including members of Truong's family. The (heterosexual) Asian American responses to the crime exhibit the same troubling adherence to an essentialist conceptualization of oppression that plagues the dominant white response. While several Asian Americans rightfully asserted that the attack was racial in nature, at times they treated race as an exclusive feature of Truong's victimization. For example, in response to portrayals of the attack as a "homophobic" crime, Quat Truong, the victim's 35-year-old nephew complained:

Everyone is using that fact that he was in Laguna Beach at the time to accuse him of being gay. I think it had to do with his being Asian. I think they saw that he was different, not because they thought he was gay, but because they saw that he was not white.

The nephew's comments indicate that he was either trying to "defend" his uncle against allegations that he was

102. See infra pp. 79-96 (discussing the construction of people of color as sexually deviant).

103. See, e.g., Costa Mesa, Asian-Americans Organize AWARE, L.A. TIMES, Sept. 29, 1993, at B4 (reporting that Asian Americans "believe Truong was also targeted for assault because of his race").

gay—obviously a heterosexist mission—or to unveil the racial dimensions of the crime, or both. Under either interpretation, however, the nephew clearly attempted to sever homosexuality from Asian American status. The nephew’s invocation of a “racial” explanation for the act of oppressive violence depended upon or compelled (he hoped) the negation of the crime’s homosexual nature. In this sense, anti-racist advocacy is heteronormative; it is conditioned upon the absence, submergence or “closeting” of homosexuality. Viewed within a larger social context, the nephew’s comments reinforce the invisibility of gays, lesbians, bisexuals and the transgendered within Asian American communities.¹⁰⁵

The heterosexual Asian American and white gay and lesbian responses to the Truong’s attack evince an essentialist conceptualization of oppressive violence because both of these marginalized communities attempted to conceal important dimensions of the assault. Thus, while their activism helped to politicize Truong’s assault, both communities engaged in the problematic essentialization of

105. See generally ASIAN AMERICAN SEXUALITIES, supra note 96; A LOTUS OF ANOTHER COLOR: AN UNFOLDING OF THE SOUTH ASIAN GAY AND LESBIAN EXPERIENCE (Rakesh Ratti ed., 1993). Subsequent to Truong’s victimization, Peter Pham, a young Asian American filmmaker, attempted to conduct research on the attack for a documentary on Asian American gays, lesbians, bisexuals and transgendered persons. See Mark Chalon Smith, Filmmaker Has Taken on a Taboo Subject, L.A. TIMES, May 22, 1993, at F2. Pham claims that his project met resistance from the Vietnamese-American community and from Truong’s family. Id. (“[T]he Vietnamese community hasn’t been supportive or responsive. He (Truong) wouldn’t even talk to me, [sic] his family didn’t want him to.”) (quoting Pham). Id. Despite the racial interpretation of the crime offered by some members of the Asian American community, the numerous journalistic accounts of the crime muffled or ignored this racial discourse, focusing almost exclusively on the crime’s sexual dimensions and the activism of (white) gays and lesbians. Furthermore, due to the crime’s “homophobic” nature, many Asian Americans, acting on heteronormative visions of racial status, were likely unable to perceive the crime as an act of racial aggression, thus contributing to an absence of visible racial activism surrounding Truong’s assault. Nevertheless, some Asian Americans persisted in believing that the crime was racially motivated. In fact, in response to Truong’s attack and to other perceived incidents of racial discrimination and harassment, a group of Asian American activists in Orange County formed an anti-racist organization to monitor discriminatory police practice in Asian American communities and to challenge other acts of anti-Asian bigotry. See Mesa, supra note 103, at B4 (reporting formation of AWARE, the Alliance Working for Asian Rights and Empowerment and citing Truong’s beating as the type of incident to which the group would respond).
identity and oppression that contributes to the invisibility of gays, lesbians, bisexuals and transgendered people of color. Yet, even as they differed in their reading of the crime, both communities experienced the assault as an act of oppression. Despite the narrow interpretation Asian Americans and gay activists attached to the crime, Truong's victimization engendered multidimensional harms: it delivered a message of inferiority and domination to Asian American and gay and lesbian communities (and the various intersections of these populations). The attack, consistent with the nature of oppressive violence, deployed terror and the fear of future violence to reinforce hierarchical social relations constructed by white supremacist and heterosexist ideologies. Thus, the actual multidimensional nature of this crime remained unaffected by the narrow constructions it received.

2. Racial Patterns in Statistical Studies of Oppressive Violence. The foregoing analysis provides a qualitative examination of violence against gay, lesbian, bisexual and transgendered people of color that unveils the multidimensional nature of systems of oppressive violence. Existing statistical studies of such violence also suggest that oppressive violence involves a complex fusion of homophobia, racism, patriarchy and class domination. Before I examine this data, I note from the outset that there are only a limited

106. Furthermore, it is important not to be misled by the Asian American response to Truong's assault. Typically, homophobic victimization does not garner the attention of anti-racism. In the Truong case, this attention, to the extent that it was given, was often precipitated on the submergence of homosexuality.

107. See Jeordan Legon, Beating Has Gays Feeling Vulnerable in Once-Safe Haven, ORANGE COUNTY REG. (Cal.), Jan. 18, 1993, at B4 (reporting fear in the gay and lesbian community as a result of the attack); Mesa, supra note 103, at B4 (forming of anti-racist group indicating Asian American community touched by the crime).

108. That both communities were terrorized by the attack suggests a possible basis for communities of color and gay and lesbian communities to form coalitions to combat oppressive violence. The respective devaluation of gay rights and anti-racism by communities of color and gay and lesbian communities, however, precludes such collective action from occurring. See Hutchinson, supra note 2, at 643 (arguing that coalition politics could result from a multidimensional construction of equality); see also SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS (1994) ("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.").
number of empirical analyses of homophobic violence, despite the politicization of this violence in gay and lesbian communities and the efforts of several anti-violence organizations to collect such data. An even smaller number provides information regarding the race of the victims and assailants, due in part to the failure of gay and lesbian politics to address issues of racial subordination and of anti-racist organizations to confront homophobia. Furthermore, when researchers investigate homophobic violence, their data may not provide a representative sample of the gay, lesbian, bisexual and transgendered community because many victims are “closeted” and, therefore, fail to report their victimization. The general invisibility of

109. As Gary David Comstock observes:

[The information [regarding homophobic violence] provided by the gaylesbian and mainstream media has been primarily anecdotal and descriptive; the political analyses and social commentaries written by lesbians and gay men and other writers have tended to discuss single incidents and to make general observations; and the social sciences have noticed anti-gay/lesbian violence as one of many problems faced by lesbians and gay men without giving it singular attention.] Comstock, supra note 61, at 32.

110. See Valerie Jenness & Kendal Broad, Hate Crimes: New Social Movements and the Politics of Violence 49-108 (1997) (discussing the politicization of oppressive violence within gay and lesbian communities and efforts to compile data regarding such violence).

111. Valerie Jenness and Kendal Broad have studied several organizations formed to combat homophobic violence. They conclude that the general omission of issues of racism (and religious bigotry) in gay and lesbian politics has affected the movement’s response to homophobic violence in at least three ways:

First, none of the antiviolence projects in our sample identify as an organization of and/or for gays and lesbians of color. Second, while addressing the problem of hate-motivated violence against gays and lesbians, only rarely do these organizations speak to the issues of racism and anti-Semitism and how they provide an institutional and cultural context for the victimization of gays and lesbians of color, as well as gays and lesbians who identify as racial and/or ethnic minorities. Third... although some of these organizations sponsor select activities for people of color and acknowledge a political concern for people of color, very few enact corresponding activism or tailor their message to gays and lesbians of color.

Jenness & Broad, supra note 110, at 55 (internal footnotes omitted); see also Kevin T. Berrill, Anti-Gay Violence and Victimization in the United States: An Overview, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men 29 (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter Hate Crimes] (“Additional research with larger and more representative samples of lesbians and gay men clearly is needed to assess the relationship between membership in minority racial and ethnic groups and the risk of anti-gay violence.”).

112. See Comstock, supra note 61, at 32 (“Because lesbians and gay men
people of color means that their experiences are even more unrepresented in these data.\textsuperscript{113} Many gays and lesbians, moreover, distrust law enforcement due to a history of victimization and harassment by police officers and, thus, often do not report such violence to law enforcement officials.\textsuperscript{114} As a consequence, statistics compiled by police departments may distort the magnitude of homophobic brutality.

Conscious of these methodological difficulties, the remaining portion of Part II tentatively examines existing empirical studies of homophobic violence in order to uncover racial patterns in such violence. These data suggest that race might increase the vulnerability of gays, lesbians, bisexuals and the transgendered of color to homophobic violence and subject them to additional harassment and further abuse by police officers when they report their victimization.

One of the most comprehensive studies of homophobic violence was conducted by Gary David Comstock.\textsuperscript{115} The Comstock Survey compiles the results of a survey of 291 gays and lesbians of different class and racial backgrounds.\textsuperscript{116} Participants in the survey responded to a series of questions regarding their experiences with homophobic violence that vary in their degree of visibility, they comprise a population that cannot be sampled representatively.”); Berrill, supra note 111, at 39 (arguing that because “many lesbians and gay men, fearing hostility and discrimination . . . conceal their gay identities” existing surveys do not provide a representative sample of the gay and lesbian community).

113. See COMSTOCK, supra note 61, at 32 (arguing that surveys of persons who have access to gay and lesbian institutions are “not likely to reach lesbians and gay men who do not associate openly with other lesbians and gay men or black, [H]ispanic, and other ethnic people who are marginalized even within lesbian/gay communities”); Berrill, supra note 111, at 39 (arguing that surveys of homophobic violence do not include adequate numbers of “people who are closeted, disabled, economically disadvantaged, elderly or very young, members of racial minority groups, or living in rural settings,” and concluding that “in most surveys that provide[ ] demographic data, a disproportionate number of those sampled were White, male, highly educated, and of middle income”).

114. See COMSTOCK, supra note 61, at 158-59 (discussing under-reporting of homophobic violence due in part to fear of hostility from police); Kevin T. Berrill & Gregory M. Herek, Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy, in HATE CRIMES, supra note 111, at 294-95 (same).

115. See COMSTOCK, supra note 61. Hereinafter, the text of this Article refers to Comstock’s research as the Comstock Survey.

116. COMSTOCK, supra note 61, at 32.
violence. The survey also compiles the results of thirty-four other studies of homophobic violence. The Comstock Survey presents its results in two broad categories: "general" and "specific" violence. The general violence category gathers information based on participants' responses to a single question generalizing all incidents of violence (e.g., "Have you been assaulted because you are lesbian or gay?"), or by collapsing together and summarizing answers to a series of questions regarding particular kinds of assaults (e.g., "Have you ever been raped, robbed, or beaten because of your sexual orientation?"). The "specific violence" category presents data detailing the percentage of individuals who have experienced certain subcategories of violence and harassment, such as assaults, rape and vandalism; in the specific category (unlike the general category) the data for the subcategories of violence remains disaggregated.

Both the general and specific violence categories demonstrate racial patterns. Under the general violence category, for example, the Comstock Survey finds that 58% of lesbians of color compared with 41% of white lesbians reported victimization; among men, 70% of men of color and 59% of white men reported victimization. Thus, when asked whether they have experienced homophobic violence generally, a higher percentage of persons of color responded affirmatively. The subcategories or specific categories contain shifting results. In some categories, a higher percentage of people of color experienced such violence; in other categories, the rate of victimization was greater among whites. Still in other subcategories, the rate of victimization was equal. Overall, lesbians of color and

117. See id.
118. Id.
119. See id. at 34.
120. Id. at 34.
121. See id. at 38. Comstock includes eight categories of violence in his survey: chase, thrown object, beating, vandalism, robbery, rape, use of weapon and spitting. See id. at 42.
122. See id. at 37, 146.
123. Although Comstock does not draw any hard conclusions regarding the higher overall rate of victimization for people of color, he suggests that it may result from the fact that people of color generally are disproportionately the victims of violence. See id. at 55; see also Berrill, supra note 111, at 29 (drawing the same conclusion).
124. See Comstock, supra note 61, at 42-43. For example, a greater number
white gay men reported higher rates of victimization in the various subcategories. These data may mean that lesbians of color and white gay men report a greater breadth of assaults. Comstock, however, fails to account for the differences between the general and specific categories. In particular, Comstock does not state whether white male participants (who, overall, reported a lower level of victimization) had higher rates of violence within the subcategories because certain individuals suffered multiple attacks or because the attacks they experienced involved combinations of offenses in the various subcategories.

Other studies support Comstock's finding that people of color experience homophobic violence in rates exceeding those of whites. While these studies tentatively support a finding that race subjects people of color to higher rates of anti-gay/lesbian violence, more research is needed due to the methodological difficulties associated with gay and lesbian surveys and because the number of studies that have provided racial data remains too small to draw any final conclusions. Nevertheless, even if statistical data ultimately prove that race does not subject people of color to greater victimization rates, racial hostility will still likely play a role in precipitating individual acts of sexualized violence.

The Comstock Survey also details and documents the tense relationship between law enforcement and gay, lesbian, bisexual and transgendered communities. Police officers and the courts have historically been indifferent to or even active participants in the marginalization of gays and lesbians through oppressive violence. Comstock confirms

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125. See id.
126. See COMSTOCK, supra note 61, at 197 & n.59; Berrill, supra note 111, at 29; Beatrice von Shulthess, Violence in the Streets: Anti-Lesbian Assault and Harassment in San Francisco, in HATE CRIMES, supra note 111, at 70. Comstock observes that one study contradicts the finding of greater rates of victimization among people of color. See COMSTOCK, supra at 37. Comstock, however argues that this study was conducted when gays and lesbians were less willing to come out of the closet and that it also failed to include subcategories of violence. See id.
127. For example, regardless of statistical trends, it remains possible to offer a racial interpretation of Truong's attack. See supra pp. 23-26 and accompanying notes.
128. See COMSTOCK, supra note 61, at 152-62.
129. See id. See also Berrill & Herek, supra note 114, at 293-95 (discussing "secondary" victimization of victims of homophobic violence by police and
this history of hostility with statistical data. Specifically, the Comstock Survey finds that 73% of the victims of all forms of homophobic violence declined to report the incidents to police, while 58% of victims of more graphic attacks declined to report the incidents. Other surveys confirm these results.

The alarming implications of these data increase when the findings are controlled for racial backgrounds. In particular, 82% of victims of color, as opposed to 72% of white victims, did not report their victimization to police.

The Comstock Survey also examines police responses to reports of homophobic violence, categorizing the victims' descriptions of police reactions as "helpful, courteous," "indifferent," "hostile," "physically abusive," and "competent." These data suggest that a higher percentage of gays and lesbians of color than whites experience harassment and abuse from police when they report incidents of homophobic violence. Specifically, 42% of people of color, compared with 16% of whites, described police responses as "hostile"; 8% of people of color, compared with 3% of whites, described police responses as "physically abusive," and 17% of people of color, compared with 65% of whites, described police responses as "helpful, courteous."

The racial patterns in these data confirm a history of particularized hostility between gays, lesbians, bisexuals and the transgendered of color with law enforcement (a history evidenced by courts). Among the most pernicious examples of the institutionalization of heterosexism in the law is the "homosexual panic defense." Under this defense, defendants charged with murdering a gay, lesbian, bisexual or transgendered person can seek to have the charge reduced to manslaughter by arguing that the victim made a sexual "advance." For a criticism of this defense, see Gary David Comstock, Dismantling the Homosexual Panic Defense, 2 LAW & SEXUALITY 81, 86-89 (1992); Comment, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 CAL. L. REV. 133 (1992).

130. See COMSTOCK, supra note 61, at 158. The rate of non-reporting of violent crimes in the general population is 64%. See id. at 158-59.

131. See id. at 158.

132. See id. (discussing other findings).

133. See id. at 159. The results for victims of serious forms of violence were roughly equal among people of color and whites, 59% and 58%, respectively. See id.

134. Id. at 160.

135. Id. Totals exceed 100% because "some respondents reported more than one incident." Id. (Table C.3). Results in the "indifferent" category were roughly equal, with 67% of people of color and 68% of whites describing the police response as such. See id.
the Stonewall Riots136) and affirm the general tension between communities of color and the police.137 These findings also demonstrate the importance of implementing anti-heterosexist agendas within critical race theory and other forms of anti-racist discourse and placing anti-racist politics within gay and lesbian liberation discourse. For example, if anti-racism and gay politics seek to challenge police insensitivity and hostility directed toward all members of their respective communities, then they must recognize and confront the ways in which race and sexual oppression interact to shape oppressive police conduct.138

The foregoing discussion has uncovered the multidimensional nature of oppressive violence and the use of sexualized racial oppression to dominate and marginalize gays, lesbians, bisexuals and the transgendered of color. The synergistic relationship between gender, class, sexuality and racial hierarchy sustains systems of oppressive violence, shapes the often negative responses of law enforcement to such brutality, creates harms that paralyze and reinforce the domination of multiple oppressed communities, and treats the transgressive sexual identities of gays, lesbians, bisexuals and the transgendered of color as particularly harmful, threatening and undesired. Given the "collusion" of racism, homophobia and patriarchy in the brutalization of people of color, anti-racist legal theorists and political activists should pay close attention to the role of heterosexism (and other forms of exclusion) as an institutional source of subordination; they should also advocate pro-gay and lesbian legal and policy reforms. Yet, as Part II

136. See supra pp. 29-31.
138. Cf. Hutchinson, supra note 2, at 637-38 ("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 analyze and confront racial and class subordination.").
reveals, anti-racist political activists and legal theorists often omit an examination of heterosexism in their work or approach the issue of gay and lesbian equality with ambivalence or skepticism. Consequently, their activism and theories, in direct opposition to the inherent goals of anti-racism, fail to counter the perpetuation of racial subordination—when it occurs through systems of homophobic racial violence and discrimination. Because these theorists and activists, however, have responded vigorously to systems of heteronormative racial violence, they have constructed a heteronormative and discriminatory racial discourse, in which heterosexual status (or the submergence of homosexuality) serves as a prerequisite for anti-racist advocacy.\(^\text{139}\)

II. HETERONORMATIVITY AND ANTI-RACIST DISCOURSE

A. Anti-Racist Political Discourse

Despite the reality of homophobic racial oppression, anti-racist legal theorists and political activists have generally failed to engage in a substantial critique of heterosexism.\(^\text{140}\) Manifestations of the marginalization of homosexuality in anti-racism range from outright homophobia\(^\text{141}\)

\(139\). See infra pp. 79-96.

\(140\). There are, of course, numerous exceptions to this statement, which counter a popular myth that people of color are more homophobic than whites. See BELL HOOKS, Homophobia in Black Communities, in TALKING BACK: THINKING FEMINIST, THINKING BLACK 120 (1989) (analyzing and criticizing homophobia in black communities); CORNEL WEST, RACE MATTERS 88-89 (1994) (criticizing homophobia within black communities); Harlon L. Dalton, Aids in Blackface, 118 DAEDALUS 205 (1969) (same); Holly Morris, Civil Rights Leaders Back End to Military's Gay Ban, ATLANTA J. & CONST., July 1, 1993, at C8 (reporting support by several racial civil rights groups of gay and lesbian efforts to desegregate military); Deb Price, Japanese-American Group Backs Gay Marriages, STAR TRIB., Oct. 5, 1994, at 4E (reporting support for same-sex marriage by Japanese-American civil rights group); Lena Williams, Blacks Rejecting Gay Rights as a Battle Equal to Theirs, N.Y. TIMES, June 28, 1993, at A1 (noting support of gay rights by Coretta Scott King, Jesse Jackson and NAACP); id. (reporting survey indicating greater black than white support for end of military's homophobic policies).

\(141\). See Cheryl Clarke, The Failure To Transform: Homophobia in the Black Community, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 197-98 (Barbara Smith ed., 1983) (discussing outward homophobia and condemnation of gays and lesbians by black nationalist organization); Hutchinson, "Claiming"
to a general lack of commitment to sexual equality. The ambivalence or opposition toward "gay rights" among anti-racists reflects the heterosexism that exists inside and outside of communities of color.

Perhaps the most frequent manifestation of heteronormativity and subordination of gays and lesbians within anti-racist discourse occurs in attempts by people of color—primarily black heterosexual males—to critique comparisons of "racism" to "homophobia" or of "black" experience to "gay" experience. Proponents of the race-sexuality analogies, primarily white gay and lesbian civil rights activists and scholars, employ them hoping that they will garner empathy and greater support for gay and lesbian political agendas. Furthermore, the centrality of "race" in equal

and "Speaking" Who We Are, supra note 24, at 12-15 (analyzing explicit homophobia of Nation of Islam leadership).


143. See, e.g., sources cited supra note 141.


protection jurisprudence greatly influences the use of this analogy in legal scholarship and litigation. By using the analogy, legal theorists and attorneys wish to convince courts that the history of discrimination against gays and lesbians is sufficiently similar to that against people of color so as to warrant application of heightened judicial scrutiny to governmental classifications based on sexual identity. Furthermore, because much of the legal and political discourse on race, for historical and other reasons, is constructed around the history of black subjugation by whites, the analogy typically invokes blackness, rather than other disparaged racial statuses. Consequently, many of the responses to the analogies from people of color have been made by blacks.

As numerous scholars in feminism, anti-racism and gay and lesbian legal theory have argued, comparisons between oppressed groups distort and hinder, rather than aid, the respective goals of cross-cultural understanding and social justice. The analogies, for example, incorrectly treat their subject populations as mutually exclusive groups, thus erasing the experiences and compounding the invisibility of persons with multiple subordinated statuses. The analog-

146. See Janet Halley, Gay Rights and Identity Imitation: Issues in the Ethics of Representation, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 121 (David Kairys ed. 1998) ("[S]eeing to find room under the aegis of key equality precedent, gay and lesbian advocates often find themselves saying that sexual orientation is like race, or that gay men and lesbians are like a racial group, or that anti-gay policies are like racist policies, or that homophobia is like racism."); Sharon Elizabeth Rush, Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation, 13 HARV. BLACKLETTER J. 65, 76 (1997) ("[E]qual protection analysis revolves around comparing different types of discrimination to race or sex discrimination. At present, then, advocates for gay men and lesbians who attempt to secure heightened scrutiny for sexual orientation discrimination cases are pursuing both possibilities of comparing sexual orientation to sex and race.").


148. See Mary Eaton, Homosexual Unmodified: Speculation on Law's Discourse, Race, and the Construction of Sexual Identity, in LEGAL INVERSIONS, supra note 76, at 62 ("Black homosexual" is ... an oxymoron in an analogical comparison of blacks and homosexuals."); Hutchinson, supra note 2, at 583-84 (arguing that race-sexuality analogies erase gays, lesbians, bisexuals and transgendered people of color); Jane S. Schacter, The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents, 29 HARV. C.R.-C.L. L. REV.
gies also obscure varying distributions of power across social groups. For instance, claims by white gays and lesbians that they are “the same” as blacks masks the operation of racial privilege in white gay and lesbian experience. Under the analogies, a poor black heterosexual is similarly situated as an upper-class white gay male: both are marginalized.

Conservative white gay male scholar Andrew Sullivan, for example, has invoked the institution of slavery to draw support for political and legal efforts to legalize same-sex marriage. His analysis powerfully demonstrates the inefficiencies associated with the race-sexuality analogies. Sullivan 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 persons they loved. That right was often peremptorily 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.

Sullivan distorts the history and scope of racism by ignoring the fact that slave marriages had no legal effect. He also romanticizes the value of “marriage” to slaves who, “married” or not, remained the “property” of whites. As a

283, 297 (1994) (arguing that attempts to compare homosexuals and other groups “erases vertical differences within a group”); Grillo & Wildman, supra note 2, at 404 (“To analogize gender to race, one must assume that each is a distinct category; the impact of which can be neatly separated, one from the other. Whenever [this division] is attempted, the experience of women of color . . . is rendered invisible.”).

149. See Grillo & Wildman, supra note 2, at 401 (“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.”); Hutchinson, supra note 2, at 631 (noting that proponents of race-sexuality analogies “ignore a legacy of racial and class hierarchy—of racial and economic privilege and subordination”); Schacter, supra note 148, at 297 (observing that attempts to compare homosexuals and other groups “erases ‘horizontal’ differences across the spectrum of legally protected groups”).

150. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 154 (1995). Interestingly, Sullivan’s “comparison” is made in a point in his discussion when he expresses discomfort with the analogies. See id.

151. See HOOKS, supra note 3, at 43.
consequence of these distortions, blacks and whites—even slaves and white gay slave owners—falsely share an equal lot: they are both "oppressed." \(^1\) Sullivan's comparison also erases black gays and lesbians; he even explicitly compares "homosexuals" for whom "there was no slavery" to "black heterosexuals." \(^2\)

While most race-sexuality comparisons are not as dramatic as Sullivan's, they all suffer from the same pitfalls—the erasure of gays, lesbians, bisexuals and the transgendered of color and the obfuscation of the effects of racial subordination and racial privilege. Despite the persistence and virulence of heterosexist oppression, white gays and lesbians remain socially advantaged in a racially hierarchical society that privileges whiteness. By treating black subjugation (or other forms of racial domination) as the same as white gay oppression, the analogies mask the reality that social and economic power is racially distributed. As a result, many people of color have rightfully criticized the deployment of the analogies in gay and lesbian political discourse. \(^3\) To the extent that black critiques of race-sexuality analogies attempt to problematize the obfuscation of racial subordination inherent in these comparisons, the critiques serve the interests of progressive political and legal agendas. \(^4\)

Although the race and sexuality comparisons tend to blur the pervasive impact of racial subordination and privilege, an anti-essentialist critique of the analogies need not imply a diminution or wholesale rejection of the compelling goal of gay and lesbian equality. Yet, an analysis of the black responses to the analogies reveals that many of them are veiled disparagements of sexual equality made through the politics and rhetoric of anti-racism. \(^5\) The arguments of

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152. Sullivan's "comparison" actually goes farther than most "analogies" because he concludes that gays are "beneath," rather than similar to, blacks (or "slaves"). SULLIVAN, supra note 150, at 154.
153. See id.
154. See, e.g., sources cited supra note 144.
155. For an additional critique of the analogies, see Hutchinson, supra note 2, at 625-34.
156. VAID, supra note 145, at 187 ("[S]ome of the [black community's] anger at the analogies stems from homophobia."); Hutchinson, supra note 2, at 628 ("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 disapproval of homosexuality and an opposition to gay and lesbian rights.").
John Sibley Butler, a sociologist at the University of Texas and a commentator on racial discrimination, illustrate the often heteronormative (and heterosexist) nature of the black heterosexual critiques of the race-sexuality comparisons.

Butler criticizes the utilization of the race-sexuality analogy in the context of debates to repeal the military's discriminatory policies against gays and lesbians. 157 While a portion of his analysis legitimately challenges the obfuscation of race in the analogies, 158 Butler ultimately, though unnecessarily, dismisses the importance of gay, lesbian, bisexual and transgender equality. Butler's discussion marginalizes gay, lesbian, bisexual and transgender identity, politics and legal reform efforts in at least four ways: it de-legitimates gay and lesbian oppression as a "civil rights" issue, erases black gays and lesbians, dismisses the injurious effects of homophobia, and ratifies homophobic characterizations of gayness.

Butler marginalizes gay and lesbian politics in his veiled effort to place heterosexism and gay and lesbian oppression beyond the scope of remedial civil rights law and policy. Butler endeavors to effectuate this (unstated) goal by analyzing, then rebuking, comparisons of "blacks" and "homosexuals." Butler observes that usage of the race-sexuality analogies in gay and lesbian political discourse reflects the gay and lesbian community's search for a "metaphor" with which to place heterosexist oppression within a larger history of societal discrimination, thereby evoking support for gay and lesbian equality. 159 Butler oppo-

157. Butler, supra note 144. Much of the black criticism of the analogies and the deployment of the analogies occurred in the context of debates concerning the exclusion of gays and lesbians from the military. See Hutchinson, supra note 2, at 625-31 (discussing black criticism of analogies in military debates).

158. Butler, supra note 144, at 17 ("The idea of common oppression with blacks is not only fallacious, it trivializes the entire history of suffering that blacks have experienced because of their outward racial characteristics, characteristics which cannot be hidden as one goes through life.").

159. Id. at 13 ("The racial metaphor ... brings the issue of homosexuality into the arena of civil rights, or the right to be a part of the military regardless of one's background."). This observation is consistent with prevailing scholarly opinion. Butler also observes that analogies have been deployed historically by several oppressed groups seeking to obtain civil rights protection. See Butler, supra note 144, at 16 ("Whatever the movement, its leaders, activists, and commentators have always used appropriate metaphors to help people understand why it was important to change a policy.").
sees the use of racism as a metaphor for heterosexism and seeks to demonstrate the inappropriateness of such comparisons.

Butler argues that comparisons between race and "homosexuality" are misplaced because race is an imposed trait while sexuality is a chosen behavior: "For white gays or white lesbians to compare themselves with blacks as a racial group violates the rules of comparative analysis. One cannot compare an achieved behavior that runs through all racial groups with an ascribed characteristic like race."\(^{160}\) Butler's analysis, contrary to contemporary racial theories, treats race as a biological phenomenon, rather than a social construct developed by political, historical, economic and ideological forces.\(^{161}\) On the other hand, Butler seems to recognize some of the social dimensions of sexual identity; he describes "homosexuality" as something "achieved" and as a "lifestyle,"\(^{162}\) even as he narrowly limits its content (almost contradictorily) to sexual "behavior."\(^{163}\) In addition to characterizing sexual identity as chosen and behavioral, Butler also distinguishes homosexuality from race on the grounds that the latter is an "outward characteristic" while the former can be "hidden."\(^{164}\) Because, Butler argues, "homosexuality" is behavioral, heterosexism, unlike racism, falls outside of the scope of protective civil rights policy. Butler concludes that "homosexual behavior...belongs to the group of metaphors that address behavior" and that gay

\(^{160}\) Id. at 17 (emphasis added).

\(^{161}\) See sources cited supra note 82.

\(^{162}\) See Butler, supra note 144, at 17 ("It should be quite clear that persons of European, African, Asian, or Mongolian descent who are attracted sexually to other people of the same sex are just a diversity of people with a certain sexual lifestyle.").


\(^{164}\) Butler, supra note 144, at 17.
and lesbian equality "cannot be based on arguments about civil rights and the denial of civil rights." Thus, unlike progressive critiques of the race-sexuality comparisons, which unveil their inherent distortions and omissions, Butler's discussion ultimately rejects the comparisons because he cannot—or he refuses to—imagine how sexual freedom for gays and lesbians might clearly relate to a broader civil rights goal of racial justice. Butler thus posits a narrow vision of civil rights that marginalizes the experiences of persons who are not similarly situated with blacks. Butler's "distinction" of race from sexuality (a "reverse analogy") is problematic on several grounds.

First, Butler's distinction of race and sexuality seems contrary to the lived experiences of gay and lesbian people. While Butler concludes that "homosexuality" "differs" from race because the former is behavioral and concealable, it is precisely when "homosexuality" is practiced (or behavioral) that it becomes visible, "like" race, and a source of discrimination and subjugation. Furthermore, Butler's analysis problematically reduces race to a biological trait, thus obscuring its social, political, historical and cultural dimensions. Race, like sexuality, is experienced and practiced, a fact that Butler's biological framework ignores. Butler, for

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165. Id. at 19.
166. See infra pp. 60-67 (criticizing similar view of civil rights offered by critical race theorists).
167. Eaton, supra note 148, at 62-63 ("When the sexual aim finds expression . . . desire enters the world of others, and becomes a phenomenon to be witnessed and perhaps judged. It is not that activity distinguishes sexual identity from race; on the contrary, it is precisely when desire erupts into conduct that it becomes observable and, like race, a matter of visual appreciation or disdain.").
168. John A. Powell, The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun, 15 LAW & INEQ. 99, 102 91997) ("[R]ace is an experiential truth, and it is a categorical error to attempt to reduce the meanings and functions of race to scientifically verifiable measurements."). Critical race theory has been instrumental in forging the experiential conceptualization of race and examining how race creates diverse knowledge and perspectives. Robin D. Barnes, Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship, 103 HARV. L. REV. 1864, 1865 (1990) ("Critical Race Theorists are attempting to integrate their experiential knowledge, drawn from a shared history as 'other,' with their ongoing struggles to transform a world deteriorating under the albatross of racial hegemony."); Alex M. Johnson, The New Voice of Color, 100 YALE L.J. 2007, 2034 ("[L]ike Critical Feminist Theory, Critical Race theory is largely experiential, grounded in the experience of scholars of color as participants in a society whose history has been soiled by racism and racist acts toward people of color.").
example, asserts that "[a]lthough racial groups do organize for political purposes, the emphasis is on shared racial characteristics, not shared lifestyles." The shared physical "characteristics" of oppressed racial groups, however, have no meaning outside of a history of white supremacist domination and racial categorization. The importance of race results from the historical oppression of persons with "shared characteristics" (and their resistance to this subordination)—not from the "characteristics" themselves.

Although the particular "distinctions" Butler makes between homosexuality and blackness are subject to criticism, my aim here is not to locate similarities between the two categories. Given the essentializing nature of comparative and distinguishing approaches to race and sexuality and the diverse manifestations of oppression, the achievement (or denial) of gay and lesbian equality must not depend upon the perceived similarities (or differences) between the two categories. Sexual subordination inflicts a multitude of harms upon its victims and the larger society. These harms require the legal and political remedies provided by the existing civil rights framework—despite "differences" (or "similarities") between black heterosexual and white gay existence.

In addition to placing anti-heterosexism beyond the domain of civil rights policy, Butler's analysis also disparages gay and lesbian equality by marginalizing gays, lesbians, bisexuals and the transgerndered of color. Butler's attempt to "distinguish" blackness from "homosexuality," like the analogical approach employed by white gay and lesbian

169. Butler, supra note 144, at 17 (emphasis added).
170. See Jayne Chong-Soon Lee, Navigating the Topology of Race, 46 STAN. L. REV. 747, 777 (1994) ("Race cannot be self-evident on the basis of skin color, for skin color alone has no inherent meaning."). Butler's understanding of the meaning of race seems to shift in his analysis, however. While he describes race as simply a biological trait, his argument derives tremendous potency when he examines the historical subjugation of blacks, a history which renders "fallacious" any analogy of white gay experience to "black" experience. Butler, supra note 144, at 15-18 (describing how analogies obscure history of racism).
171. Hutchinson, supra note 2, at 633 ("[G]ay 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."); Schacter, supra note 148, at 315 (concluding that race-sexuality analogies do not "serve . . . the cause of gay civil rights").
172. See Hutchinson, supra note 2, at 633.
activists and theorists, treats blackness and "homosexuality" (and black subjugation and homophobia) as unconnected. As a result, Butler's framework erases black gay, lesbian, bisexual and transgender experience and places black heterosexuals and white gays and lesbians at the center of analysis. Ironically, Butler criticizes white gay and lesbian activists for omitting "black homosexuals" from discussion through their use of the analogies. 173 His own analysis, however, makes the same omission. For example, after locating "distinctions" between "homosexuality" and blackness, Butler concludes that the "issue of social change relating to homosexuality must be divorced from issues relating to the history of blacks in America." 174 This conclusion essentializes black identity by ignoring the multiplicity of experiences within black communities. Black gay experiences, for example, cannot be "divorced" from black history. Furthermore, Butler, at various points in his analysis, explicitly limits his observations to white gays and lesbians and black heterosexuals. 175 By erasing black gays and lesbians, issues of their multidimensional oppression, the relevance of gay and lesbian equality to "black" liberation, and a discussion of what the repeal of the military's anti-gay policy might mean for gays, lesbians, bisexuals and the transgendered of color are excluded from discussion.

Butler's elision of black sexual diversity is also demonstrated in his analysis of white gay social status. Butler examines white gay and lesbian racial privilege in order to question their claim of oppression and need for civil rights protection. 176 While the question of white privilege is vital

173. Butler, supra note 144, at 17. ("A related point is that when someone says blacks and homosexuals, they automatically leave out blacks who are homosexuals.").

174. Id. at 15.

175. Id. at 17 ("For white gays or white lesbians to compare themselves with the blacks as a racial group violates the rules of comparative analysis."); id. at 18 ("White homosexuals are well represented in all professions and have had the same opportunity as other white persons to take advantage of the varied existing opportunity structure."); id. at 14 ("When we say blacks in the military from an historical perspective, we are speaking of blacks who were male and non-homosexual . . . ").

176. Id. at 18 ("White homosexuals are well represented in all professions and have had the same opportunity as other white persons to take advantage of the varied existing opportunity structure."); id. at 17 ("[T]here were probably white homosexuals who opposed the [racial] desegregation of the military, no less than the rest of society. Let us not forget that J. Edgar Hoover, the head of the FBI and a reputed homosexual, was one of Martin Luther King's worst
for discussions of racial and sexual inequality,\textsuperscript{177} the inclusion of black gays, lesbians, bisexuals and transgendered individuals in Butler's analysis would have complicated his discussion regarding the relative privileges of white gays and lesbians and those of "blacks."\textsuperscript{178}

Butler, for example, observes that white gays and lesbians could always participate in the military, despite exclusionary policies, if they concealed their sexual identity; blacks, on the other hand, could not do so because "skin color" historically served as an open and visible barrier to their participation.\textsuperscript{179} Although these observations raise important questions about the existence of privilege within gay and lesbian communities, Butler's analysis ultimately suffers because he fails to integrate blackness and gayness and include black gays in his argument. As a result, Butler does not consider how the military's sexual discrimination—and heterosexist oppression in general—harms communities of color and creates uneven distributions of power and privilege among blacks. As his analysis subtly suggests, black gays may not benefit equally as black heterosexuals from "advancements" in racial equality because they often remain subject to homophobic racism and acts of heterosexist discrimination generally. The existence of heterosexist subordination may mean that black heterosexuals will have access to "privileges" (e.g., participation in the military) denied to black gays, lesbians, bisexuals and transgendered individuals.\textsuperscript{180}

\textsuperscript{177} See Hutchinson, supra note 2, at 642 (encouraging scholars to explore "differences" in gay and lesbian experiences supplied by racial and class hierarchies).

\textsuperscript{178} Butler's analysis of white gay privilege also ignores the injurious effects of homophobia. See infra notes 51-55.

\textsuperscript{179} Butler's analysis overlooks the possibility of black gay males serving in the military, perhaps because he believes that population of gays and lesbians is white, or that the population of black gays and lesbians is negligible. Butler, for instance, observes that white gays and lesbians have been able to participate in the military, despite the exclusionary policies, by concealing their sexuality. Butler, supra note 144, at 17. ("It is without a doubt that there were white homosexuals, albeit unknown, in the Navy [during its period of racial exclusion].") He, nevertheless, fails to make the same conclusion regarding blacks. See id. at 14 ("When we say blacks in the military from an historical perspective, we are speaking of heterosexual blacks who were male and non-homosexuals (if they were homosexual, then they were excluded from military service when it was instilled in the code of military justice).")

\textsuperscript{180} See Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988)
The recognition of power inequality within communities of color would have problematized Butler's questioning of gay and lesbian claims for civil rights protection based on the existence of white gay privilege. If black heterosexuals (and wealthy blacks and black males) remain (rightfully) entitled to civil rights protection, despite their possession of varying degrees of social privilege, then a more complicated argument is needed to deny civil rights to white gays and lesbians because they are white.\textsuperscript{181} Such an argument would have been difficult to construct; indeed, under Butler's reasoning no oppressed group could obtain civil rights protection because each group (including blacks) has "privileged" members. By excluding black gays, lesbians, bisexuals and the transgendered from his analysis, Butler avoids confronting the question of heterosexual privilege within black communities, an issue that undermines his questioning of the need for gay and lesbian civil rights based on the existence of privilege within gay, lesbian, bisexual and transgender communities.

Butler's analysis also disparages gay and lesbian politics and identity by dismissing the injurious effects of heterosexist oppression. Butler, as have other commentators, argues that gays and lesbians may evade discrimination by "hiding" their sexuality.\textsuperscript{182} As a result of this "ability," Butler argues, "white homosexuals are well represented in all professions and have had the same opportunity as other white persons to take advantage of the varied existing opportunity structure."\textsuperscript{183} Butler's argument is, on

\textsuperscript{181} See Hutchinson, supra note 2, at 628 ("[D]espite the existence of class stratification and privilege within black communities, all blacks . . . are entitled to civil rights protection due to their vulnerability . . . 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 those communities.").

\textsuperscript{182} Butler, supra note 144, at 17 (contrasting experience of "homosexuals" with that of blacks who suffer discrimination based on "their outward racial characteristics, characteristics which cannot be hidden as one goes through life"); see also Rogers, supra note 144, at A21 (arguing that gays and lesbians, unlike blacks, can "pass through life and selectively shield themselves from criticism, praise, negative attitudes or other perceptions").

\textsuperscript{183} Butler, supra note 144, at 18 (emphasis added); see also id. ("In
one level, legitimate because racial subordination, patriarchy and economic deprivation create diverging experiences of oppression within the populations of gays and lesbians and may shield male, upper-class and white individuals from certain forms of homophobic exclusion.\textsuperscript{8} Butler’s suggestion that heterosexism is without cost or that it does not limit “opportunity,” however, is severely problematic for several reasons. First, Butler’s analysis draws upon the positionality of white, wealthy and upper-class gays and lesbians. In a society where heterosexist oppression leaves individuals vulnerable to employment and housing discrimination and oppressive violence, persons with a certain degree of social and economic privileges will have a greater ability to live openly gay or lesbian lives.\textsuperscript{8} The greater ability of race and class-privileged individuals to express publicly their marginalized sexual identities has helped create a false—yet common—belief that all gays and lesbians are wealthy, powerful and white.\textsuperscript{8} Emerging statistical models and literature, however, refute this myth and demonstrate the relationship between gay and lesbian status and economic harm.\textsuperscript{8} Butler’s analysis likely reflects his adherence to this mythology.

Butler’s failure to recognize the injuries caused by America, [homosexuals] have served their country and have held the highest positions in government. This is especially true for those of European origin. Black homosexuals, like all blacks, have had a different experience in the workplace.

\textsuperscript{184} See Hutchinson, supra note 2, at 583 (“[B]ecause race and class also create privilege, these statuses may offer some insulation from forces of oppression.”).

\textsuperscript{185} See Hutchinson, supra note 2, at 605-08 (discussing positive correlation between ability to “come out” and economic privilege); Samuel A. Marcosson, The “Special Rights” Canard in the Debate Over Lesbian and Gay Rights, 9 NOTRE DAME J. ETHICS & PUB. POL’Y 137, 160 n.69 (1995) (same).

\textsuperscript{186} Hutchinson, supra note 2, at 605 (discussing “stereotype that ‘all’ gay men and lesbians are wealthy: relative to the ‘heterosexual’ population”); 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 Elliot, 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.”).

\textsuperscript{187} M.V. Lee Badgett, Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men, in HOMO/ECONOMICS: CAPITALISM, COMMUNITY AND LESBIAN AND GAY LIFE IN THE UNITED STATES 19 (Amy Gluckman & Betty Reed eds., 1995) (finding that gay and lesbian status negatively impacts income); Hutchinson, supra note 2, at 605-08 (same); Marcosson, supra note 185, at 160 n.69 (same).
heterosexism also glamorizes "the closet." Opponents of gay and lesbian equality often point to the ability of gays and lesbians to withdraw from society and live their lives in the shadows of secrecy and dishonesty as a source of privilege (a "privilege" not possessed by other oppressed groups).

While the closet does allow gay and lesbian individuals to evade some forms of discrimination, it is not a comfortable "safe haven" for any gay or lesbian individual, wealthy or poor; rather it causes many psychological injuries and precludes collective political action by gays and lesbians to end oppression. Furthermore, the closet is not a foolproof way to avoid heterosexist oppression. Many victims of brutal acts of homophobic violence, for example, are "closeted" but are victimized because they are perceived as gay or are discovered as being gay by their assailants. In addition,

188. See, e.g., Rogers, supra note 144, at A21 (arguing that gays and lesbians, unlike blacks, can "pass through life and selectively shield themselves from criticism, praise, negative attitudes or other perceptions").

189. See Gregory M. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 L. & SEXUALITY 133, 145-45 (1991) ("Lesbians and gay men probably maintain self esteem most effectively when they identify with and are integrated into the larger lesbian and gay community."); Schacter, supra note 148, 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."). The liberating aspects of "coming out," however, are often overstated by gay and lesbian theorists who ignore the reality of racism, patriarchy and class oppression within gay and lesbian communities. See Hutchinson, supra note 2, at 603 ("The coming out process . . . 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."); Introduction to A LOTUS OF ANOTHER COLOR: AN UNFOLDING OF SOUTH ASIAN GAY AND LESBIAN EXPERIENCE 12 (Rakesh Ratti ed., 1993) (relating experiences of South Asian gays and lesbians and observing that "[o]nce 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."); Marlon Riggs, Tongues Untied, in BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN 203 (Essex Hemphill ed., 1991) (black gay male observing that in dominant white gay and lesbian community of San Francisco, California he is "an alien, unseen, and seen, unwanted").

190. Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity, 36 UCLA L. REV. 915 (1989) (arguing that closet precludes political action by gay and lesbian individuals); Hutchinson, supra note 168, at 120-21 (discussing political and emotional costs of the closet); Schacter, supra note 148, at 299.

191. See supra pp. 35-36 and n.112 (observing that many victims of
the closet also hinders political action in communities of color; fearing disclosure of their sexual identities, gays, lesbians, bisexuals and the transgendered of color may decline from engaging in political action for their own unique needs. The closet, thus, precludes political action for the advancement of persons of color. Because Butler erases gays, lesbians, bisexuals and the transgendered of color from his analysis, he does not consider what injuries the closet might visit upon communities of color and anti-racist politics.

Finally, Butler marginalizes gays, lesbians, bisexuals and the transgendered by uncritically portraying, even ratifying, pejorative characterizations of homosexuality. Butler, for example, asserts that repealing the military's sexually discriminatory policies is a "complicated task," not only because homosexuality is a behavior ("unlike" race), but because "it is classified [in social science and medical literature] as a behavior that is deviant." Although gay and lesbian persons have suffered a history of abuse and discrimination from social scientists and the medical profession, contemporary reforms have led to some improvement in official policy towards homosexuality by mental health professionals. Butler's analysis, however, does not engage

homophobic violence are in the closet). Furthermore, Loc Minh Truong denied being gay but was the victim of a homophobic assault. Id.

192. See Cohen, supra note 3, at 371 ("[T]he level of silence among black lesbian and gay men is still an immediate and pressing concern for those organizing in the [black] community today.").

193. Butler, supra note 144, at 18 (emphasis added). Butler observes that "[homosexuality] has appeared in sociology textbooks in the same section as prostitution, alcoholics, and mental disorders" and that "[I]n psychiatry, homosexuality is regarded as a condition that can be treated, but the wish to change is the most important prerequisite for successfully changing the behavior." Id.

the mental health policies and literature that counter the "deviant" classification of homosexuality. He also fails to challenge or question the "deviant" categorization of homosexuality himself, instead letting it stand as implicitly valid and unassailable truth.

Butler also uncritically portrays homophobia within black communities. Butler argues that black (heterosexual) opposition to gay and lesbian equality should not "surprise" Americans:

This position is... not surprising to those who understand that there is a segment of blacks that is very conservative when it comes to behavior issues. The idea that blacks should support every change in behavior, simply because they have a history of being excluded based on race, is not only illogical but represents a misapplication of metaphor. Reading of the literature and attendance of major black institutions make clear that homosexual behavior is not accepted in the black community. This does not mean that there are no blacks who engage in this behavior. It simply means that the community as a whole does not accept this lifestyle; people have not stood up and legitimated it as an acceptable tradition.

Butler is correct in noting that homophobic attitudes exist among blacks—as in all other racial groups. Butler's argument, however, constructs a monolithically homophobic black community, obscuring the existence of dissenting points of view by blacks of varying sexual identities. Moreover, Butler does not offer any critique of black homophobia, instead leaving the impression that he accepts its legitimacy. Given the numerous ways in which Butler's argument minimizes the importance of gay and lesbian equality and the harms of heterosexist exclusion, the

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195. Butler, supra note 144, at 18 (emphasis added).
196. See sources cited supra note 141 (noting homophobia in black communities).
197. See sources cited supra note 140 (noting support for gay and lesbian equality by black political organizations and political figures and other racial civil rights groups).
uncritical presentation of societal homophobia in his analysis strongly suggests his ratification of heterosexist oppression.\textsuperscript{198} Butler's analysis, though framed as an anti-racist critique of gay and lesbian essentialism, ultimately endorses heterosexist oppression, marginalizes gay, lesbian, bisexual and transgendered people of color, and places anti-heterosexist agendas outside the scope of traditional civil rights policies.

Butler's work is reflective of a pervasive and harmful misconception in anti-racist thought and in communities of color—that combating heterosexism is unrelated to the pursuit of racial justice and that homosexual identity is unconnected to or inconsistent with "colored" status.\textsuperscript{199} Although ambivalence towards gay rights is by no means universal within—or limited to—communities of color and anti-racist organizations, homophobia and essentialist political agendas present special problems for oppressed racial communities. First, heterosexism divides communities of color politically and socially, often preventing collective action against racial oppression.\textsuperscript{200} Also, the heteronormative construction of anti-racist politics means that an entire body of sexualized racial oppression—directed toward gay, lesbian, bisexual and transgendered persons of color—does not receive the attention of (or receives insufficient and essentialist treatment from) anti-racist activists and theorists.\textsuperscript{201}

Perhaps the most damaging context in which the heteronormative construction of anti-racist political discourse operates is in the anti-racist responses (or lack of responses) to the epidemic of AIDS and HIV within communities of color. Blacks and Latinos are vastly over-represented in

\textsuperscript{198} At one point in his analysis, Butler concedes that the issue of civil rights for gays and lesbians "represents a special moral case." Butler, \textit{supra} note 144, at 19. The remainder of his analysis, however, overshadows, indeed undermines, this fleeting concession. Moreover, Butler does not even begin to spell out the elements of this "special moral case" nor does he conclude whether the "case" is strong enough to defeat societal opposition to gay and lesbian equality (which he does not challenge). Perhaps Butler's silence as to why gay and lesbian rights presents a special case reflects his ambivalence or opposition to this claim.

\textsuperscript{199} \textit{See generally} Hutchinson, \textit{supra} note 24 (discussing heterosexist nature of anti-racist politics).

\textsuperscript{200} \textit{See id.} (observing how Million Man March fractured over question of black gay sexuality); \textit{see also infra} p. 110.

\textsuperscript{201} \textit{See generally infra} pp. 96-100 (discussing problems of heteronormative anti-racism).
the number of persons with AIDS and HIV.\textsuperscript{202} Despite the devastation of AIDS within communities of color, anti-racist political organizations have largely ignored this issue, due to homophobia, heteronormativity and a false "belief" that the issues presented by AIDS lie outside the scope of "traditional" anti-racist politics.\textsuperscript{203} Anti-racist advocacy, however, is needed to obtain financial support for HIV prevention programs and for the provision of health care to persons of color (particularly the poor) with HIV and AIDS-related illnesses. These issues—equal access to health care and to preventative health counseling for persons of color—

\begin{footnotesize}
202. See Minorities Miss Out on AIDS Survival Increase, AIDS ALERT, May 1, 1997, at 56 (noting that blacks have AIDS at seven times the rate of whites and that Latinos have AIDS at three times the rate of whites).

203. Dalton, supra note 140, at 209-11 (observing that homophobia in black community precludes adequate responses to AIDS epidemic); HIV Prevention in People of Color: Hearings Before the Subcomm. on Human Resources and Intergovernmental Relations of House Comm. on Government Operations, 102 Cong. (1994) (statement of Martin Ornelas-Quintero, Director AIDS Programs, National Latino/a Lesbian and Gay Organization (LLEGO)) (arguing that homophobia prevents effective protection of Latinos and Latinas from AIDS and HIV); Paula C. Johnson, Silence Equals Death: The Response to AIDS Within Communities of Color, 1992 U. ILL. L. REV. 1075, 1079 (1992) ("[Due to homophobia] the response of minority civil rights organizations to the AIDS crisis has often been one of silence."); James Monroe Smith, When Knowing the Law Is Not Enough: Confronting Denial and Considering Sociocultural Issues Affecting HIV Positive People, 17 HAMLINE J. PUB. L. & POL'y 1, 13-14 (arguing that homophobia in black and Latino communities harms black and Latino persons with AIDS and HIV and prevents black and Latino communities from "owning" the HIV and AIDS epidemic); Katie Monagle & James Earl Hardy, Confronting the AIDS Crisis; Reactions from the Gay Community and the Minority Communities, SCHOLASTIC UPDATE, Feb. 22, 1991, at 6 ("[H]omophobia . . . in both the black and Hispanic communities has prevented many people even from acknowledging AIDS' existence."); Sheryl Gay Stolberg, Epidemic of Silence: Eyes Shut, Black America Is Being Ravaged by AIDS, N.Y. TIMES, June 29, 1998, at A1 (reporting that black homophobia precludes political responses to AIDS and HIV epidemic and reporting view of Urban League that AIDS is "outside of [the organization's] traditional purview") (quoting Lee Daniels, spokesperson for Urban League); Cynthia Tucker, Even Blacks Can Be Bigots, DENVER POST, May 23, 1998, at B7 ("[B]lack America pays a high price for . . . homophobia, in the advance of AIDS among blacks.").
\end{footnotesize}
are squarely within traditional anti-racist politics. Only a heteronormative construction of anti-racism could define AIDS and HIV-related health care issues as non-racial, given the harmful racial impact of the epidemic. The virtual silence of the anti-racist political community on the vital issue of AIDS and HIV serves as a troubling reminder of the heteronormative construction of anti-racist political discourse and the urgent need for multidimensional anti-racist political agendas.

204. See Cohen, supra note 3, at 375. As Cathy Cohen has argued: Because AIDS touches on, or is related to, so many other issues facing, in particular poor black communities—healthcare, poverty, drug use, homelessness, etc.—we might reasonably expect black leaders to 'use' the devastation of this disease to develop and reinforce an understanding of the enormity of the crisis facing black communities.

205. The omission of AIDS and HIV from anti-racist agendas is particularly devastating given the marginalization of people of color in AIDS-related and other gay and lesbian civil rights organizations and the general powerlessness of gays, lesbians, bisexuals and the transgendered of color. See, e.g., Cohen, supra note 3, at 365.

In the case of AIDS, without the support of established leaders and organizations in black communities, underfunded community-based education programs encounter limited success, facilitating the continued infection and death of black men, women, and children. Further, in the absence of political pressure from leaders, organizations, activists, and mobilized members of the black community the federal government is allowed to continue its shameful dealings, neglecting to provide the full resources needed to effectively fight this disease in black communities.

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Id. Hutchinson, supra note 2, at 619-35 (discussing marginalization of people of color in gay, lesbian, bisexual, and transgender politics); Valdes, supra note 1, at 354 n.1252 (discussing dissolution of “Queer Nation” movement over, among other things, “allegations of racism”); David W. Dunlap, Three Black Members
B. Critical Race Theory

Anti-racist legal scholarship, including critical race theory, also deploys a heteronormative conception of racial justice.\(^{206}\) Despite the prevailing heteronormativity in legal scholarship on race, critical race theorists have been at the forefront of the various internal critiques, including race-sexuality scholarship, which question traditional and essentialist methods for analyzing identity and oppression.\(^{207}\) Consequently, critical race theory has been receptive—even if sluggishly—to internal dissent, modification of theory, and accommodation of new voices.\(^{208}\) Consistent with its relative openness to evolution, the critical race theory movement has recently begun to “institutionalize” the race-sexuality critiques by incorporating issues of heterosexual oppression within academic conferences\(^{209}\) and scholarship.\(^{210}\) Though welcomed as a sign of progress, these recent overtures do not negate the overall heteronormative nature of the theory.

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\(^{206}\) Valdes, supra note 12, at 1332 (discussing omission of sexual identity issues in critical race scholarship).

\(^{207}\) See supra pp. 1-6 (discussing internal critiques of progressive social movements); see generally, Hutchinson supra note 15.

\(^{208}\) See Angela P. Harris, The Jurisprudence of Reconstruction, 82 CALIF. L. REV. 741, 767-71 (1994) (arguing that postmodernist currents of critical race theory, including race-gender critiques, contribute to “sophistication” of race scholarship).

\(^{209}\) During the 1997-1998 academic year, heterosexism was discussed at several race theory conferences, including the Critical Race Theory Workshop at Tulane Law School, the Critical Race Theory Conference at Yale Law School, the Mid-Atlantic People of Color Legal Scholarship Conference at Rutgers-Camden School of Law and the Western People of Color Legal Scholarship Conference at the University of Oregon School of Law.

\(^{210}\) Robert S. Chang & Jerome McCristal Culp, Nothing and Everything: Race, Romer and (Gay/Lesbian/Bisexual) Rights, 6 WM. & MARY BILL RTS. J. 229 (1997) (analyzing racial implications of Supreme Court's gay and lesbian jurisprudence).
1. Ambivalence or Opposition to Gay and Lesbian Civil Rights. Critical race theorists deploy a heteronormative conception of race when they (as do anti-racist political activists and commentators) dismiss the importance of sexual equality for gays, lesbians, bisexuals and the transgendered. A recent article by Roy Brooks, a prominent race theorist, illustrates how racial discourse may diminish the importance of gay and lesbian equality.

Brooks' analysis considers two opposing contentions—that race is an "under-inclusive" and "over-inclusive" concept. Brooks first responds to arguments that race is under-inclusive. According to Brooks, some social scientists contend that "the civil rights conception of race is too narrow because it necessarily looks at the cultural... experiences of social groups separately rather than jointly." These scholars, as Brooks construes their work, argue that "racial" categories should be defined by the common experience of cultural subordination. African Americans, Asians, women, the disabled, and homosexuals, for example, are "racially" identifiable in terms of their "outsider" status, in terms of their "otherness," and in terms of their common cultural experiences in relation to the socially dominant group in American society—namely, straight, able-bodied white males.

Brooks, however, cautions against a reconceptualized theory of race that would relate racial subordination to—or equate it with—other forms of oppression. Brooks offers several reasons for rejecting a "unifying" theory of oppression. First, Brooks argues that a "broader" definition of race, one that equates other forms of oppression with racism, would constitute a "monumental change in constitutional law by expanding the number of suspect classifications." Brooks claims that according the same level of scrutiny to non-racial and racial classifications would

212. Id. at 13 (citing RONALD TAKAKI, IRON CAGES: RACE AND CULTURE IN NINETEENTH CENTURY AMERICA 186 (1979); PAUL GILROY, THERE AIN'T NO BLACK IN THE UNION JACK: THE CULTURAL POLITICS OF RACE AND NATION 14, 17, 27 (1987)).
213. Id. at 12 (citing Anthony Platt, Rethinking Race, SOCIAL JUST., Spring-Summer 1993, at iii-v) (emphasis added).
214. Id. at 14.
“strain” the judicial system, causing a substantial increase in the amount of civil rights litigation. Brooks contends that judges would respond to growth in civil rights cases by erecting procedural barriers, such as “heightened pleading standards,” to the adjudication of discrimination claims. Brooks argues that such restraints would harm “African-Americans . . . more than any other ‘racial’ group, for litigation has been the traditional and often most effective vehicle used by African-Americans in the drive toward racial equality.” Finally, Brooks, like Butler, examines the “exceptional history” of blacks in America, contrasting black suffering from other forms of inequality. Brooks concludes that the unique experience of blacks “defies a unifying theory of subordination.”

Although I do not contest the anti-essentialist portion of Brooks’ argument, in which he criticizes arguments equating inter-group experiences, his thesis subsequently de-

215. Id.
216. Id.

218. See Butler, supra note 144, at 14 (discussing history of black subjugation). Brooks relies on Butler’s work to develop several themes in his analysis. See Brooks, supra note 211, at 13 n.17 and accompanying text (citing Butler for the proposition that use of race as metaphor for oppression is improper); id. at n.28 and accompanying text (citing Butler for the proposition that race-sexuality analogies distorted because gays do not suffer as the result of a visible, immutable characteristic); id. at n.51 and accompanying text (citing Butler for the proposition that use of race as a “metaphor” for other forms of oppression are imprecise).

219. Id. at 15-19.
220. Id. at 15.
221. I am not in complete agreement with Brooks’ interpretation of the progressive scholars he criticizes for purportedly seeking a “uniform” theory of subordination, in which intergroup differences are submerged. These progressive race critics, who seek a broader construction of race, one that accounts for particularities and interdependence of gender, sexuality and class, have not argued that subordination can be accurately described without accounting for differences. On the contrary, these scholars have been at the forefront of unveiling the diverse experiences within oppressed groups and across the social fabric of subordinate populations. See, e.g. Platt, supra note 213, at iii-iv (“Our understanding of race has a new richness and complexity when it is informed by an analysis in which class, race and gender are constitutive of the material relations of production and reproduction, when racism and sexism are understood as reciprocally determining processes, not simply a by-product of exploitation.”) (emphasis added); id. at iii (“[I]t is not enough to add gender and
values the importance of combating "non-racial" forms of subordination, thereby marginalizing anti-heterosexism as a broader civil rights and anti-racist goal.

Brooks' "cost-benefit analysis" of social justice, for example, implicitly devalues non-racial forms of oppression and treats them as separate from race. Brooks argues that courts should not recognize new suspect classifications, such as sexual orientation, because this development would unduly burden the judiciary to the detriment of blacks. Brooks, however, fails to state why the potential "harm" to the judiciary from expanded notions of equality would outweigh the benefits to those groups protected by this jurisprudential transformation. Furthermore (and more importantly), Brooks does not immediately consider how "black" liberation efforts might benefit from an expanded construction of justice, including the implementation of anti-heterosexist policies. In his move to guard black politics and anti-discrimination law from what he perceives as the encroachment of "other" progressive movements, Brooks blurs the connections between anti-racism and these movements.

Brooks also devalues "non-racial" oppression by directly questioning the importance of sexual equality as a civil rights goal. Brooks, for instance, offers the following observation concerning the protection of gays and lesbians as a marginalized class:

[I]t could... be argued that some classes "deserve" less protection than others or no protection at all. Some might argue... that group identification based on an immutable personal trait (e.g., skin color or gender) should enjoy greater protection than group

sexuality to class and race but... to uncover and explain their interdependence.

222. See Brooks, supra note 211, at 14.

223. Brooks also fails to explain how an expansion in civil rights would dangerously increase the volume of civil rights litigation, overwhelm the judiciary, and thus, impede the ability of blacks to pursue "equality." He also does not consider whether any additional judicial burden that might result from an expansion of civil rights doctrine could be alleviated by devoting greater economic resources to the judiciary. One might argue that an expanded notion of equal protection should generate a greater allocation of resources to enforce civil rights laws.

224. Brooks later analyzes differences within the black community, particularly those supplied by class. See Brooks, supra note 211, at 20-27. This analysis, however, does not refute his earlier questioning of gay rights. See infra pp. 66-67.
identification predicated on behavior (e.g., some forms of obesity or homosexuality). Even if a condition (say homosexuality) is immutable, should groups who can “pass” receive the same protection as groups who cannot “pass”?²²⁵

Although Brooks frames his analysis as a series of hypothetical arguments,²²⁶ his failure to respond to these “arguments” and his express desire to limit the number of constitutionally protected categories (including sexual identity) indicate that he likely agrees that sexual equality should have a subordinate role in civil rights jurisprudence, litigation and legal reform efforts. The passage immediately following the above-quoted text provides additional support for my reading of Brooks’ work. There, Brooks questions whether homosexuality (a “condition”) is an immutable characteristic like race and gender and “assuming that it is, whether the line between protected and unprotected classes should be based upon whether discrimination against a group is reasonable or unreasonable under the circumstances.”²²⁷ This passage suggests that Brooks believes discrimination against gays, lesbians, bisexuals and the transgendered might be “reasonable” under certain, unspecified

²²⁵. Id. at 15 n.28 (emphasis added). An interesting question raised by Brooks’ “passing” analysis is whether blacks who can pass should be denied civil rights protection. Furthermore, Brooks’ argument does not confront the hierarchal systems of race and sexuality that encourage “passing.”

²²⁶. These hypothetical arguments are also raised in footnotes. Their location, however, does not diminish their import.

²²⁷. Id. at 15 n.28 (emphasis added). This argument has the effect of biologizing race. See Christopher David Ruiz Cameron, How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, 85 CAL. L. REV. 1347, 1370 (1997) (“[T]he mutable-versus-immutable dichotomy ignores the persuasive argument...that even so-called ‘immutable’ characteristics such as race and sex are social constructs rather than anthropological or biological facts of life.”); Cheryl I. Harris, Whiteness As Property, 106 HARV. L. REV. 1709, 1739 (1993) (“The legal definition of race [during the eighteenth and nineteenth centuries] was the ‘objective’ test propounded by racist theorists of the day who described race to be immutable, scientific, biologically determined—an unsullied fact of the blood rather than a volatile and violently imposed regime of racial hierarchy.”); Chris K. Iijima, The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm, 29 COLUM. HUM. RTS. L. REV. 47, 51 (1997) (“Constructed race is not simply a biological and immutable attribute such as phenotype or skin color, but an unstable and decentered complex of social meanings constantly being transformed by political struggle.”).
circumstances. A conclusion that anti-gay and lesbian discrimination is "reasonable," under certain circumstances indisputably reflects heteronormativity: it portrays homosexuality as deviant and in need of discriminatory prescription and, by implication, depicts hetero-sexuality as "normal" and preferred.

A reading of Brooks' work as heteronormative is also supported by his subsequent devaluation of the contributions of the race-gender internal critiques. In a later article Brooks and co-author Mary Jo Newborn examine the contributions of critical race theory to racial legal scholarship and compare critical race literature to the work of traditional civil rights—or "reformist"—scholars. A portion of this article examines the work of intersectionality scholars and concludes that "intersectionality analysis has not contributed a perspective on Title VII employment discrimination claims that differs substantially from that offered by the reformists." Brooks and Newborn base their conclusion on the fact that prior to the groundbreaking work of Kimberle Crenshaw, which demonstrates how Title VII jurisprudence often fails to accommodate the experiences of women of color, "reformist" scholars had already developed the notion of "compound discrimination," which would permit race-gender discrimination claims by women of color. Intersectionality, however, offers much more than a new litigation-oriented civil rights paradigm. As Angela Harris observes, responding to Brooks and Newborn, "Crenshaw's concept of intersectionality brings a postmodernist skepticism about the transparency of language to bear on legal doctrine and social policy. In demanding a jurisprudence that can recognize women of color as proper legal subjects in themselves, Crenshaw destabilizes the familiar categories of 'race' and 'gender.'" Brooks and Newborn's constricted reading of intersectionality suggests a lack of appreciation of its theoretical observations—observations that transcend the particular boundaries of Title

229. Id. at 839.
230. See Crenshaw, supra note 9, at 139.
231. Brooks & Newborn, supra note 228, at 839.
232. Harris, supra note 208, at 768; see also supra pp. 10-17 (discussing contributions of intersectionality to race and feminist scholarship).
VII litigation—regarding the complexity of subordination and the need for more comprehensive and inclusive paradigms for conceptualizing and responding to oppression.

Thus, Brooks' arguments—though compelling to the extent that they embody anti-essentialist criticism—dismiss the general importance of sexual equality and the connections between sexual equality and racial justice. Accordingly, they have the effect of deploying a heteronormative vision of racial equality and excluding gays, lesbians, bisexuals and the transgendered from the protection of anti-racist law and politics and from the broader terrain of civil rights policies.

Ironically, while Brooks criticizes efforts to construct a "unifying" and essentializing theory of subordination, his own arguments reflect an essentialist view that racial subordination and sexual subordination are wholly independent forces. By questioning the need to implement vigorous anti-heterosexist policies, Brooks fails to recognize the importance of sexual freedom for communities of color. Because sexuality (and gender and class) serves as a mechanism for racial domination, anti-racist legal theorists should not seek to guard civil rights jurisprudence from the "intrusion" of progressive sexual politics or from the recognition of additional subordinated classes for heightened judicial protection. Rather, given the multidimensional nature of racial oppression and the existence of sexualized racism, anti-racist theorists should join efforts to inscribe progressive sexual politics into the language of civil rights jurisprudence. Brooks' analysis, however, leaves little (if any) space for progressive sexual politics in critical race discourse.

In addition to reflecting essentialism, Brooks' analysis encourages essentialism. Brooks argues that civil rights law should focus on differences between oppressed social groups. Attempts to draw similarities, Brooks claims, obscures historical and political particularities of inter-group experience.233 After making this anti-essentialist observation, Brooks questions the importance of according civil rights protection to groups whose experiences with subordination differ from those of blacks. In other words, Brooks criticizes arguments that "equate" black experiences with the subjugation of other oppressed groups, but he then

233. See Brooks, supra note 211, at 15.
posits a vision of civil rights protection that would seemingly limit civil rights protection (or at least the most strenuous protection) only to those groups who can accurately claim to be similarly situated with blacks (e.g., those whose discrimination is based on an "immutable" trait).\footnote{Id. at 15 n.28} A civil rights paradigm, as the one offered by Brooks, that limits heightened protection only to those groups having similar (or "the same") experiences as blacks, inevitably causes "non-black" groups to make analogies between black suffering and their own experiences. Thus, Brooks' vision of civil rights ultimately induces the very essentialism that he condemns.

While the first portion of Brooks' analysis addresses claims that race is an under-inclusive concept, the latter section of the article turns to the question of whether race is over-inclusive. Specifically, Brooks examines whether the traditional civil rights model, which analyzes race in isolation from other forms of subordination, creates a "superficially broad understanding of race" that obscures gender, class, sexuality and other internal differences.\footnote{235. Brooks, supra note 211, at 20.} It is in this portion of his analysis that Brooks first acknowledges and discusses the fact that communities of color are not monolithic\footnote{236. In particular, Brooks examines how class and economic deprivation creates varied experiences and needs among blacks. See id. at 20-27.} and that the varied experiences of persons within oppressed racial groups compel "a more complex understanding of race than has been the tradition in civil rights law."\footnote{237. Id. at 20.} Brooks, however, never connects or harmonizes his conflicting arguments that civil rights law often fails to recognize "internal" racial group differences with his suggestion that civil rights law should not include sexual identity as a protected category. Thus, Brooks leaves the impression that a subordinate role for gay and lesbian equality might be appropriate under and consistent with a

\footnote{Some might argue... that group identification based on an immutable personal trait (e.g., skin color or gender) should enjoy greater protection than group identification predicated on behavior (e.g., some forms of obesity or homosexuality). Even if a condition (say homosexuality) is immutable, should groups who can "pass" receive the same protection as groups who cannot "pass"?}
more "complex" formulation of race and racial justice. Because the vision of civil rights Brooks articulates is ambivalent toward (or even opposed to) having a central role for pro-gay and lesbian politics and theory, his model of equality provides a marginal space for gays, lesbians, bisexuals and the transgendered of color in anti-racist laws and politics.

2. Maintaining "Some" Distance Between Race and Sexuality. Even those critical race scholars who embrace gay and lesbian equality and seek to examine the connections between race and sexuality jurisprudence may distance, to some degree, race from sexuality. A recent article by Robert S. Chang and Jerome McCristal Culp, Jr. illustrates this point. In this publication, Chang and Culp take an insightful look at the Supreme Court's decision in \textit{Romer v. Evans}, in which the Court invalidated on equal protection grounds a Colorado constitutional amendment ("Amendment 2") that repealed and prohibited the enactment of state or municipal legislation or policies protecting gays, lesbians and bisexuals from discrimination. Chang and Culp seek to demonstrate that the \textit{Romer} decision and the underlying facts of the case have important racial dimensions. With this as their mission, the authors' work serves a compelling goal—ending the separation of race and sexuality discourse within critical race theory. Their

\begin{footnotes}
\footnote{238. A mere recognition of internal differences among oppressed racial groups does not necessarily mean that one would vigorously support "other" progressive social movements or the need to combat the systems of inequality that create these internal differences.}
\footnote{239. \textit{See generally} Chang \& Culp, \textit{supra} note 210.}
\footnote{240. 517 U.S. 620 (1996).}
\footnote{241. Amendment 2 provided:
\textit{No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.} Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance, or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.\textit{Romer}, 517 U.S. at 624.}
\footnote{242. \textit{See} Chang \& Culp, \textit{supra} note 210, at 234 ("[T]he simple truth is that \textit{Romer} is always and everywhere a case about race as well as being about the rights of gays, lesbians, and bisexuals.").}
\end{footnotes}
analysis, however, maintains some distance between race and sexuality, which limits their ability to unveil more completely the relevance of race in Romer.

Although Chang and Culp distance race from sexuality, they, unlike Butler and Brooks, do not marginalize or call into question the need for vigorous protection of gays, lesbians, bisexuals and the transgendered from heterosexist discrimination. Thus, their analysis does not produce the type of harms caused by the active devaluation and exclusion of anti-heterosexism within critical race theory. Nevertheless, the space the authors place between sexuality and race blurs their analysis of race in the context of heterosexist discrimination. Accordingly, my criticism here seeks to nudge the authors toward examining race and sexuality as interdependent forces rather than as close, yet distant, systems of domination.

In their analysis Chang and Culp contend that the Court ignored important racial factors that shaped the underlying controversy in Romer. Primarily, Chang and Culp charge the Court with improperly submerging race in its rejection of Colorado’s argument that civil rights protection for gays and lesbians amounts to “special rights.”

Chang and Culp assert that the “special rights” argument advanced in Romer has a pre-existing history in race-related civil rights cases, a history which the Court should have addressed to contextualize its refutation of the anti-gay “special rights” rhetoric deployed in Romer. While Chang and Culp convincingly unveil the Court’s obfuscation of race in its rejection of the “special rights” discourse, race maintains some “distance” from sexuality in their own arguments because they fail to consider how the “special rights” rhetoric in the sexuality context is itself a

243. See infra Part III.

244. See Chang & Culp, supra note 210, at 239-48. The Court swiftly refuted this claim, stating that “we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone.” Romer, 517 U.S. at 631.

245. Chang & Culp, supra note 210, at 245 (“The notion that the role of civil rights law is to create ‘special rights’ is a product of our jurisprudence on race.”).

246. Id. at 248 (“The power of the Court’s opinion in Romer would have been enhanced if the Court had been willing to put the special rights debate into a better moral and political framework that acknowledged the power of race to distort the truth.”).
racialized discourse, not simply a by-product of a seemingly "separate" or "parallel" jurisprudence on race. To develop this argument, I first examine the elements of the "special rights" discourse invoked in *Romer*, demonstrating how the "special rights" rhetoric in the anti-gay context is a narrative on the racial composition of gay, lesbian, bisexual and transgendered communities. I will argue, more specifically, that the "special rights" rhetoric in the gay and lesbian context effectively constructs gays and lesbians as white (and, by implication, people of color as heterosexual). I will then demonstrate how Chang and Culp's distancing of race from sexuality caused them to overlook the racialization of gays and lesbians through the "special rights" argument advanced in *Romer*.

The "special rights" depiction of gay rights has a notorious history in political and legal challenges to gay and lesbian inequality. According to the "special rights" discourse, gays, lesbians, bisexuals and the transgendered do not need civil rights protection because they lead comfortable lives, are wealthy and powerful, and have the ability to conceal their sexual identity and evade discrimination.

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247. See Schacter, supra note 148, at 293 ("'Special rights' has become the central slogan for the anti-gay movement, appearing regularly in the names of organizations opposing gay civil rights and in their media campaigns.").

248. See id. at 291-93 (observing that anti-gay rhetoric "depicts comfortable gay and lesbian lives").

249. See id. at 291-92 (arguing that "opponents of gay civil rights claim that gay men and lesbians are economically well-off and therefore do not need legal protection."). See also VAID, supra note 145, at 250-52 (discussing role of perception of gay wealth in anti-gay political campaigns); Hutchinson, supra note 2, at 605 ("Anti-gay and lesbian groups . . . have appropriated . . . surveys [purporting to demonstrate gay and lesbian wealth] in order to depict the gay and lesbian community as wealthy and privileged and, therefore, undeserving of civil rights protection.").


251. See Schachter, supra note 148, at 299 (discussing anti-gay "suggestion that gay men and lesbians can opt out of discrimination by staying hidden from public view"). Justice Scalia "bought" substantially all of the "special rights" arguments in his dissenting opinion. See *Romer*, 517 U.S. at 645 ("[T]hose who engage in homosexual conduct tend to . . . have high disposable income . . . [and] they possess political power much greater than their numbers.") (Scalia J.,
according to the "special rights" discourse, are not actually subordinated, they are merely trying to augment their power by unfairly obtaining "special" status under civil rights laws, laws which should only protect the "truly disadvantaged."  

The "special rights" portrayal of gay, lesbian, bisexual and transgender wealth and privilege is a racialized (and class-based) discourse, which constructs gay and lesbian people as white. This process of racial construction occurs in at least two important ways. First, the "special rights" rhetoric is racialized because its "conclusion" regarding the purported wealth and privilege of gay and lesbian communities is drawn from race (and class) based data that reflect white (and upper-class) status and that misrepresent the income levels of the average gay and lesbian individual. Second, the rhetoric is racialized because it compares "privileged" gays and lesbians to "oppressed" communities of color, assuming a separateness of the two populations that erases gays, lesbians, bisexuals and the transgendered of color, thereby depicting gays and lesbians as white and communities of color as heterosexual.

The "evidence" of gay and lesbian wealth offered by anti-gay activists contributes to the racialization of the anti-gay "special rights" rhetoric. Frequently, proponents of the "special rights" discourse rely on polling data to support their observation that most gays and lesbians are wealthy. 253 As several scholars have argued, however, these studies are invariably based on biased samples that inflate gay and lesbian wealth. 254 The socioeconomic data in many of the popular polls, for example, were collected by surveying persons whose names appear on donor lists of gay and lesbian civil rights organizations or on subscription lists of

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dissenting); see id. at 636 (characterizing Amendment 2 as a "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") (Scalia J., dissenting). Although they do not explicitly align themselves with the "special rights," anti-gay forces, the arguments of Brooks and Butler also strikingly parallel the contours of this rhetoric. See supra pp. 45-56, 60-67.

252. Schacter, supra note 148, at 291-93 (observing that anti-gay forces claim that gay and lesbian civil rights will give protection to powerful group, protection previously reserved for the racially oppressed).

253. See sources cited supra note 249.

254. See VADD, supra note 145, at 252-53; Hutchinson, supra note 2, at 606; Marcosson, supra note 185, at 160 n.69.
Periodical subscribers and financial contributors to political campaigns, however, have higher income levels than the average population; thus, reliance on these samples as indicators of gay and lesbian wealth provides a skewed representation of gay and lesbian income. Furthermore, to the extent that the data only pertain to individuals who publically identify themselves as "gay" or "lesbian" (as do individuals on gay and lesbian organizational membership and periodical subscription lists), they again will inflate gay wealth. Due to the economic consequences of heterosexist employment and housing discrimination, those individuals "who are in a position of relative comfort and security" will face fewer barriers than the poor in living openly gay and lesbian lives. Thus, surveys of "out" gays and lesbians tend to under-represent the poor.

The population of open gays, lesbians, bisexuals and transgendered individuals is also racially distorted, as people of color may face greater difficulties than whites in coming out of the closet. Indeed, people of color often point to the existence of racial discrimination as a factor that prevents them from coming out; they fear that the discrimination resulting from coming out will exacerbate their already vulnerable social positions. Furthermore, people of color, who are disproportionately poor, will comprise a large por-

255. See sources cited supra note 254.
256. See id.
257. See id.
258. Marcosson, supra note 185, at 160 n.69. See also VAID, supra note 145, at 256 ("[M]iddle-class and wealthy gay people are far more likely to be visible than are working-class poor queers."); Hutchinson, supra note 2, at 607-08 (discussing relationship between wealth and racial status and the ability to "come out").
259. See Hutchinson, supra note 2, at 608 ("[G]ays and lesbians of color have stated that racial, gender, and class oppression force them to conceal their sexual orientation . . . ."); Marta A. Navarro, Interview with Ana Castillo, in CHICANA LESBIANS: THE GIRLS OUR MOTHERS WARNED Us ABOUT 113, 123 (Carla Trujillo ed., 1991) (observing that Chicanos and Chicanas remain in the closet because they do not want to face the "risk . . . [of] further disenfranchise[ment]") (quoting Ana Castillo); Patrice Gaines-Carter, Festival Will Celebrate the Pride of Being Black and Gay, WASH. POST, May 24, 1991, at C1 (observing that black gays and lesbians express "fear that a public acknowledgment 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 discrimination as reasons why black gays and lesbians remain in the closet).
tion of those individuals who are unable to come out for economic reasons.  

As a result of these social realities, income statistics that portray the wealth of openly gay and lesbian individuals typically fail to represent the income of the poor (including whites) and people of color. Therefore, the "special rights" rhetoric is based on statistical data that invariably reflect white and upper-class gay and lesbian income levels. The rhetoric then describes this race and class-privileged location as normative within gay and lesbian communities, thereby constructing gay and lesbian people as white. Hence, race (and class) is at the center of the "special rights" debate in the gay and lesbian context.

The "special rights" discourse also constructs gay, lesbian, bisexual and transgendered communities as white when it purports to contrast the "privileged" status of "gays and lesbians" with the "subordinate" position of "people of color" (usually blacks). Such comparisons are a central feature of the "special rights" discourse. For example, during the political campaign to pass Amendment 2, the Traditional Values Coalition, a conservative political group in favor of the amendment, produced a video entitled "Gay Rights/Special Rights." Among the many images contained in the video that "contrast" black and gay experience is footage that portrays "differences" between gay rights parades and marches and the 1963 March on Washington

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260. See Hutchinson, supra note 2, at 607-08 ("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 coming out.").

261. Hutchinson, supra note 2, at 608 (observing that "'gay and lesbian' wealth stereotype evolves from race- and class-biased statistics... that are often contrasted with the low-income levels of the presumed distinct population of 'people of color'; see Schacter, supra note 148, at 291 (observing that opponents of gay rights depict "comfortable gay and lesbian lives against which the 'true' disadvantage of existing protected groups is dramatically juxtaposed").

262. See Schacter, supra note 148, at 291.

for racial justice. The video also contains a screen that reads "Ever denied the right to vote? . . . Homosexuals: No . . . African Americans: Yes." The video was widely distributed to black political and cultural organizations, in an attempt to solicit black support for the amendment. Ironically, while many black heterosexuals have criticized the exploitation of black suffering by white gays and lesbians, no significant critique has been lodged against conservative political organizations that "appropriate" black subjugation to advance anti-gay agendas. It thus appears that some blacks are willing to collude with conservative, perhaps racially hostile, organizations in order to preserve heterosexual privilege. Heterosexism in communities of color and in anti-racist organizations undoubtedly explains the disparate responses to the "appropriation" of black

264. See Russell, supra note 263, at 48; Schacter, supra note 148, at 292.

265. Schacter, supra note 148, at 292 (citing Videotape: Gay Rights, Special Rights (Traditional Values Coalition 1993)).

266. See Russell, supra note 263, at 48; Schacter, supra note 148, at 292.

267. See Butler, supra note 144, at 17 ("The idea of common oppression with blacks is not only fallacious, it trivializes the entire history of suffering that blacks have experienced because of their outward racial characteristics, characteristics which cannot be hidden as one goes through life."); Brooks, supra note 211, at 15 (arguing that the unique experience of blacks "defies a unifying theory of subordination"); Rogers, supra note 144, at A1 (arguing that "obvious differences [between black and gay experience] are key and show a hint of the baselessness of the comparisons."); see also Hutchinson, supra note 2, at 626-28 and accompanying notes (detailing heterosexual black responses to race-sexuality analogies); Russell, supra note 263, at 49 (same).

268. I have only located a few arguments that respond to the appropriation of black subjugation by conservative, often racist, organizations—in stark contrast to the numerous expressions of outrage at the "appropriation" of black subjugation by gay and feminist groups. See Chideya, supra note 263, at 73 (questioning sincerity of anti-gay organizations' overtures to black community, given the opposition to racial anti-discrimination policies by leaders of these organizations); Diamond, supra note 263, at 36 ("[T]he Christian right's new recruitment of evangelical blacks says nothing about whether the movement will act in their interests or merely use them as multicultural window-dressing."); Smith, supra note 263, at 128.

The irony of this alliance [between blacks and conservative organizations] is that never before have right-wing organizations protested with African-Americans on issues of redlining, minority-business contracts, police brutality and economic redevelopment of the inner city. Many of their key spokespersons have a long history of actively opposing our civil rights, yet we have allowed the Far right to play "divide and conquer" games between the African-American and lesbian and gay communities.

Id.
subordination by pro-gay activists and to the collusion of blacks with conservative politics.

The comparative dimension of the "special rights" rhetoric (like its evidentiary foundation) also constructs gays and lesbians as white and people of color as hetero-sexual. As a threshold matter, any comparison of "gays and lesbians" with "people of color" assumes the two are mutually exclusive groups, thereby negating the existence of gays, lesbians, bisexuals and the transgendered of color. In addition, the wealth characterization—as the "special rights" discourse explicitly makes clear—does not apply to communities of color. These communities, unlike gay and lesbian communities, are poor and subordinate. The "special rights" discourse, thus, creates a "gay and lesbian" stereotype that is defined as inapplicable to "persons of color." The separation of gay, lesbian, bisexual and transgendered identity from colored status through the stereotypification of gays and lesbians as wealthy (as opposed to poor persons of color) further marginalizes and renders invisible gays, lesbians, bisexuals and the transgendered of color and centralizes white gay positionality, thus portraying gays and lesbians as white and people of color as heterosexual.

In summary, the "special rights" discourse makes generalized claims about the gay and lesbian community, relying upon demographic data that represent white and upper-class positionality. The discourse also constructs gay and lesbian stereotypes and contrasts these images with conflicting perceptions of communities of color. Consequently, the discourse creates oppositional descriptive labels (e.g., "wealthy" versus "poor") for the two communities which, if accepted, preclude a recognition of "cross-identification," thus solidifying a white construction of non-heterosexual status.

269. See sources cited supra note 148.
270. See Hutchinson, supra note 2, at 570 (discussing how conflicting stereotypes of "Latino" and "gay" men contributed to disbelief that a Puerto Rican male was victim of homophobic violence); id. at 608 (arguing that gay wealth stereotype may "reflect society's views of white gays and lesbians or a perception that all gays and lesbians are white").
271. There is scant literature on the racialization of homosexuality in legal literature. For an excellent examination of this topic, see Eaton, supra note 148 (arguing that courts construct gays and lesbians as white and people of color as heterosexual).
The racial dynamics of the anti-gay "special rights" rhetoric were obscured in Chang and Culp's analysis. Chang and Culp focus their attention on the Court's failure to connect the "special rights" rhetoric with white hostility toward civil rights measures enacted to protect people of color from discrimination. The authors argue that "the power of the Court's opinion in Romer would have been enhanced if the Court had been willing to put the special rights debate into a better moral and political framework that acknowledged the power of race to distort the truth."

As I understand Chang and Culp's claim, the historical invocation of "special rights" in racial discrimination cases provides a contextual framework for understanding how the rhetoric generally represents a disparagement of civil rights claims. This assertion is supported by the history of white opposition to civil rights for people of color.

The authors correctly locate the origins of "special rights" rhetoric in racial civil rights cases of the late-nineteenth century. During this era, the Supreme Court severely limited Congressional efforts to enact protective legislation for blacks who continued to face subjugation, despite the ratification of the post-Civil War Amendments. The Court's reasoning indicates that it perceived additional measures to protect blacks from subjugation as providing them with "special rights." For example, in the Civil Rights Cases, the Court invalidated a federal public accommodations statute upon finding that the enforcement provisions of the Fourteenth Amendment did not permit Congress to regulate private behavior and upon concluding that

273. See id. at 245 ("The notion that the role of civil rights law is to create 'special rights' is a product of our jurisprudence on race.").
274. See id. at 245-46 (discussing deployment of "special rights" rhetoric in the Court's racial jurisprudence).
276. 109 U.S. 3 (1883).
277. See id. at 11 ("[The Fourteenth Amendment] does not invest Congress with power to legislate upon subjects which are within the domain of State
nineteenth century racial segregation in places of public accommodation was not a "badge or incident of slavery," which Congress could regulate under the Thirteenth Amendment. In discussing the claim that racial segregation was a badge or incident of slavery, Justice Bradley, writing for the Court, questioned the appropriateness of further legislation protecting blacks from discrimination, providing an early deployment of the "special rights" response to civil rights legislation. Bradley argued that

[it] would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business . . . . When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.

Thus, in the immediate years following the "emancipation" of slaves, members of the Court were already uncomfortable with and hostile to the idea of legitimating civil rights protection for blacks, construing such laws as "special" handouts.

As Chang and Culp and other commentators have demonstrated, the "special rights" discourse also plays a central role in the political and judicial opposition to affirmative action and other forms of civil rights protection for legislation; but to provide modes of relief against State legislation, or State action . . . ."

278. See id. at 21 ("[C]ongress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents . . . ."); id. at 24 ("[W]e are forced to the conclusion that [racial segregation in places of public accommodation] has nothing to do with slavery or involuntary servitude . . . .").

279. Id. at 24-25 (emphasis added).

280. Debates surrounding the passage of Proposition 209, which eliminates governmental affirmative action in California, highlights how the "special rights" discourse is invoked to disparage affirmative action and to gain support for the dismantling of policies to remedying racial and gender discrimination. The Ballot Pamphlet that "explained" the effect of Proposition 209 to voters included political statements from both supporters and opponents of the initiative. One statement drafted by proponents argued that "[a] generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality,
people of color. The close connection between affirmative action and "special rights" rhetoric also impacted the political discourse surrounding Amendment 2. For instance, during the Amendment 2 campaign, conservative political groups argued that gay and lesbian civil rights protection would lead to "quotas" and "affirmative action" on the basis of sexual orientation\(^2\) — despite the fact that none of the laws invalidated by the amendment mandated or had been interpreted to require affirmative action.\(^3\) The amendment itself codified the anti-affirmative action rhetoric, prohibiting "quota preferences" based on gay, lesbian or bisexual orientation.\(^4\)

Thus, the "special rights" discourse has been employed historically in political discourse and judicial opinions to criticize, prevent and overturn governmental policies de-


282. See, e.g., Russell, supra note 263, at 51 ("Throughout the Amendment Two campaign ... [sexual orientation antidiscrimination law] was transmogrified into a veritable 'affirmative action' dragon. Accordingly, the dragonslayers seized the opportunity to capitalize upon mainstream resentment not only of affirmative action for lesbians, gays and bisexuals but of affirmative action itself."); Laurie Goodstein, New York Joins Boycott on Colorado Gay Law; Atlanta Also Bans Employee Trips to State, WASH. POST, Dec. 9, 1992, at A3 (reporting that conservative group "promoted [Amendment 2] as a way to prevent homosexuals from winning 'special rights' and quotas."); Dirk Johnson, Colorado Faces Boycott Over Its Gay-Bias Vote, N.Y. TIMES, Dec. 2, 1992, at A16 (reporting that a conservative group in support of Amendment 2 "contended [that] anti-discrimination laws amounted to special rights that would lead to higher quotas in affirmative action programs."). See also Schacter, supra note 148, at 293 (noting role of anti-affirmative action sentiment in anti-gay "special rights" rhetoric).

283. See Russell, supra note 263, at 50-51.
signed to remedy the effects of racial subjugation. The historical deployment of “special rights” rhetoric in race cases clearly impacts gay and lesbian civil rights, as white opposition to “affirmative action” and “quotas” is invoked to help defeat gay rights initiatives. As Chang and Culp demonstrate, the Court in *Romer* failed to engage the racial civil rights dimensions of the “special rights” rhetoric, an omission which caused the opinion to lack an historical contextualization. In their own analysis, however, Chang and Culp do not reveal the more immediate (and perhaps more relevant) racial implications of the anti-gay “special rights” discourse: namely, that the discourse itself constructs a white gay and lesbian community. Chang and Culp fail to uncover this racialization of gay and lesbian people because race and sexuality occupy seemingly close—but separate—spheres in their analysis. Chang and Culp treat race as an autonomous and separate (though important) jurisprudential reference point—a body of politics and case law which, if engaged, provides a more complete understanding of the disparagement of civil rights in the context of *Romer*. Race is also seemingly treated as distinct and separate from sexuality in Chang and Culp’s analysis when they conclude that the “special rights” discourse in the anti-gay context makes heterosexism analogous to (hence separate from) racism. The authors argue that the gay and lesbian victims of Amendment 2 were injured by the same devaluation of and opposition to civil rights in the race litigation context: “In this sense, being a sexual minority is very much like being a racial minority. It is another form of the Other that is excluded from constitutional discourse.” While the authors are correct in observing that the intention of the “special rights” argument is the same in both the race and sexuality contexts—the disparagement of civil rights and those in need of civil rights—analogies of people of color and gays and lesbians have the effect of erasing gays and lesbians of color, thereby reinforcing the separation of colored and gay status.

By failing to place race fully within the sexuality

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285. Given the Court’s complicity in the deployment of the “special rights” rhetoric, such an engagement might have appeared ironic.


287. Id at 248. (emphasis added).
context, the authors are unable to explain how the "special rights" discourse painted a racial portrait of gay and lesbian America. Thus, while Chang and Culp's provocative analysis highlights the relevance of race jurisprudence to the articulation of "special rights" in the gay and lesbian context and contributes to an important, ongoing dialogue among critical race theorists on issues of sexual oppression, the distance between sexuality and race maintained in their discussion obscures the racial narrative portrayed by the anti-gay "special rights" discourse and blurs the intertwining of racial and sexual identities.

C. Race and Sexual Subordination: The Historical Connection

Anti-racist theorists, in varying degrees, have marginalized the importance of combating heterosexist oppression in their analyses. The ambivalence or resistance toward pro-gay politics among anti-racists, however, does not mean that anti-racism has not paid any attention to sexual subordination. On the contrary, anti-racism (as the following discussion demonstrates) has vigorously challenged sexual stereotypes, sexual oppression and sexualized violence directed toward communities of color. Furthermore, sexual subordination and bigotry have figured prominently in the oppression of people of color. While each

288. My observation that the "special rights" discourse constructed gays, lesbians, bisexuals and the transgendered as white has important implications for judicial decision-making in the context of gay and lesbian equality. These issues, which I explore in a current work-in-progress, are beyond the scope of this Article, but are worth mentioning briefly. If, as I have argued, the "special rights" rhetoric paints the gay and lesbian community as white, does the Court in Romer join in this racial construction by failing to deconstruct or reject the racial premises of the rhetoric? See IAN HANEY LOPEZ, WHITE BY LAW (1997) (discussing the Court's role in constructing and preserving whiteness); Eaton, supra note 148 (discussing role of courts in constructing homosexuality as white). Furthermore, if the Court perceives the gay and lesbian community as white, do gay and lesbian legal "victories" result from the Court's acceptance of progressive sexual politics or because the Court is simply protecting white privilege (and ignoring the sexuality of gays and lesbians)? Finally, if the Court is protecting white privilege in "favorable" gay and lesbian litigation, how will it respond to claims of gays, lesbians, bisexuals, the transgendered of color and of those white gays who "transgress" from the Court's view of "acceptable" whiteness?

289. Naomi Zack, writing in the context of black subjugation, offers a crisp analysis of this point:
marginalized racial group has a unique history of sexualized racial oppression, they share a similar history of racial hierarchy executed by sexual repression and violence. Furthermore, white supremacist culture has assigned a battery of sexual stereotypes to each marginalized racial group which have served to justify systems of violence and oppression against people of color. Much of this sexualized racial marginalization, however, has carried a heterosexual, rather than homosexual, tone. Nevertheless, the responses of anti-racism to "heterosexually linked" violence provides ample precedent for the incorporation of sexual politics, including gay and lesbian liberation, within critical race theory and contemporary anti-racist politics.

The existence of anti-racist responses to heterosexual racism also creates a glaring disparity within anti-racist discourse: heterosexual racial discrimination receives the challenge of anti-racist advocacy, while homophobic racism remains marginalized and unnoticed. Anti-racists have not offered any convincing explanation for their disparate responses to heterosexual and homosexual varieties of sexualized racial oppression. While the diverging responses likely result from many factors, including homophobia among anti-racists, the differences, whether intentional or otherwise, have the effect of subordinating gays and lesbians of social

The result of the historical intersection or connection between socially constructed sexuality and socially constructed race has been the sexualization of race in American lived experience.... The sexualization of race means that the fictitious ideological machinery which posits and reproduces the existence of races... as well as the crimes and slights that whites have committed, and still do commit, against blacks in American culture... are qualities and conditions of sexuality, for some individuals.

Zack, supra note 79, at 147; see also Abdul R. JanMohamed, Sexuality on/of the Racial Border: Foucault, Wright and the Articulation of "Racialized Sexuality," in DISCOURSES OF SEXUALITY: FROM ARISTOTLE TO AIDS 94, 112 (Donna C. Stanton ed., 1995) ("[W]ithin the discursive formation of racialized sexuality the process of racialization is always already a process of sexualization, and the process of sexualization is also always already—or at least functions as if it were—a process of racialization.").

290. See Lopez, supra note 82, at 31-32 ("Social renditions of masculinity and femininity are inseverably a part of racial constructs, just as racial stereotypes invariably embody some elements of sexual identity. The archeology of race soon becomes the excavation of gender and sexual identity.").

291. See infra Part III.C.

292. See Zack, supra note 79, at 154 (noting role of heterosexuality in sexualization of blacks in America).
color and allowing homophobic racism to escape the challenge of anti-racist advocacy. These disparities, however, are not inevitable. If anti-racist theory and politics can react to a legacy of sexual subordination premised upon heterosexual status, then homosexual-based oppression can also occupy a meaningful space in anti-racist agendas.

1. Blacks and Sexualized Racial Oppression. Much of the oppression and discrimination blacks have endured has been sexual in nature. The sexualized oppression directed at blacks, given a patriarchal social structure, has produced gendered effects—creating different experiences for black men and black women. In America's racially hierarchical society, black men are constructed as promiscuous, threatening to white women and as possessing an unmatched sexual prowess. Although commentators do not explicitly describe them as such, these constructs are heterosexual in nature, as indicated by the perception of black male sexuality as threatening to white women. Within gay and lesbian communities, however, these constructs have taken on a "homosexual" tone.

The sexualization of black male heterosexuality emerged primarily during slavery. One force that led to the sexualization of black men was the economics of slavery. In order to generate more "commodities" for the capitalistic slavery industry, black reproduction was needed. Although white male slave owners often fulfilled the male role in heterosexual biological reproduction by raping black women, black male slaves were compelled to "breed" with black female slaves in order to produce offspring, thereby

293. See generally Calvin C. Hernton, Sex and Racism in America (1965); Stember, supra note 79; West, supra note 140, at 119-31.
294. See Joel Kovel, White Racism: A Psychohistory 67 (1984) ("Allegations as to the Negro's sexual prowess, or the heroic proportions of his genitalia are a widely known legend . . . .").
296. See Zack, supra note 79, at 152.
augmenting the property holdings of slave owners. The profit-driven “breeder” role, along with generalized notions of black sexuality as “unclean,” provided the roots for and reinforced the construction of black male heterosexuality as promiscuous and potent.

Black male heterosexual practice, though encouraged by white supremacist society to increase the number of slaves, was at the same time stigmatized by white males who saw black men as a threat to their patriarchal

297. While much of the literature on slave “breeding” focuses on black female slaves (particularly due to the brutality surrounding their role in “breeding”), black male slaves were also victims of this practice. See B.A. Botkin, Lay My Burden Down: A Folk History of Slavery 161-62 (1989) (relating story of female slave compelled to breed with male slave); Lisa A. Crooms, Don’t Believe the Hype: Black Women, Patriarchy and the New Welfarism, 38 How. L.J. 611, 619 (1995) (“Slavery imposed on all slaves a duty to breed in accordance with their owners’ expectations.”); Thelma Jennings, “Us Colored Women Has to Go Through a Plenty: Sexual Exploitation of African-American Slave Women, 1 J. Women’s Hist. 45 (1990) (describing role of black male slaves in “breeding” of new slaves); Joyce McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 YALE J.L & FEMINISM 207, 217-18 (1992) (“It is indisputable that all slaves, regardless of their sex, were potential, if not actual, . . . participants in chattel breeding . . .”). On the economic role of “breeding,” see A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “Yearning to Breathe Free: Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. Rev. 1213, 1226 (1993) (“By breeding slaves for the market, . . . owners could improve their economic position.”); Zack, supra note 79, at 150 (discussing role of breeding in slave economy); Note, Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution, 103 YALE L.J. 791, 803 (1993) (“A slave owner could . . . force slaves to have intercourse with his family, friends, or other slaves, and then profit from the intercourse by selling or enslaving the baby.”).

298. Zack, supra note 79, at 152-53. See also William N. Fisher III, Ideology and Imagery in the Law of Slavery, 68 CHI.-KENT L. REV. 1051, 1063 (observing that law of slavery era often portrayed male slaves “as sexually animalistic”). While Zack attributes the sexualization of black male heterosexuality to “the use of black males for breeding more slaves,” Zack, supra note 79, at 152, and to “economic and social domination” of blacks by whites, Zack, supra note 79, at 153, she argues that the sexualization of black maleness was “diminutive” relative to that of black female status during slavery. Zack argues that black male sexuality could be viewed as “unnecessary,” given the ability of white slave owners to “breed” new slaves. See id. at 152-53. Zack’s observations seem questionable given the many ways in which the law sanctioned violence against male slaves (and female slaves) as a result of white perceptions of black sexuality. See, e.g., A. Leon Higginbotham, Jr. & Anne F. Jacobs, The “Law Only As an Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia, 70 N.C. L. Rev. 969, 1057 (1992) (discussing the domination of black male slaves through rape law).
domination over white women. Black male sexuality was profitable and desirable only when it was confined to black women. The stereotypification of black male heterosexuality as threatening thus developed to stigmatize prophylactically black male sexuality and inter-racial sexual relations between black men and white women.

The racial narrative of black male sexuality as menacing has left an indelible imprint in the history of American injustice. The horrible "institution" of lynching in the post-bellum South, for example, was justified by the construction of black male heterosexuality as a violent threat to white women. Although in the majority of lynchings rape was not even alleged, the pervasive fear of black men as rapists of white women was exploited to legitimate the slayings and to excuse white control and domination over blacks generally. Fear of black male heterosexuality also impacted the law and the legal system, resulting in (among other things) gross deprivations of due process in criminal proceedings, vast disparities in punishment, and dis-

299. The racial or slave status of children was, therefore, typically determined by looking at the status of the mother. See Christopher A. Ford, Administering Identity: The Determination of "Race" in Race-Conscious Law, 82 CAL. L. REV. 1231, 1273-74 (1994); Wilbert E. Moore, Slave Law and the Social Structure, 26 J. AM. NEGRO HIST. 171 (1941), reprinted in THE LAW OF AMERICAN SLAVERY 325, 327 n.5 (Kermit L. Hall ed., 1987).


301. See Higginbotham, supra note 300, at 535; Holden-Smith, supra note 300, at 34.

302. Crenshaw, supra note 1, at 1272.

303. See id. ("Ironically, while the fear of the Black rapist was exploited to legitimize the practice of lynching, rape was not even alleged in most cases. The well-developed fear of Black sexuality served primarily to increase white tolerance for racial terrorism as a prophylactic measure to keep Blacks under control.").

304. See Powell v. Alabama, 287 U.S. 45 (1932) (reversing conviction of black males accused of raping white women; defendants convicted and received death penalty after one day trial, with all-white jury, and without assistance of counsel).
criminatory laws prohibiting interracial marriage.\textsuperscript{305} Racial domination supported by gendered and sexualized constructs of black males has sparked and continues to generate stiff resistance from blacks. In fact, as many scholars have argued, black (heterosexual) male sexual subordination often serves as the "archetype" of black subjugation, to the exclusion of black women and black gay men.\textsuperscript{307}

Black women also suffer from negative sexualized racial constructs. Under racial mythology, black women are often considered promiscuous and sexually aggressive "Jezebels."\textsuperscript{308} The Jezebel stereotype, which focuses on male and female coupling, is clearly heterosexual in nature.

The sexualization of black women, like that of black men, began largely during slavery and was connected, in part, to economic forces. Black females were raped by white slave owners and compelled to breed with other slaves in order to satisfy capitalistic demand for new slaves and to facilitate patriarchal domination.\textsuperscript{309} The exploitation of

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  \item 305. The death penalty for rape has been applied in a clearly racist manner. For instance, between 1930 and 1967, 405 of the 455 men executed for rape in this country were black. See Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 75 (1973) (citing United States Dept. of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 46, Capital Punishment, 1930-1970, at II (Aug. 1971)). While these statistics reflect a fear of black male heterosexuality, the statistics also reveal a devaluation of black women (which most commentators fail to mention): no person has been executed for raping a black woman. See Ammons, supra note 9, at 1026 n.107 (citing Rosemarie Tong, Black Perspective on Women, Sex, and the Law, in Women, Sex and the Law 153 (1984)).
  \item 307. See Crenshaw, supra note 1, at 1272-73 ("Within the African-American community, cases involving race-based accusations against black men have stood as hallmarks of racial injustice. The prosecution of the Scottsboro boys and the Emmett Till tragedy... triggered African-American resistance to the rigid social codes of white supremacy.").
  \item 308. See Dorothy E. Roberts, Unshackling Black Motherhood, 95 Mich. L. Rev. 938, 950 (1997) ("One of the most prevalent images of slave women was the character of Jezebel, a woman governed by her sexual desires ... "); Judith A. Winston, Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990, 79 Cal. L. Rev. 775, 784 (1991) ("White society created myths [during slavery] to justify their oppression and exploitation, portraying black women as fecund and promiscuous objects, available to satisfy white male sexual desires."); see also West, supra note 140, at 119 (discussing Jezebel stereotype); Crenshaw, supra note 1, at 1271 (discussing stereotypes of black female sexuality as unclean).
  \item 309. See Zack, supra note 79, at 150 ("[B]lack female slaves became objects of sexual desire to white slave owners because money could be made if they bred
black women as "breeders" fostered and reinforced the stereotypification of black women as sexually promiscuous.

Gendered and sexualized stereotypes of black women, like those applied to black men, have legitimated a legacy of violence and legal injustice. The black woman as promiscuous stereotype justified the sexual assault of black women by white slave owners and has caused the devaluation of black female sexual victimization, particularly through legal institutions. During slavery, for example, the rape of black women by any man was not recognized as a crime.\(^\text{310}\)

The negative effects of sexualized racism continue to haunt black women. For instance, now that the rape of black women is formally recognized as a crime, the construction of black women as promiscuous causes jurors in sexual assault prosecutions to doubt black women's credibility, presenting tremendous barriers to the conviction of defendants accused of raping them.\(^\text{311}\) Furthermore, men who rape black women tend to receive significantly shorter sentences than men who rape white women.\(^\text{312}\)

Black women, thus, have been particularly marginalized by a patriarchal society that supports white male

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310. See Susan Brownmiller, Against Our Will 210-56 (1975); A. Leon Higginbotham, In the Matter of Color: Race and the American Legal Process, the Colonial Period 282 (1978); Jennifer Wriggins, Rape, Racism, and the Law, 6 Harv. Women's L.J. 103, 118 (1983); see also George (a slave) v. State, 37 Miss. 306 (1859) (dismissing indictment of male slave for rape of female slave less than ten years old because "[t]here is no act (of our legislature on this subject) which embraces either the attempted or actual commission of a rape by a slave on a female slave ... ").

311. See Crenshaw, supra note 1, at 1271 (suggesting negative stereotypes of black women "may make black women's rape either less believable or less important"); Wriggins, supra note 310, at 121 ("The criminal justice system continues to take the rape of Black women less seriously than the rape of white women.").

312. See Crenshaw, supra note 1, at 1268 (discussing statistics demonstrating shorter sentences for rape of black women); Wriggins, supra note 310, at 121 ("Studies show that judges generally impose harsher sentences for rape when the victim is white than when the victim is Black.").
control over the bodies of all women and black male domination of black women, and that devalues black female sexual victimization, regardless of the race of the perpetrator. Anti-racist and feminist political movements have historically responded sluggishly, if at all, to the particular problems faced by black women in the area of rape and subordination.\footnote{See Crenshaw, supra note 1, at 1266-82.} These movements, reflecting their hegemonic and essentialist nature, have focused primarily on the experiences of white female rape victims\footnote{See id.} and on the racist treatment of black men accused of sexual assault, including the assault of black women.\footnote{See id. at 1266-68, 1271-77.} The narrow responses to rape by feminist and anti-racist lobbies have compounded the invisibility of black women’s issues surrounding rape.\footnote{See id. at 1266 (“Although antiracist and antisexist assaults on rape have been politically useful to Black women, on some level, the monofocal antiracist and feminist critiques have also produced a political discourse that diserves Black women.”).} Nevertheless, feminist of color critiques of both anti-racist and feminist discourses have created some space within these social movements for discussing and responding to issues of heterosexual rape and sexual stereotypes that pose particular problems for black women.

2. Latinos and Latinas and Sexualized Racial Oppression. Latinos and Latinas have also suffered from sexualized racial oppression and stereotypes.\footnote{See Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258, 1273 (1992) (describing range of stereotypes of Mexican-Americans and noting that these images often have “sexual overtones”).} The sexualization of Latino and Latina statuses, like that of black men and women, is gendered.

Latino males are often constructed as “macho,” “passionate,” promiscuous and violent.\footnote{See id. at 1273 (describing stereotype of “tragic, silent, ‘Spanish,’ tall, dark, and handsome” Mexican-American); Jenny Rivera, Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, 14 B.C. THIRD WORLD L.J. 231, 240 (1994) (“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.”).} These stereotypes though facially neutral, have traditionally been associated
with heterosexual, Latino male status. Nevertheless, within gay and lesbian communities these stereotypes have taken on a homosexual dimension. Many of the negative sexualized stereotypes of Latinos and Latinas emerged during and after the United States imperialist conquest of Mexican territory in the Southwest; thus, much of the scholarly literature on this subject surrounds Mexican American experience.

Although "Mexican" status had historically been considered both a "nationality" and a "race," during the mid-1800s United States expansion in the Southwest, whites began to "conflate and stigmatize" Mexican nationality and race. Under this racialization of Mexican status, Mexican Americans were sexualized. For example, the offensive "greaser" stereotype emerged to describe a treacherous Mexican male who was sexually threatening to and desirous of white women. As with negative images of black male sexuality, the greaser stereotype centers around white fear of heterosexual Mexican American male sexuality and threats to white heterosexual male patri-archal domination of white women. Mexican American males, on the contrary, were also depicted as lacking masculinity, relative to white men.

Sexualized (and other) stereotypes of Latinos justified legal and extra-legal racial terrorism and domination. In 1855, for instance, California passed the "Greaser Act," purportedly a vagrancy law, which expressly applied to "all persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood . . . and who go armed and are

320. See Delgado & Stefancic, supra note 317, at 1273-74; Lopez, supra note 82, at 29 (arguing that "animus" toward Mexicans "had its source in the Anglo-Mexican conflicts in the Southwest, particularly in Texas and California").
321. My analysis will reflect this fact, though I do not wish to essentialize Latino experience.
322. Lopez, supra note 82, at 28.
323. See Delgado & Stefancic, supra note 317, at 1274 ("[T]he greaser coveted Anglo women and would seduce or rape them if given the opportunity.") (citing ARTHUR G. PETTIT, IMAGES OF THE MEXICAN AMERICAN IN FICTION AND FILM 22-25 (1980)).
324. See Lopez, supra note 82, at 30-31 (discussing role of gender and sexuality in the construction of Mexican Americans).
not peaceable and quiet persons." Furthermore, negative portrayals of Latinos, including sexualized imagery, were invoked to justify the brutal displacement of Mexican Americans from land they inhabited in the Southwest. T.J. Farnham's writings demonstrate the role of sexualized and gendered racism as a justificatory instrument of imperialism:

No one acquainted with the indolent, mixed race of California, will ever believe that they will populate, much less, for any length of time, govern the country. The law of nature which curses the mulatto here with a constitution less robust than that of either race from which he sprang, lays a similar penalty upon the mingling of the Indian and white races in California and Mexico. They must fade away.... The old Saxon blood must stride the continent, must command all its northern shores, must here press the grape and the olive, here eat the orange and the fig, and in their own unaided might, erect the altar of civil and religious freedom on the plains of the Californias.

Farnham constructs Mexican American males as "emasculated" and portrays white (not "Spanish," but "old Saxon") males as "true men," worthy of exercising dominion over the western territories. Farnham also proclaimed that white conquest of California was appropriate because native Californians "are an imbecile, pusillanimous race of men, and unfit to control the destinies of that beautiful country." As Farnham's racist, gendered and sexualized declarations demonstrate, the stereotypification of Latino male identity served to legitimate the violent domination of Southwestern territory by white Americans and the subjugation of Latinos and Latinas.


326. T.J. FARNHAM, LIFE, ADVENTURES, AND TRAVEL IN CALIFORNIA 413 (1840) quoted in HEIZER & ALMQUIST, supra note 325, at 140 (emphasis added); see also Lopez, supra note 82, at 29 (discussing racist and imperialist writing of Farnham).

327. FARNHAM, supra note 326, at 413.

328. Id. (emphasis added).

329. See Lopez, supra note 82, at 30 ("Farnham's assertions regarding the racial character of these Mexicans reflected the psychological need to justify conquest: the people already in California, Farnham assured his readers, would
Latinas, like Latinos, have also endured a history of sexualized racial stereotypification and oppression. Latinas, like black women, have at times been depicted as wanton and promiscuous. Nevertheless, at points in American history, some Latinas have been depicted as sexually desirable, refined and eligible for marriage to whites, particularly to the extent that they were considered Euro-peon and elite. Both of these sexualized racial constructs are heterosexual in nature. Although race critics, including critical race theorists and LatCrit scholars, have not devoted sufficient attention to the sexualized subordination of Latinas (or Latinos), emerging scholarship seeks to counter the (heterosexual) male focus of "Latino" studies. Existing scholarship, in fact, demonstrates that the construction of Latinas as promiscuous has legitimated violence against them. For example, their claims of sexual assault and violence, like those of black women, have been met with disbelief or lack of concern. Therefore, as with blacks and Latino males, sexual stereotypification has justified violence against and lack of concern for the victimization of Latinas.

3. Asian-Americans and Sexualized Racial Oppression. Asian Americans, like blacks, Latinos and Latinas, have been the victims of sexualized racial constructs and violent

330. See Rivera, supra note 318, at 241 (describing construction of Latinas as "sensual and sexually responsive" to satisfy her "hot-blooded, passionate partner").

331. See Lopez, supra note 82, at 31 & n.120.

332. The amount of legal and other scholarly literature on the sexualization of Latinas and Latinos is rather small.


334. See Iglesias, supra note 333 (discussing marginalization of women of color, including Latinas, in rape policy); Rivera, supra note 318 (discussing inadequacies of domestic violence laws to protect Latinas and arguing that law enforcement do not take Latina victimization seriously due to stereotypes of Latinas).
domination. Sexualized stereotypes of Asian Americans are also gendered, affecting men and women differently. Sexualized racism against Asian Americans has its root in racist and sexist immigration practices. The Naturalization Act of 1790, for example, permitted only “free white persons” to become naturalized. 335 This restriction remained in the statutory scheme until 1952. 336 Despite the racially exclusionary naturalization statute, Asian Americans, primarily males, were allowed to “immigrate” to the United States to serve as a source of inexpensive labor for the nation’s economy. 337 The achievement of economic success by some Asian Americans immigrants in the late nineteenth century and the concurrent downturn in the national economy, however, led to deep hostility toward and scapegoating of Asian Americans, in particular the Chinese, who were blamed for the country’s economic woes. 338 A host of stereotypes soon emerged to stigmatize Asian Americans. 339 While many of the stereotypes focus more directly on economic fears, casting Asian Americans as “unfair competitors,” 3340 for example, others are sexualized. Asian American men have been constructed as effeminate, asexual, passive and weak. 341 Because they have historically been

337. See Cho, supra note 79, at 183 (“The racial economy of pre-civil rights America preferred a ‘bachelor society’ of single Asian men who proved to be a source of cheap, vulnerable labor.”); Delgado & Stefancic, supra note 317, at 1270 (“In the middle years of the nineteenth century, Chinese were welcomed into the land for their labor: They were needed to operate the mines, build railroads, and carry out other physical tasks necessary to the country’s development.”) (citing ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHEMINE MOVEMENT IN CALIFORNIA 19-45 (1971); E. WONG, ON VISUAL MEDIA RACISM: ASIANS IN THE AMERICAN MOTION PICTURES, at ii-v (1978)). As a result of the preference for male immigrant labor, there were stark gender imbalances in the Asian American population until 1965 when racial restrictions on immigration were lifted. See GARY OKIHIRO, MARGINS AND MAINSTREAMS 67 (1994); Cho, supra note 79, at 183.
338. See Delgado & Stefancic, supra note 317, at 1270-71 (“Chinese became the scapegoats for the 1870s Depression.”).
339. These stereotypes re-emerged as other populations of Asian Americans began to immigrate to the United States in greater numbers. See Delgado & Stefancic, supra note 317, at 1271 (describing anti-Japanese stereotypes).
341. See Hutchinson, supra note 2, at 577 & n.78 (citing Petersen, supra note 76, at 122); David Mura, How America Unsexes the Asian Male, N.Y.
depicted as effeminate, weak and passive, Asian Americans males have not typically been perceived as menacing sexual threats as have black and Latino males.\(^3\)\(^4\) The sexualized construction of Asian American males is also heterosexually based—it seeks to stigmatize Asian American male heterosexuality by feminizing it, or even labeling it as "gay."\(^3\)\(^4\)\(^3\)\(^4\)

The perception that Asian American males are effeminate and weak, yet economically threatening, has led to acts of oppressive violence against them. The most widely discussed account of anti-Asian American violence and legal discrimination is the murder of Vincent Chin. Chin, a Chinese American, was killed in 1982 by Ronald Ebens and Michael Nitz, two Detroit autoworkers. A witness to the brutal attack\(^3\)\(^4\) testified that Ebens exclaimed "that it was because of people like Chin... that he and his fellow employees were losing their jobs."\(^3\)\(^4\)\(^5\) The attackers also called Chin a "Chink."\(^3\)\(^4\)\(^6\) Ebens and Nitz eventually pleaded guilty to manslaughter and were each given lenient sen-

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\(^{342}\) See Kang, supra note 341, at 345 ("Early White American rhetoric surrounding Black men focused on their masculine appearances, but the rhetoric surrounding Asian men emphasized either their asexuality or their perceived femininity."). Though not commonly seen as sexually threatening, Asian American males have been viewed as an economic threat and have at times been seen as sexually threatening. See Kang, supra (the fact that pervasive racial stereotypes depict Asian American men as effeminate does not mean "that Asian men were [never] stereotyped as sexual threats to White women or other menacing threats.").

\(^{343}\) See Hutchinson, supra note 2, at 577; Petersen, supra note 76, at 122 (describing racist attack on Asian American students in which attackers called victims "faggots").

\(^{344}\) Ebens and Nitz delivered four blows to Chin's head with baseball bats and hit him repeatedly. See Chang, supra note 84, at 1253 n.33 (citing American Citizens for Justice, CONFIDENTIAL REPORT ON THE VINCENT CHIN CASE TO THE U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION 3-4 (June 28, 1983) [hereinafter Confidential Report].


\(^{346}\) Chang, supra note 84, at 1252 n.32 (citing Confidential Report, supra note 344, at 3).
ences of three years probation and fines of $3,780. As a result of political efforts by the Asian American community, the United States Department of Justice subsequently prosecuted the defendants for violating Chin's civil rights. Ebens was initially convicted and sentenced to twenty-five years; Nitz was acquitted. On appeal, Ebens' conviction was overturned, and his retrial was held in Cincinnati, Ohio, after a successful motion for a change of venue. Ebens was subsequently acquitted.

While the Chin case has been widely analyzed (accurately) as a horrible case of anti-Asian American aggression, gender and sexuality also informed Chin's victimization. In a patriarchal society where masculinity is a source of privilege, men who deviate from or who are perceived as transgressing from the norm of masculinity (e.g., gay men or effeminate men), are marginalized and subordinate. Furthermore, violence is often the instrument through which males can gain masculine status and exercise control and domination over non-conformist males. Moreover, masculinist competition fractures along
racial lines, and in a white supremacist society, men of color have been subjected to patriarchal, racial domination.\textsuperscript{356} This interplay of race, gender and sexual hierarchies rendered Chin vulnerable to attack and explain his victimization.\textsuperscript{357}

Asian American political organizations have responded vigorously to the violent victimization of Asian American males, such as Chin. As one commentator has compellingly argued, Asian American male victimization might actually serve as the paradigm of Asian American oppression,\textsuperscript{358} an observation consistent with the marginalization of feminist ideology and the oppression of women of color in Asian American politics generally\textsuperscript{359} and in other anti-racist contexts.\textsuperscript{360} Although their experiences have been subordinated in anti-racist and feminist discourse, Asian American women have also endured a similar history of racist sexualization. Due to racial exclusions in immigration law\textsuperscript{361} and the gendered preferences for Asian male immigrants in the mid-nineteenth century labor market,\textsuperscript{362} the population of Asian Americans in the United States was gender imbalanced during the pre-civil rights era.\textsuperscript{363} Asian American women, however, like Asian American males, were allowed to "immigrate" for economic purposes—to meet demand in the sex industry, serving as prostitutes for both white men

\begin{itemize}
\item \textsuperscript{356} See id. at 510 ("The notion of white superiority has always expressed the anxieties of male rivalry.").
\item \textsuperscript{357} Matsuda, supra note 1, at 1189-90 (explaining Chin's killing as the result of sexual, gender and racial hierarchies).
\item \textsuperscript{358} See Karin Wang, Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community, 3 ASIAN L.J. 151, 178 (1996) ("The movement [against anti-Asian violence] has focused overwhelmingly on male murder victims, even though Asian American women have also been victims of comparably brutal racially-motivated killings.").
\item \textsuperscript{359} See Cho, supra note 79, at 185 ("[D]espite the many critical articles written by Asian Pacific Americans on the model minority stereotype, few have theorized how it specifically relates to Asian Pacific American women."); Volpp, supra note 7 (criticizing erasure of Asian American women in anti-racist and feminist politics and in legal institutions).
\item \textsuperscript{360} See generally sources cited supra note 9.
\item \textsuperscript{361} See supra p. 90.
\item \textsuperscript{362} See id.
\item \textsuperscript{363} See Cho, supra note 79, at 183.
\end{itemize}
and the skewed population of Asian American males.  

Thus, the forces that led to Asian American female sexualization were heterosexual in nature: Asian American women were coveted to satisfy heterosexual male desire. A plethora of sexual stereotypes soon emerged to describe Asian American female immigrants, primarily Chinese, during the early nineteenth century. These stereotypes combined racial imagery of Asian Americans as "passive" with gendered and sexualized characterizations consistent with sexual commodification and exploitation. Asian American women were constructed as compliant, sexually pleasing "lotus-blossoms," on the one hand, while conniving and sinister "dragon ladies" on the other. The "model minority myth" solidified white supremacist notions of Asian American passivity and economic success and, together with historically sexualized notions of Asian American female status, led to the saturation of popular culture with images of Asian American women as docile, servile and heterosexually submissive.

364. See OKIHIRO, supra note 337, at 67; Cho, supra note 79, at 184 (arguing that gender inequity among Asian American population "led to importation of Asian women as prostitutes"); see also Lucie Cheng, Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America, in LABOR IMMIGRATION UNDER CAPITALISM 402-34 (Lucie Cheng & Edna Bonacich eds., 1984).

365. See Cho, supra note 79, at 184-95.

366. See id. at 185 ("The 'domesticated' lotus-blossom version of Asian female identity...co-existed with the 'foreign' counterpoint known as the 'dragon lady'—a conniving, predatory force who travels as a partner in crime with members of her own kind."); Renee E. Tajima, Lotus Blossoms Don't Bleed: Images of Asian Women, in MAKING WAVES, supra note 9, at 309.

367. See supra pp. 91-92.

368. See Cho, supra note 79, at 186 ("Model minority traits of passivity and submissiveness are intensified and gendered through the stock portrayal of obedient and servile Asian Pacific women in popular culture."); Wang, supra note 358, at 176 (discussing "ultra-femininity myth' which portrays Asian women as sensual yet submissive"). For an excellent explication of the role of the "model minority myth" in the sexualization of Asian American women, see Cho, supra note 79, at 184-95.

One of the most blatant (and notorious) expressions of white supremacist, patriarchal characterizations of Asian women was penned in the British edition of Gentleman's Quarterly magazine. There, Tony Rivers explained his preference for "Oriental girls":

Her skin colour—ah, that delicious discrimination—and its texture—lotus-fed, innocent of roses, silky, silky. Her hair—long and black and shiny, serenely straight...eyes almond shaped for mystery.....When you get home from another hard day on the planet, she comes into existence, removes your clothes, bathes you and walks naked on your back to relax you.....She doesn't go to assertiveness training classes,
The development of sexualized racial stereotypes was a product of and helped to justify the sexual exploitation and domination of Asian American women and control of Asian American people through the law. For instance, the portrayal of Asian American women as submissive sexual commodities led to the enactment of racist and sexist immigration legislation by Congress and western states, the enforcement of which further deepened the disparity between male and female Asian American immigrants. The white supremacist control of Asian American women was also exercised in the criminal system. For example, while white and Asian American women engaged in prostitution in western states during the late nineteenth century, the latter were arrested in disparate rates, a reflection of anti-Asian biases in the administration of criminal law.


The sexualization of Asian American women continues to legitimate their subordination by private and legal actors. Poor Asian women, for example, are a primary target of an exploitative, heterosexual “mail-order bride” industry, driven by white male eroticization of Asian women and desire for sexually compliant, non-feminist women. Furthermore, the legal system has failed to protect Asian American women from domestic violence and sexual harassment. Many commentators offer a compelling argument that this lack of protection results from stereotypes of Asian female sexual passivity, which portray Asian women as accepting of and consenting to sexual harassment and gendered physical abuse. Although Asian American feminists are waging an ongoing battle to include feminist politics within Asian American studies and political agendas, the construction of Asian American women as sexual commodities and the resulting oppression and discrimination caused by this process have been challenged to some degree by Asian American women’s organizations and scholars.

D. Anti-Racist Heteronormativity: Disparities and Inefficiencies

1. Heteronormativity Revealed: Discriminatory Responses to Sexualized Racism. As the foregoing discussion demonstrates, a history of sexualized (and gendered) racial oppression has played a central role in the social, economic,
political and legal oppression of people of color. Consistent with the inherent goals of any authentic anti-racist agenda, race theorists and activists have aggressively challenged this legacy of sexualized racial oppression. Anti-racists, however, have confined their responses almost exclusively to those forms of sexualized racial oppression that appear heterosexual in nature (or which anti-racist activists have construed as heterosexual victimization). In fact, some anti-racist scholars have questioned the importance of pursuing gay and lesbian equality as a broader goal of anti-discrimination law and policy. The marginalization of anti-heterosexism within anti-racist theory thus renders anti-racism internally inconsistent: the forms of sexualized oppression endured by gays, lesbians, bisexuals and the transgendered of color remain excluded from anti-racist discourse, while hetero-sexual victimization enjoys centrality.

The disparate anti-racist responses to homophobic and heterosexual forms of racism perpetuates patterns of social subordination, a result that is patently inconsistent with the goals of any liberationist movement. Heteronormativity in anti-racist discourse creates a discriminatory model of racial justice in which heterosexual status serves as a prerequisite for obtaining the advocacy and creative analysis of anti-racist theorists and activists. Heterosexuals are thus privileged in racial discourse, while gay, lesbian, bisexual and transgendered persons are subordinate. Heteronormativity in anti-racist discourse, therefore, compounds the marginalization of gay, lesbian, bisexual and transgendered people of color, who already face racial, class, gender and heterosexist oppression from the greater society. The perpetuation of social subordination and privilege by a "liberatory" movement is clearly contradictory.

The exclusion of anti-heterosexist politics from anti-

378. See supra pp. 45-56, 60-67. Other race theorists who embrace the goals of gay and lesbian politics may, nevertheless, place some distance between race and homosexuality, treating the two as related—yet not intertwined concepts. See supra pp. 67-79. As a result, their work may fail to explicate the racialized dimensions of gay and lesbian subordination and the impact and implications of multidimensional oppression on gay and lesbian legal reform efforts. See id. Nevertheless, the work of these scholars does not produce the negative harms associated with active dismissal of the injurious nature of heterosexism and the questioning of the need for gay and lesbian equality that plague the work of other anti-racist theorists.
racism becomes even more troubling when one considers that "heterosexuality" is typically a privileged status. While heterosexual identity is a source of social power (for persons of any race), it has also served as a source of subordination for people of color.\(^{379}\) If heterosexual status can become stigmatized and an instrument of racial oppression, then it is logical and, indeed, likely that gay, lesbian, bisexual and transgender identities (which are generally marginalized social categories) can also serve as sources of racial oppression and disadvantage.

2. Other Problems Caused by Anti-Racist Heteronormativity. In addition to rendering anti-racism internally inconsistent and discriminatory, anti-racist heteronormativity causes a host of other problems and inadequacies. First, the failure of anti-racists to challenge heterosexism conflicts with the inherent purpose of anti-racism—responding to the many, often subtle, ways in which people of color are oppressed in a white supremacist society. By ignoring how the sexualization of race subordinates gay, lesbian, bisexual and transgendered people of color, anti-racist activists and theorists permit an entire category of racial oppression—homophobic racial subordination—to escape their needed analysis and critique. Thus, contrary to the inherent goals of anti-racism, a species of racial oppression remains unchecked (perhaps endorsed\(^ {380}\)) by anti-racist theorists and activists.\(^ {381}\)

Heteronormativity also harms anti-racist politics and the larger body of progressive political action. On the one hand, anti-racist heteronormativity divides communities of color and hinders the formation of coalitions within communities of color to combat racial oppression.\(^ {382}\)

\(^{379}\) Cf. Jones, supra note 41 (discussing role of maleness as source of subordination for black men).

\(^{380}\) When anti-racists question the importance of strong anti-heterosexist laws, their actions may be construed as endorsing or legitimating sexual subordination.

\(^{381}\) See Valdes, supra note 12, at 1332 (arguing that heteronormativity in critical race theory "disregards the subordination of racial and ethnic minorities on sexual orientation grounds").

\(^{382}\) See Hutchinson, supra note 24 (making this observation and arguing that homophobic statements of organizers of Million Man March hindered collective action by black men); Valdes, supra note 12, at 1332 (arguing that omission of sexual orientation issues in critical race theory "factionalizes rather than coalesces progressive intra-group relations").
normativity may also place anti-racist activists in collusion with, and provide legitimacy for, conservative political organizations—organizations that might endorse agendas contrary to the needs of communities of color. In addition, essentialism—in all social movements—prevents collective political action across the terrain of socially oppressed groups. By deploying essentialist politics that deny the importance of combating all forms of inequality, progressive social movements often deteriorate into a futile battle of oppression-ranking, which paralyzes the coalitional potential.

Finally, heteronormativity within anti-racist movements (like forms of hegemony within feminism and gay politics) legitimates the subordination of “other” oppressed people. By questioning the importance of anti-heterosexist politics and legal reform for persons of all races, anti-racists contribute to an oppressive public discourse and ideology that constructs gays, lesbians, bisexuals and the transgendered as deviant and that justifies their oppression. The legitimation of subordination by a progressive movement is (again) patently contradictory.

The last section of this Article makes a final case for transforming racial discourse from its current hetero-normative state. This section first considers some of the possible explanations for heteronormativity in anti-racist discourse but finds none sufficient to validate the hegemonic nature of this discourse. This section concludes by discussing how multidimensionality can help anti-racist theorists and activists dismantle heteronormativity in racial theories, law

383. See supra pp. 72-74 (discussing how people of color joined conservative political forces to promote anti-gay agendas); supra note 251 (observing that arguments by anti-racist theorists mirror those made by explicitly anti-gay political groups).

384. See PHelan, supra note 108, 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 4, at 615 (“The 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.”); Hutchinson, supra note 2, at 642-43 (arguing that inclusion of anti-racist struggle within gay and lesbian politics “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”).

385. See Valdes, supra note 12, at 1332 (arguing that omission of sexual orientation issues within critical race theory “acquiesces to the perpetuation of homophobic inhumanity in the name of antiracist liberation”).
and policy and help foster the progression toward a richer, more accurate conception of justice.

III. RECONSTRUCTING ANTI-RACISM: FROM HETERONORMATIVITY TO MULTIDIMENSIONALITY

A. Possible Reasons for Heteronormativity in Anti-Racist Discourse

Although "raw homophobia" provides a simple explanation for the heteronormative nature of anti-racist discourse, such a reductionist response fails to account for the complex (and subtle) historical and cultural dimensions of the problem of heterosexism within anti-racist communities and in communities of color. While there are several possible reasons for the marginalization and omission of gay and lesbian politics in anti-racist discourse, including homophobia, none of these explanations validates the hegemonic construction of anti-racist discourse centered around heterosexual identity. Engaging and confronting these reasons, nevertheless, will likely serve as a necessary element of any successful effort to move anti-racist discourse toward a more inclusive model of racial justice.

The exclusion of gay and lesbian politics from anti-racist discourse may reflect the relative "newness" of the categories gay, lesbian, bisexual and transgendered people of color and the newly emergent nature of literature detailing the needs of these communities. Despite the recent arrival of gay, lesbian, bisexual and transgendered person of color statuses to the topography of socially constructed identities, scholars, activists and artists have already painstakingly demonstrated the existence of homophobic racial oppression, which implicates issues as

386. See Hutchinson, supra note 2, at 614 n.225. By describing gay/lesbian/bisexual/transgender of color statuses as "new," I do not mean to suggest that people of color have only recently begun to engage in transgressive sexual practice. Instead, this description reflects the reality that people of color have only recently begun to organize politically and socially around their marginalized sexual identities. See Cohen, supra note 3, at 368-70 (tracing post-civil rights emergence of black gay and lesbian identity).

387. See Hutchinson, supra note 2, at 562-63 n.9 (providing extensive list of literature on the oppression of gay, lesbian, bisexual and transgendered people of color).
diverse as health care delivery, oppressive violence and employment discrimination. The compelling testimony of these commentators makes a formidable case for the inclusion of pro-gay politics in anti-racist discourse.

Anti-racist theorists may also ignore homophobic racism because they doubt its existence. For instance, one might easily understand how a society that has a “phobia” of black heterosexual males will respond violently to them, but in a society where gay men are considered “weak,” the use of violent subordination may seem questionable. This argument, however, ignores the often inconsistent and dynamic nature of racism and centralizes black heterosexual male experience. While society has created the construct of a sexually threatening black heterosexual male to justify the control and violent domination of all black men, it has also used sexual stereotypes that “differ” from the menacing black heterosexual male construct in order to justify the oppression of people of color. Women of color and Asian men, for example, have not typically been portrayed as sexually threatening; nevertheless, a legacy of sexualized racial violence has been administered against these individuals. In addition, the sexual stereotypes of each particular group of people of color have themselves been inconsistent: black heterosexual males have been seen as sexually threatening and as harmless “Uncle Toms”, black women have been considered sultry “Jezebels” and

388. See supra pp. 57-58.
391. See Valdes, supra note 12 (encouraging anti-racist and pro-gay theorists to respond to the needs of gay and lesbian people of color in light of emerging race-sexuality critiques).
393. Although I have found no published accounts of this argument, several law professors have made this point in response to my presentation of the ideas expressed in this Article.
394. WEST, supra note 140, at 119-20 (describing range of black stereotypes).
venerable "mammies"; Latinas have been constructed as passionate and promiscuous and religious and passive; Latinos have been constructed as "macho" and passionate, yet indolent and docile; Asian American males have been perceived as conniving and competitive yet asexual and effeminate; finally, Asian American women have been portrayed as difficult "Dragon Ladies" and as soft and compliant "lotus blossoms." Therefore, the possibility that homophobic racism might not "resemble" other forms of sexualized racism should neither preclude nor deter the examination and countering of homophobic racism by anti-racist theorists.

Heteronormativity in anti-racism may also reflect the fact that homophobic stereotypes describing gays, lesbians, bisexuals and the transgendered of color do not seem as developed as those applied to heterosexuals of color. In fact many "gay" stereotypes conflict with "racial" stereotypes, implying an "absence" of stereotypes that apply to gays, lesbians, bisexuals and the transgendered of color. Although there is some legitimacy to this basis for the inattention to heterosexism in anti-racist discourse, it ultimately fails as a justification for marginalizing gay and lesbian politics. First, "heterosexual" racial stereotypes are often generalized, justifying a host of harms against communities of color irrespective of the sexual identity of the victims. For instance, the construction of Latino men as "macho" and aggressive has been invoked in the context of oppressive homophobic violence to excuse police inattention to crimes committed against gay people of color. This process is revealed in the slaying of Julio Rivera—a poor, Puerto Rican gay male—by a gang of white supremacist and homophobic youth. After Rivera’s killing, gay rights

395. See Ammons, supra note 9, at 1049-51 (describing range of black female stereotypes).
396. See Rivera, supra note 318, at 240 (describing range of Latina stereotypes).
397. See id.
398. See Lopez, supra note 82, at 31.
399. See supra p. 90-91.
400. See supra p. 94.
402. For a detailed account of Rivera's murder, see Alessandra Stanley, The
activists pressed the police to investigate the crime more vigorously and to classify it as a “hate crime.” Police, however, denied that Rivera was a victim of a “hate crime” and instead attempted to portray Rivera as responsible for his own victimization—labeling the crime as “drug-related,” a characterization reflective of the stereotypification of poor Latinos as “criminal.”

Because Rivera was a Latino male—and therefore “macho” and aggressive—the police could not perceive him as gay (and a victim of homophobic violence). On the contrary, because he was Latino, male and poor, Rivera’s victimization was more easily dismissed by the police as a drug offense, a crime undeserving of publicity and heightened investigatory efforts. Thus, heterosexual stereotypes of people of color may serve as a prophylactic justification for racist acts regardless of the sexual identity of the victim and may contribute to the perpetuation of homophobic racism.

Indeed, while specific racial stereotypes of gay, lesbian, bisexual and transgendered persons of color may not be sharply transcribed into the social structure, statistical data and numerous reports vividly demonstrate that racism and homophobia interact to create patterns of particularized victimization for people of color. Fighting these “patterns” of discrimination is entirely consistent with prevailing anti-racist thought which focuses extensively on challenging subtle, implicit, de facto and hidden forms of oppression.

Symbols Spawned by a Killing, N.Y. TIMES, Nov. 18, 1991, at B1. For a closer examination of the racial, class and sexuality issues implicated by Rivera’s murder and responses to the murder by police and political activists, see Hutchinson, supra note 2, at 567-73.

403. See Hutchinson, supra note 2, at 570-71 (discussing police response to Rivera’s slaying).
404. Police and mainstream gay activists never considered race as a motive in the case, despite the fact that the youths were members of a white supremacist organization. Id. at 568-69. A combination of factors likely resulted in the marginalization of race in responses to Rivera’s death; these factors include the essentialist framing of the crime by white gay and lesbian activists, the admission of homophobic intent by one of the assailants and the desire of the police to prevent giving any heightened attention to the crime. See id. at 568-73.

405. Cf. Crenshaw, supra note 9, at 149 (“Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and black men.”). Indeed, it is not clear (or likely) that all of the victims of heterosexual racial stereotypes actually engaged in heterosexual practice.
406. See sources cited supra note 54.
the absence of clearly articulated racist-homophobic stereotypes should not deter anti-racists from combating the racial effects of heterosexist subordination.407

Finally, heteronormativity and intolerance of sexual diversity among anti-racists and in communities of color may reflect an attempt by people of color to combat the painful history of sexualized racial stigmatization and other forms of discrimination. As Cathy Cohen (looking specifically at black experiences) has argued, the “systematic degradation, stereotyping and stigmatization of Black Americans has all but dictated that attempts at incorporation, integration and assimilation on the part of black people generally include some degree of proving ourselves to be ‘just as nice as those white folks.’”408 Similarly, in Asian American and Latino and Latina communities, intolerance of gay, lesbian, bisexual and transgender identity may result from the construction of these communities as “foreign.”409 In order to overcome this stereotype heterosexual Asian Americans and Latinos and Latinas may conservatively police sexuality within their communities, stigmatizing gay, lesbian, bisexual and transgender identity as undesirable and as inconsistent with a goal of being accepted by white American society.410

407. In fact, these patterns may reflect both conscious and “unconscious” homophobic-racism. See Hutchinson, supra note 2, at 609 (arguing that common “racist” and “homophobic” stereotypes may converge and create particularized effects for people of color).

408. Cohen, supra note 3, at 376; see also Clarke, supra note 141, at 199 (attributing insensitivity towards gays and lesbians in black communities to a desire “to debunk the racist mythology which says [black] sexuality is depraved.”); Jackie Goldsby, Queen for 307 Days: Looking B(ack) at Vanessa Williams and the Sex Wars, in SISTERS, SEXPERTS, QUEERS: BEYOND THE LESBIAN NATION 121 (Arlene Stein ed., 1993) (arguing that history of stereotypes concerning black sexuality contributes to silence surrounding issues of sexuality within black communities); Petersen, supra note 76, at 125 (“The legacy of slavery (i.e., the desire to keep Black sexuality out of the view of white voyeurs) may contribute to the silencing and enforced invisibility of lesbians in contemporary Black communities.”).


410. This “justification” for heterosexism in communities of color is vividly
Although white supremacy provides a context for understanding some of the intolerance of transgressive sexual identities in communities of color and perhaps for explaining, in part, the heteronormative nature of anti-racist discourse, it ultimately fails as a justification for the exclusion of pro-gay politics in communities of color and anti-racism.

First, allowing white supremacy to dictate sexual expression in communities of color and the composition of anti-racist political agendas and legal theories is inconsistent with the goals of anti-racist struggle. Indeed, such a situation actually inscribes white supremacist ideology into anti-racist discourse and in the culture of communities of color. Anti-racist politics should seek to resist, rather than embrace, white supremacist ideologies.

In addition, even if heteronormativity in anti-racism represents a response to a history of racist sexual stigmatization and exclusion, anti-racists should balance the "gains" (if any) from this heterosexist response against the problems caused by essentialism. These problems undoubtedly outweigh any "benefit" that anti-racism could obtain from a heteronormative "compromise" with white supremacy and white homophobia.

demonstrated in the exclusion of SALGA, the South Asian Lesbian and Gay Association, from participation in New York City's annual India Day parade (a celebration of Indian Independence Day). In "explaining" the group's exclusion, Nitin Vora, president of the Federation of Indian Associates (the group responsible for organizing the parade) stated that "homosexuality" is not Indian values... [c]ertainly that's not to be appreciated. That is not what we should be showing to the American people." Somni Sengupta, Indian Parade: Gays Not Allowed, NEWSDAY, Aug. 14, 1995, at A12 (emphasis added). A feminist group was also excluded. See id. The Supreme Court's decision in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that application of state public accommodation law to force inclusion of gays and lesbians in private parade violated First Amendment) effectively bars any claim by SALGA to participate in the parade on civil rights grounds.

411. See Kendall Thomas, "Ain't Nothing Like the Real Thing": Black Masculinity, Gay Sexuality, and the Jargon of Authenticity, in REPRESENTING BLACK MEN 66 (Marcellus Blount & George Cunningham eds., 1996). As Kendall Thomas has argued:

[T]he heteronormative vision of racial identity that would exclude the expression of sexual difference among African-Americans does not exorcize 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.

Id. at 66.
Furthermore, a heteronormative response to white supremacy is discriminatory. Although heterosexual practice within communities of color has been subjected to stigmatization and has served as a source of violent oppression, anti-racism has not responded to this stigmatization by excluding heterosexuals from anti-racist political activism and theory, nor have communities of color sought to “closet” heterosexual identity. In fact, heterosexual status operates as a prerequisite for anti-racist advocacy and, often, for making an “authentic” claim to “person of color” status. Thus, if white supremacy really explained the heteronormative construction of anti-racist discourse, one would expect (but, alas, does not see) equal policing of heterosexual practice in communities of color and the exclusion of heterosexuals from anti-racist agendas. The disparate “response” to white supremacist stigmatization of sexuality in communities of color suggests that heterosexism and homophobia are actually central causes of heteronormative anti-racist politics, rather than fears of retribution from whites.

Finally, the construction of a heteronormative racial discourse as a response to white supremacy means that anti-racists have simply acquiesced in the notion that heterosexuality is “normal” and homosexuality is “deviant.” If anti-racists were to transcend heterosexist ideology and recognize the connections between racism and heterosexism, then the terms of racial justice would not require the subordination and invisibility of gays, lesbians, bisexuals and transgendered persons of color. Anti-heterosexism (and sexual freedom generally) would instead be considered an integral component of racial justice. Although I have

412. Cohen, supra note 3, at 379 (arguing that as a result of black heterosexual policing of black sexuality, “to be a true black man is antithetical to being gay”); see Hutchinson, “Claiming” and “Speaking” Who We Are, supra note 24, at 4-5 (arguing that homosexuality is often considered a product of white culture by people of color); Thomas, supra note 411, at 59 (arguing that heteronormativity in the black community dictates who is “authentically” black); Sengupta, supra note 410, at A12 (reporting view of Indian American community activist that homosexuality does not represent “Indian values”).

413. See Hutchinson, supra note 2, at 616 n.231 (“The suppression of sexual difference to advance purported racial freedom ... reflects an essentialist view that sexuality is separable from and unconnected to racial identity, subordination and liberation.”); cf. Crenshaw, supra note 1, at 1295 (“Although collective opposition to racist practice has been and continues to be crucially important in protecting Black interests, an empowered black feminist
engaged several possible explanations for the heteronormative nature of anti-racism, none of these reasons provides a justification for the continued deployment of heteronormative anti-racist legal theories and politics. Whatever the explanation for the exclusion of gay, lesbian, bisexual and transgender equality from anti-racist discourse, the result remains problematic and indefensible: heteronormativity in anti-racism leads to legal theories and political action that marginalize gay, lesbian, bisexual and transgendered people of color, conflict with the inherent goals of anti-racism, cause political fragmentation within and across socially oppressed groups, and discount and ignore the sexualization of race in homosexual contexts, thus limiting the transformative potential of anti-racism. Due to the numerous inefficiencies, injuries and contradictions associated with anti-racist heteronormativity, race theorists should actively seek to reconstruct their theories in order to purge them of their sexually hegemonic nature. The final section of this Article tentatively discusses some of the immediate implications of a multidimensional anti-racist legal theory and civil rights regime.

B. Beyond Heteronormativity in Anti-Racist Theory and Law

1. Reconstructing Anti-Racist Legal Theory. While heteronormativity plagues anti-racism in its present form, the newly emerging race-sexuality critiques of gay and lesbian legal theory and critical race theory provide alternative and more accurate equality paradigms that conceptualize racial oppression and heterosexism as interrelated, rather than as unconnected and autonomous systems of subordination. This Article has offered multidimensionality as an instrument for reconstructing anti-racist legal theory beyond its currently heteronormative nature.414 Multidimensionality sensibility would require that the terms of unity no longer reflect priorities premised upon the continued marginalization of Black women."). Other reasons for anti-racist heteronormativity include the notions that “race” unlike “sexual identity” is an “immutable characteristic” and that heterosexism does not produce sufficient injuries to warrant the attention of civil rights scholars. Because these arguments were addressed in Part II of this Article, I do not repeat them in this section.

414. See supra Part II.A.1; see also Hutchinson, supra note 2, at 566
demands that anti-racist and other progressive theorists seek to uncover the many dimensions and layers of social inequality and identity categories, realizing that no one system of oppression ever stands alone. Multidimensionality also reveals the troubling disparities that result when essentialist civil rights theorists reject pleas for the formation of more inclusive paradigms, while their own work likely reflects the transparently multidimensional perspectives of particular classes of individuals (e.g., heterosexual men of color or white gay men). Anti-racist scholars should engage this Article and other works within the growing and compelling race-sexuality corpus, seeking to explore the many ways in which people of color are affected by heterosexist subordination and how their own scholarship marginalizes gays, lesbians, bisexuals and the transgendered. They should then attempt to reshape their work so that it no longer deploys a heteronormative paradigm that subordinates the sexually transgressive. As the emergent race-sexuality scholarship and the foregoing analysis demonstrate, heterosexism plays a central role in the subordination of people of color. Accordingly, anti-racist theory must embrace gay and lesbian equality in order to articulate effective and comprehensive challenges to racial oppression in its various forms and contexts.

2. Reconstructing Civil Rights Law. While this Article has uncovered the systematic exclusion of anti-heterosexist
politics from anti-racist legal theory and political discourse, the same omission plagues the body of anti-discrimination law. This section offers some tentative suggestions for extricating heteronormativity from civil rights law and policy.

Most commonly, anti-heterosexism is marginalized in anti-discrimination laws when such laws fail to recognize "sexual identity" as a protected category.\textsuperscript{417} Sexual identity remains unprotected in federal civil rights law\textsuperscript{418} and is a protected classification in only a few states and municipal civil rights regimes.\textsuperscript{419} While anti-discrimination law often fails to include sexual identity as a protected category, most civil rights laws prohibit \textit{formal} racial discrimination. The failure of anti-discrimination law to combat heterosexist discrimination—while purporting to provide for racial equality—means that it subscribes to the same narrow and heteronormative vision of racial equality offered by anti-racists. By omitting sexual identity discrimination from civil rights law and treating it as unimportant in judicial opinions, legislatures and courts, in addition to legitimating the oppression of gays, lesbians, bisexuals and the transgen-

\textsuperscript{417} Several commentators have noted that a primary limitation on the application of "intersectionality" in the gay and lesbian context is the non-recognition of sexual orientation discrimination in civil rights law. \textit{See} Arriola, \textit{supra} note 416, at 128-29 (observing that intersectionality "does not reach discrimination occurring along intersections of non-traditionally recognized categories, such as homosexuality"); Valdes, \textit{supra} note 12, at 1335 ("The doctrinal experience with race and gender suggests that intersectionality is not well suited to sexual orientation equality claims because 'sexual orientation discrimination' is not formally prohibited by federal anti-discrimination statutes."). The particular forms of discrimination—racism and sexism—analyzed under much of the intersectionality scholarship are recognized in federal and state civil rights regimes. Thus, the theory does not contemplate the experiences of gays, lesbians, bisexuals and the transgendered of color who typically do not receive civil rights protection for their sexualized victimization. Although intersectionality does not contemplate this result, the theory must be understood as providing a re-conceptualization of oppression, rather than a mere "doctrinal" critique. \textit{See} Harris, \textit{supra} note 208, at 768 ("Crenshaw's concept of intersectionality brings a postmodernist skepticism about the transparency of language to bear on legal doctrine and social policy. In demanding a jurisprudence that can recognize women of color as proper legal subjects in themselves, Crenshaw destabilizes the familiar categories of "race" and "gender."); \textit{see also supra} pp. 9-17 (discussing theoretical contributions of intersectionality scholarship).

\textsuperscript{418} \textit{See} Valdes, \textit{supra} note 12, at 1335.

\textsuperscript{419} Although formal equality, as the experience of women and people of color demonstrate, does not end social subordination, it is an important step toward the achievement of that goal.
dered of all races, offer an essentialist construction of formal racial equality that ignores the reality that racism has a homophobic dimension and that racism and homophobia are related systems of oppression.

Furthermore, the failure of civil rights law to provide for sexual equality may actually provide an incentive for defendants in discrimination cases to concede "heterosexual," rather than "racial," bias when the surrounding circumstances of their cases strongly suggest the operation of "some" discriminatory motivation. Thus, the current heteronormative nature of civil rights law may provide a loophole that would permit litigants to admit to homophobic discrimination as a means of escaping liability for racial discrimination. In such a situation, heteronormativity and the legal marginalization of gays and lesbians would clearly permit and legitimate the perpetuation of racial subordination and discrimination.

The absence of sexual identity as a civil rights category has other important implications for the achievement of racial justice. Consider again, for example, the beating of Loc Minh Truong. Truong's assault was a manifestation of racial, gendered and homophobic stereotypes. Much of the evidence of bias in the case, however, was "sexualized." Despite the sexual coloring of the crime—or the fact that the evidence had a sexual "hue"—the crime also supported racial domination. This observation is consistent with the history of racialized sexual aggression against persons of color of all sexualities, the surrounding facts of Truong's assault, and the multidimensionality of oppression. Because systems of oppression (including oppressive violence) and social identity categories are multidimensional, evidence of bias in a particular incident of violence or discrimination will be multidimensional. Hence, sexual epithets, common evidence of bias in discrimination and hate crimes cases, may inflict racial wounds as well as sexual wounds.

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420. Cf. Valdes, supra note 1, at 136-68 (discussing anti-discrimination cases in which defendants conceded sexual orientation bias, rather than gender bias because the former is an unprotected category in civil rights law).

421. See id.

422. See generally Wang, supra note 53, at 50 (discussing use of epithets in commission of "hate crimes"). In this Article, I take a neutral position on the constitutionality and efficacy of "hate crimes" statutes. This topic remains subject to substantial scholarly debate.

423. See Hutchinson, supra note 2, at 641 (arguing that the word "'gay' may
Truong's victimization, for example, negatively affected both gay and lesbian and Asian American communities, thereby reinforcing both sexual and racial hierarchies.  

Despite the multidimensional nature of oppression, the sexualized nature of the evidence in the Truong case led prosecutors and the police to conclude that the crime was "sexual," dismissing any possibility of "racial" motivation. While their essentialist conclusions are problematic because they treat racism and homophobia as separate, the conclusions also underscore the importance of including sexual identity discrimination in civil rights law. Because Truong's assault was sexually colored—that is, homophobic in appearance—sexual bias was likely the strongest avenue, from a litigation standpoint, for pursuing the criminal and civil cases under the state criminal and civil hate crimes laws. The sexuality approach, that is, provided for the least amount of confusion for the police, attorneys and juries that had to decide "what type" (or types) of bias influenced the attack.

In the context of Truong's victimization, however, the particular laws under which the assailants were prosecuted and subsequently sued included race and sexuality as protected categories. Thus, Truong's attorney was able to pursue the case as a sexual hate crime and, given the sexual coloring of the evidence, had a likelihood of securing a verdict against the defendants. If sexual identity had not been included in the civil hate crimes statute, then Truong's case would have probably been more difficult to pursue as a "hate crime"—despite the strong evidence, indeed confession, of biased motivation. Due to pervasive societal treatment of homophobia as separate from racism, it would likely have been difficult to convince the jury that the sexualized and homophobic evidence in fact proved racial domination. This complicated project—demonstrating to courts, attorneys, law enforcement and juries the connection between racism and homophobia—is necessarily a

derescribe a poor, Latino male, a black, lesbian feminist, or a white, middle-class male—depending on the context of its usage” because oppression and identity categories possess “multiple dimensions and contextual layers” (emphasis supplied); Julie Inness, Going to the Bottom, 9 BERKELEY WOMENS'S L.J. 162, 171 (1994) (“When a Black lesbian is called ‘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 . . . ”).

424. See supra p. 33.
crucial element of strategies to achieve the legal equality of sexually transgressive persons of color. Furthermore, in the absence of sexual identity as a protected civil rights category, attorneys have no other choice but to uncover the racial dimensions of sexualized racial oppression and discrimination targeting persons of color. These measures, however, may not prove sufficient to convince a jury or court, accustomed to essentialist conceptualizations of oppression, to find racial discrimination when evidence appears homophobic in nature. Hence, a civil rights statute that fails to recognize “homophobic” discrimination may not provide an adequate remedy for racism in its homophobic forms.

The statute under which Truong brought his claim, however, precluded the type of confusion that could result in situations where the law fails to provide protection for the various hues and dimensions of racial (or other forms) of bias. By explicitly including sexual identity as a protected category, the “hate crimes” statute at issue in the Truong case provided a remedy for situations in which evidence of racial motivation is largely sexually colored.

425. See Valdes, supra note 12, at 1339 (“The development of tools and techniques that permit and advance transformative legal analysis in light of sexual orientation’s formal vulnerability therefore is one of the key tasks pending for the second stage of sexual orientation theorizing.”). In the Truong civil suit, for example, the attorney could have taken several steps during discovery to bring out possible racial elements of the attack, including questioning the defendants regarding, or otherwise seeking to determine, how the assailants determined Truong was “gay,” if they by-passed white gay individuals, and if they harbor racial prejudice. The attorney could also have attempted to construct an argument that a demonstration of homophobic motivation (which the assailants conceded) could be used to infer racial motivation, given the psychological data that individuals commonly adhere to multiple forms of bigotry. The validity of this latter option will probably differ in the criminal context, where the rights of the defendants are much more enhanced. Furthermore, the legality of this approach is unclear even in the civil context. See Freshman, supra note 80, at 250 (discussing use of one form of bias to prove existence of other forms of bias and noting split among courts regarding the legitimacy of this practice). For purposes of this Article, I am not advocating the use of this methodology in the criminal law context.

426. The absence of sexual identity in federal civil rights law has already affected a race discrimination claim brought by a black gay male. The Court dismissed the race claim concluding that the evidence seemed “sexual” in nature, and because sexual identity is not a protected category under federal law, plaintiff was left without a remedy. See Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 69 (8th Cir. 1989).

427. Because heterosexual racial stereotypes and anti-racist attention to
Thus, civil rights regimes that protect sexual identity (as well as other disparaged statuses) provide an opportunity for litigating multidimensional discrimination claims. Only by vigorously seeking to undo both formal and structural manifestations of heterosexism, can civil rights law transcend its current heteronormative nature and move towards recognizing the multidimensional harms caused by racism (and other forms of forms of oppression). The inclusion of marginalized sexual identity within existing civil rights laws is an important step toward this end.428

CONCLUSION: THE CRUELTY OF PARTIAL JUSTICE

During the completion of this project, a horrible act of oppressive violence occurred in the city of Jasper, Texas. On the night of June 7, 1998, James Byrd Jr., a 49-year-old black male, accepted a ride from three white males. Byrd, who was walking home from a social function, was then beaten and chained to the truck that the men drove and was dragged for two miles. Byrd's body was later found dismembered, broken into parts from the impact of the dragging.429 The three killers were subsequently arrested and charged with capital murder. Police later found that Byrd's killers were white supremacists, and the district attorney prosecuting the case concluded that the crime was racially motivated.430 On July 6, the three men were indicted on the capital murder charges.431 On February 25, John William King, the first of Byrd's killers to face a criminal trial, was convicted and sentenced to death.432

heterosexual racial subordination are more inscribed in the social structure (than are homophobic race stereotypes and anti-racist challenges to homophobic racism), the sexualized victimization of heterosexual people of color might be more easily identified as "racial" victimization by judges and juries. Thus, under the present construction of most civil rights law which include race as a formally protected category, acts of heterosexual racial discrimination may be "read" as racial even if they are sexually colored.

428. See Valdes, supra note 12, at 1339 (arguing that formal protection for "sexual orientation" must be secured in order to apply theories such as "intersectionality" in the context of heterosexist discrimination).


430. See Cropper, Black Man Fatally Dragged, supra note 429, at A16.


432. See Rick Lyman, Texas Jury Picks Death Sentence in Fatal Dragging of
Byrd's killing sparked an outpouring of support from anti-racist organizations and people of color (and whites) across the country, who appropriately condemned the crime as a gross act of racial domination.433 Byrd's lynching, a horrible manifestation of white supremacy and the social construction of black maleness as threatening and in need of violent restraint, serves as a reminder to people of color of the ongoing need for vigilant responses to racism—in both its graphic and more subtle (everyday) forms.

As I think of Byrd's killing and the vigorous responses to the crime by anti-racists and the media, I cannot escape the temptation to juxtapose these reactions against the ways in which anti-racists respond to homophobic racism and to heterosexist domination generally. I try to imagine how the anti-racist response to Byrd's vicious murder would have sounded if, instead of offering needed advocacy and support, anti-racist activists had provided the same battery of (non)excuses they offer to gays, lesbians, bisexuals and transgendered people of color for failing to challenge or to take seriously the institutions of heterosexist oppression and homophobic racism.

In order to have conformed their response to Byrd's death with their reaction to heterosexism, perhaps anti-racists should have considered if Byrd's chosen "behavior" left him vulnerable to the attack. Maybe, for instance, Byrd committed a tragic error by accepting a midnight ride from three white men driving a truck in rural East Texas; or perhaps he was "acting black" and somehow provoked the racist assailants to attack. On the other hand, perhaps anti-racists should have sought to discover whether blackness is itself deviant and inferior—that is, to engage the terms of the racial eugenics movement, refashioned as scholarship by contemporary writers such as Richard J. Hernstein and Charles Murray.434 Such an inquiry could determine

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434. See Richard J. Hernstein & Charles Murray, *The Bell Curve* (1994) (arguing that race and intelligence are linked). This would be a "fairer" test than the one posed by Butler in his discussion; Butler did not engage, but accepted the terms of social theories that declared homosexuality "deviant." See Butler, *supra* note 144, at 16.
whether blackness has an appropriate “metaphor” for civil rights protection or whether anti-black discrimination is reasonable or legitimate under “certain circumstances.” Or, maybe a better test to determine whether Byrd’s racially motivated murder qualifies for the attention of anti-racism would have endeavored to discover whether anything in Byrd’s life embarrassed the black community (or other persons of color) before whites; if Byrd was anti-assimilationist, for example, then advocating on his behalf might obscure the path of integration. Finally, perhaps anti-racists should have inquired into Byrd’s sexual practices and identity, determining whether his sexuality conformed with the “party line” established by anti-racist discourse. Transgressions from these requirements would cause his immediate disqualification from anti-racist activism. With these considerations made and publicly aired, the anti-racist “powers that be” could then decide whether to protest Byrd’s death or to dismiss it with the ambivalence, confusion, uncertainty and hostility with which they address homophobic racism affecting gays, lesbians, bisexuals and the transgendered of color (and heterosexism affecting persons of all races).

On many levels these “imagined” anti-racist responses to Byrd’s killing would have been as cruel as the killing itself. The search for reasons to justify ambivalence toward racial suffering and inhumanity in any form is terribly inconsistent with the goals of anti-racism and of progressive social change. Yet, these evasive responses to racial and sexual hierarchy by anti-racists are quite “real” when the victims of oppressive violence and other forms of domination are gay, lesbian, bisexual or transgendered. The heteronormative nature of anti-racist political and legal discourse creates a troubling litmus test in which “proper” (i.e., “heterosexual”) sexual identity qualifies people of color for the advocacy of anti-racist thought and politics. This litmus test, like racial, gender and sexual hierarchies deployed by a white supremacist society, harms persons of color and is

435. In a heteronormative society, individuals are presumed to be heterosexual. Indeed, that the anti-racists did not inquire into Byrd’s sexuality indicates that they “perceived” him as being heterosexual. See Mary Coombs, Between Women/Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male)Sex Sexual Activities, 8 YALE J.L. & HUMAN. 241, 255 (1996) (“Heterosexuality is both assumed as the natural and normal form of sexual practice, and assumed away as a subject to be examined.”).
not more legitimate or less destructive because it occurs within the context of and under the guise of anti-racism. Heteronormative anti-racism is ultimately a shallow and “partial justice” that denies the promise of liberation to sexually transgressive persons within communities of color. This half-empty freedom calls into question the very legitimacy of racial liberation as a “progressive” social movement.

The various internal critics of progressive social movements have compiled a formidable array of works that allow willing scholars and activists to disavow narrow and partial theories of equality and to replace them with more complete and inclusive models. While the race-sexuality critiques have only recently begun to unfold and take shape, these works, coupled with a history of anti-racist opposition to sexualized racism, provide ample guidance for ending the contradictory perpetuation of social subordination within anti-racist discourse. Thus, the road to transforming and reconstructing anti-racism from heteronormativity toward a multidimensional social movement is brightly illuminated by historical example and the by the ongoing efforts of critical scholars. By offering multidimensionality as a paradigm for theorizing equality, I hope to push willing anti-racists (and other equality theorists) along this vital path of racial reconstruction.