The Sexualization of Difference:
A Comparison of Mixed-Race and
Same-Gender Marriage

Josephine Ross∗

I. INTRODUCTION: MIXED-RACE LOVE AS A SEXUAL ORIENTATION

The past prohibition of mixed-race marriages in many U.S. states is often cited by those who support civil recognition of same-sex marriages. Advocates and scholars reason that just as it is no longer legal to deny marriage licenses on the basis of race, it should be illegal to deny marriage licenses on the basis of sex. Unfortunately, the comparison usually stops there. No effort has been made by the legal community to examine the actual lives of these two groups of outsider couples to see if the comparison holds together descriptively as well as formally.1 Nor have contemporary attitudes towards same-sex couples been compared to historical data detailing attitudes towards mixed-race sexuality during the time that mixed-race relationships were illicit. This Article will compare heterosexual mixed-race and same-sex unions (both mixed-race and mono-race) in the context of history, both legal and cultural. The historical treatment of mixed-race marriages in this country supplies important information regarding the way society marginalizes certain relationships, and the connection between deprivation of marriage rights and the sexualization of relationships.

∗ Visiting Assistant Clinical Professor at Law, Boston College Law School. J.D., Boston University School of Law, B.A., Oberlin College. I gratefully acknowledge the comments on an earlier draft by Leslie Espinosa and David Cruz. I have also benefited from discussions on same-sex marriage issues with a variety of other people, including Arthur Berney, Anthony Farley, Maria Grahn-Farley, Jane L. Scarborough, and Catharine Wells. This Article is based on a talk I gave at the University of Florida for Latcrit VI, and I benefited from the comments of those in the audience. My diligent research assistant Heather Lynn Anderson also earned my heartfelt thanks. Finally, I thank the editors at this journal for the enthusiasm and dedication with which they embarked upon the editing process.

1 See Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 221, 249 (1994) (arguing that discrimination against gay men and lesbians is part of a larger pattern of domination of women by men, just as discrimination against interracial couples is part of a larger pattern of domination of blacks by whites); James Trosino, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. Rev. 93 (1993) (arguing that the judiciary’s historical treatment of miscegenation cases reflected societal prejudices, and explaining how those same prejudices are being reflected in the judiciary’s contemporary treatment of same-sex marriage).
To say that a relationship is “sexualized,” means it is viewed as essentially sexual, and is not seen to be about commitment, communication or love. To understand what I mean by the word “sexualized,” consider certain reactions to an elementary school teacher who came out to his class in Newton, Massachusetts.\(^2\) When asked if he was married, the teacher responded that he was not, but that if he were to live with someone, he would live with a man that he would “love the way your mom and dad love each other.” This response gave rise to a parent’s complaint that the teacher had talked inappropriately about “sex.” That story nicely encapsulates what I mean by the sexualization of same-sex love. If the teacher had answered that he would like to marry a woman whom he would “love the way your mom and dad love each other,” no one would have sexualized his response.

My argument is that the sexualization of gay relationships is similar to the way interracial relationships were sexualized in the past.\(^3\) For both, sexualization is a cause as well as a symptom of disempowerment. In the 1970s, social scientists began to describe the continued sexualization of black-white relationships in the United States from the time of slavery through the decade following the Supreme Court’s 1967 decision in *Loving v. Virginia*.\(^4\) They noted that narrative discourse around mixed-race couples was sexualized, and that mixed-race love was viewed as something pornographic and essentially different from mono-race love. Social scientists uncovered attitudes towards mixed-race couples by family members and society at large that I believe mirror attitudes towards same-sex couples.

Part II of this Article provides clues to the link between the sexualization of relationships that trespass on societal norms, and the deprivation of power and rights. Section A explores how mixed-race relationships were sexualized in the past, while Section B examines how the law has been used to restrict both mixed-race and gay couples. Section B also explores the cases that predate *Loving* and the reasons for denying recognition to mixed-race marriages. Those reasons are compared to arguments made by marriage opponents in same-sex marriage cases today.

Part III considers similarities in the lives of gay couples and mixed-race couples in order to demonstrate that analogizing the issue of marriage as it relates to each group is not merely a trick of logic. Section A examines the analogy between *Loving v. Virginia* and same-sex marriage cases. Section B reviews recent social science data that illustrates many parallel experiences of outsider couples, including the reactions of family members and society, the ways non-traditional couples cope with those


\(^3\) Of course, this Article is not meant to suggest that mixed-race couples have achieved full social acceptance. *See infra* note 64 and accompanying text.

negative reactions, and the reasons couples commit to one another despite adversity. By comparing mixed-race and same-sex couples, one can learn a good deal about the way society grants status and safety to certain relationships while marginalizing others. 5

Part IV asks whether the term “sexual orientation” should be expanded to include those in mixed-race, heterosexual relationships. How one answers this question will shed light on whether the phrase “sexual orientation” is a useful or accurate term when applied to those in gay relationships.

In the Conclusion to this Article, I urge scholars to desist from sexualizing gay relationships. Like mixed-race couples, same-sex partners are not necessarily any more sexual than their heterosexual counterparts. Gay couples, like mixed-race couples, are different not because of what they do or do not do in the bedroom, but because of the meaning ascribed to these couples in supermarkets, in dance halls, and in PTA meetings. Advocates and scholars should learn from past sexualization of mixed-race love and consider more accurate and less sexualized means to characterize same-sex love and relationships.

II. THE SEXUAL DIMENSION TO AN INFERIOR STATUS

A. Historically, Mixed-Race Relationships Were Sexualized

There is every indication, however, that no matter how literally the sociologists employ the term “intermarriage,” among the bigoted, it is merely a euphemism for any sexual activity: though they may use the word “marriage,” they simply mean “sex.” 6

The history of opposition to interracial marriage in this country is replete with sexual undertones. Laws that made mixed-race marriage illegal were part of a package that also criminalized sexual relations between unwed individuals across racial lines. 7 The statutes prohibiting

---

5 I am mindful that one danger of analogizing race discrimination to other forms of discrimination is that readers will assume that the two groups discussed are distinct, obscuring the recognition of mixed-race, same-sex couples. See generally Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms), 1991 DUKU L.J. 397 (describing the dangers of analogizing race and sex discrimination). Mixed-race couples and same-sex couples are certainly two overlapping categories. Moreover, Grillo and Wildman agree that analogies are important despite some attendant dangers because “analogies deepen our consciousness and permit us to progress in our thinking.” Id. at 400. Throughout this Article, I intend for same-sex couples to include mixed-race gay couples.


7 Id. Thirty-eight states forbade intermarriage during the nineteenth century. See Joseph R. Washington, Marriage in Black and White 74 (1970). By 1967, when Loving
fornication and adultery between whites and non-whites were not intended to be enforced, however, unless the woman involved was white. In essence, “interracial marriage” was a symbol or code word for sexual activity between black men and white women.

Underlying the whole discussion of black-white relationships was a view of black-white sexuality as perverse. Writing in 1965, sociologist Calvin C. Hernton observed that “[t]o the majority of white men the mere thought of sexual relations with a black woman is either pruriently disgusting or obscenely exciting.” He noted similar prurient curiosity among white women in that time period: “The thought of having relations with a [male] Negro may be a revolting or an exciting thing. In either case, however, it is a vulgar thing, a perverse thing.” Black-white relationships “have fascinated and titillated society since the days of slavery.” Even as mixed-race couples began to break taboos in the North and become more open about their love, their relationships were sexualized. Hernton observed, “In New York, where there is more tolerance for mixed couples than anywhere else in the United States, a Negro and a white woman cannot walk down the street without the leering, disapproving stares of passers-by, especially white men.” A famous liberal journalist admitted in 1963 to “the disgusting prurience that can stir in me at the sight of a mixed couple.” Writing in 1972, another observer noted that “there are not many Americans, black or white, who can honestly claim that they have no emotional reaction to (such) implied sexuality” upon seeing a

was decided, only sixteen states still maintained anti-miscegenation laws on the books. Id. at 93. For a list of these anti-miscegenation statutes, see id. at 73–80. See also id. at 95 for a list of states that repealed their laws between 1925 and 1968.

Black-white couples were the paradigmatic focus of most sociological studies, although many statutes criminalized sexuality, cohabitation, and marriage between a variety of mixed-race couples. Though beyond the scope of this Article, several scholars have discussed theoretical gaps in scholarship on miscegenation laws due to an excessive focus on black-white couples. See, e.g., Leti Volpp, American Mestizo: Filipinos and Anti-miscegenation Laws in California, 33 U.C. Davis L. Rev. 795, 825–26 (2000) (explaining how anti-miscegenation laws targeted Chinese, Japanese, and Filipino persons as well).

8 Washington, supra note 7, at 72–73.
9 Stember, supra note 6, at 15.
10 Calvin C. Hernton, Sex and Racism in America 90 (1965, reprinted with introduction 1988).
11 Id. at 84.
13 Hernton, supra note 10, at 118. See also Winthrop D. Jordan, Introduction, in Black/White Sex 8 (Grace Halsell ed. 1972) (“Anyone in this country who has walked publicly arm in arm with a person of the opposite sex and race can testify that old hostilities are not yet dead.”) cited in Stember, supra note 6, at 21 n.30.
mixed-race couple. In sum, sexuality between the races was viewed as deviant and pornographic.

Furthermore, the veil of privacy that generally surrounds sexuality in marriage was not respected for interracial couples. Normally, people announce they are married and no one asks if they are having sex regularly or what they do in bed. Thus, marriage allows one to be very public about one’s relationship without sacrificing sexual privacy. However, this was not the case for many mixed-race couples. “Are you being satisfied?” was one of many questions directed at a black woman married to a white man—a question asked by black men insinuating that white men were sexually inferior.

15 Jordan, supra note 13, at 8, cited in Stember, supra note 6, at 3–4, 211 n.6.
16 The fact that sexuality and marriage were outlawed for mixed-race couples in the first half of the twentieth century did not eradicate sexual behavior between white people and people of color. Some scholars assert that classifying certain sexual activity as licentious and deviant may encourage rather than discourage this behavior. See generally Michel Foucault, The History of Sexuality, Volume I: An Introduction (Robert Hurley trans., 1980) (explaining the history of sexuality in terms of power and resistance, and arguing that in the eighteenth and nineteenth centuries, the classification of certain sexual activity as deviant encouraged resistance to rather than compliance with those rigid classifications). See also Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 265–73 (2001) (arguing that “laws regulating child pornography may produce perverse, unintended consequences”). Cf. Anthony Paul Farley, The Black Body as Fetish Object, 76 Or. L. Rev. 457 (1997) (describing “race” as “a sadomasochistic form of pleasure” in which “whiteness is a sadistic pleasure” and “the black body is a fetish object”).
17 This Article is less interested in the legal privacy rights extended to married individuals than the social privilege afforded to married persons regarding their private sex lives. With regard to legal privacy, however, marriage does extend certain rights and privileges that are not offered to non-married couples. When the Supreme Court first recognized sexual privacy as a legal right, it only offered this right to married persons. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that there is a constitutional right to privacy that protects the use of contraceptives within the marriage relationship). This right to sexual privacy was eventually extended to non-married couples. See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decisions whether to bear or beget a child.”). In Bowers v. Hardwick, however, the Supreme Court recast its Eisenstadt holding as concerning “procreation” and refused to extend the right to privacy to same-sex sexuality within a home. See Bowers, 478 U.S. 186, 191 (1986) (“No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”). As a result, constitutional jurisprudence still primarily conceives of sexual privacy as a right belonging to the marital unit, and thus denied to gay men and lesbians.
18 Hernton, supra note 10, at 155 (recounting this incident, recorded in 1968). Other intrusive comments were made by white women to black women about the black women’s husbands. Id. at 25. Comments like the one above are reminiscent of the assertion that all lesbians need is “a good dick,” again implying the sexual inferiority of their choice. See, e.g., Koppelman, supra note 1, at 248.

A lack of marriage rights contributes to the sexualization of gay couples. In turn, the sexualization of gay love is used as a justification for denying the right to marry. See Josephine Ross, Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage, 55 SMU L. Rev. (forthcoming Fall 2002). Currently, 51% of Americans oppose allowing gay couples to marry while 34% approve. Press Release, Will Lester, Human
In addition to sexuality, gender issues were completely intertwined with racial bigotry both in the origins and effects of the interracial marriage taboo. Southern laws were aimed at preventing black men from having sex with white women, but it was a one way ban that gave relatively free access to Southern white men to have sexual relations with black women. In fact, many sociologists thought that the Southern caste system was designed solely for that purpose. Certainly, sexual exploitation of black women was maintained and promoted by the system of segregation, including prohibitions against interracial marriage.

The ban on mixed-race marriage did not eliminate sexual activity, but affected the nature of the sexuality, making it secret, closeted and sinful. In the case of white men and black women, the taboo distorted their relationships, suppressing affection or the appearance of affection, rendering them sexual liaisons only. As sociologist Hernton wrote, a white man “can sleep with [a black lover] discreetly, give her mulatto babies, but in all of this he must never act as if he loves her.”

Although the apartheid system in this country was intended to prevent access to white women by black men, the system was not completely successful. Hernton documented in his personal life and in his work a great deal of sexual activity between white women and black men in this era. In his opinion, women were often the aggressors because they were the ones with power during segregation. Jim Crow laws could even be said to aid the women’s conquest because although there were dreadful consequences for black men who consented and were discovered, men were sometimes more afraid to resist for fear they would be framed as rapists and face mob violence. As with white men’s liaisons with black women, the interracial sex taboo served to make liaisons between white women and black men purely sexual and clandestine.


19 See Maria Grahn-Farley, Not For Sale! Race & Gender Identity in Post-Colonial Europe, 17 N.Y.L. SCH. J. HUM. RTS. 271, 272 (2000) (“Racism is about how Europeans look upon Others as not looking European . . . . Sexism is about how men look upon Others as not looking male . . . . Racism cannot be disconnected from gender.”).


21 Hernton, supra note 10, at 176. Until the 1960s, Southern white men were able to coerce sexual favors from black women working as domestic help, one of the few areas of employment then open to black women. Id.

22 Id. at 101.

23 Id. at 25. See also Henriques, supra note 14, at 72 (noting sexual activity between white women and black men). See generally, e.g., Harper Lee, To Kill a Mockingbird (1960).

When it comes to sexual contact between the races, the southern way of life has been, and is, one in which almost everything is permitted so long as such things remain undercover, both in the objective world and in the psychological world. . . . Objectively, behind locked doors, in abandoned buildings, in parked automobiles under cover of night, and in numerous other situations suitable for clandestine behavior, Negro men and white women act out their forbidden passions.25

Segregationists repeatedly used the sexual aspect of mixed-race relations as a scare tactic. “When all is said and done about the reasons for opposing racial integration, the bottom line is invariably a superstitious imagining of the pornographic nature of interracial sex.”26 Although the segregationist literature of the 1960s often focused on intermarriage, “venom is equally directed at nonmarital sex” where the black man “has the gratification of cohabitation without the responsibilities of marriage.”27 Nor was it only white people who viewed mixed marriages as prurient or immoral. Hernton wrote that, “ultimately, like whites, the vast majority of blacks really feel deep down inside that sex across the color line is morally wrong and somehow sinful.”28

Opposition to interracial marriage was so pronounced in the South, that a debate raged among sociologists over whether sexuality lay at the core of racial hatred.29 One side thought segregation was really about economic and political power and status. In this view, protecting white womanhood from black male sexuality was simply the excuse for a system that benefited white Americans. The other side thought sexuality was the key, that the effort to prevent black male access to white women lay at the root of racism and segregation.30 For the purposes of this Article, it is enough to point out that the obsession with sexuality played a key role in maintaining the racist power imbalance and the continued second-class treatment of certain relationships.

25 Id. at 24–25.
26 Id. at xii.
27 Stember, supra note 6, at 15.
28 Hernton, supra note 10, at xvi. While Hernton provides no polling data to support his position, a 1990 Gallup poll found that black respondents most strongly opposed a close relative marrying someone outside their racial or ethnic group. Among African Americans, 57.5% were opposed as compared to 40.4% of Hispanic Americans and 16.3% of Jewish Americans. Black women, as a group, have historically opposed intermarriage more vehemently than white women or men of either race. See Maria P. P. Root, Love’s Revolution: Racial Intermarriage 11, 77 (2001).
29 Stember, supra note 6, at ix, 11–15 (putting forth the debate).
30 Theorists who believed in the sexual underpinnings of race hatred pointed to the recurrence of sexual mutilation at lynchings. See, e.g., Stember, supra note 6, at 13.
B. Understanding the Parallel: Similarities Between Past Views of Mixed-Race Couples and Present Views of Same-Gender Couples

In courts, legislatures, and public debate, similar arguments have been made and tactics used to oppose acceptance of mixed-race and same-sex relationships. For example, at one time more than half the states had anti-miscegenation statutes, and although those laws varied one from the other, they generally criminalized relationships between mixed-race couples in the way state sodomy laws and the federal Defense of Marriage Act currently operate against same-sex couples. In 1959 a Louisiana court examined a statute that defined “miscegenation” as “marriage or habitual cohabitation” amongst people of different races. The court defined cohabitation to mean “sexual relations or acts of sexual intercourse.” A jury was entitled to infer that a man and woman of different races who lived together were having on-going sexual relations. As a result, the statute not only nullified attempts to marry, but also criminalized sexual behavior. Similarly, in Georgia, a woman of color was convicted for “cohabiting and having sexual intercourse with [‘an unmarried white man’],” even though they had been married by a preacher and had obtained a marriage license within the state. The trial

34 Id. at 235.
35 See also Scott v. State, 39 Ga. 321, 322 (1869). See also Pace v. Alabama, 106 U.S. 583, 585 (1883) (holding that § 4189 of the Code of Alabama, which made adultery or fornication between any white person and any Negro a criminal offense, did not discriminate on the
judge barred attempts to prove that the couple was married since Georgia law did not permit such marriages. The prohibition against mixed-race marriage turned their union into an illegal sexual relationship between unmarried persons. The ban on mixed-race marriages, like the ban on same-sex marriages, made these types of relationships appear illicit and casual.

Courts interpreting miscegenation statutes often explained that the more committed the relationship, the worse the offense. The American military currently takes this same approach when enforcing its sodomy statute. As a defense or mitigation to the charge of sexual misconduct, the military accepts the argument that the defendant was having a one-time same-sex sexual experience and was not normally gay or in a gay marriage. Ironically, while the military statute makes same-sex relationships appear to constitute casual sex, casual sex is in fact punished less harshly. As with the mixed-race marriage bans of yore, the question must be asked whether the laws are truly intended to prevent sexuality, or only to run it underground. The similarity between opposition to mixed-race and same-sex couples lies not only in the laws used to discourage those relationships, but also in the arguments offered to support such laws.

Opponents of mixed-race marriages, like opponents of same-sex marriages today, cited religion and natural law to block acceptance of those relationships. The case law is rife with such references. In 1871, a Tennessee court based its opposition to interracial marriage on the Old Testament, saying: “It is an institution of God, and a very honorable state . . . ‘Thou shalt not,’ said Abraham, ‘take a wife unto my son of the daughters of the Canaanities,’ . . . . The laws of civilization demand that the races be kept apart in this country.” Current opponents of gay marriage make very similar arguments: “First Corinthians 6:9 mentions ‘ho-

basis of race or violate the Equal Protection Clause of the Fourteenth Amendment because the same punishment was applied to both white and black offenders).

37 See Poland v. State, 339 S.W.2d 421 (1960) (interpreting an Arkansas anti-miscegenation statute, the court held that one act of sexual intercourse would not constitute “cohabitation” for the purposes of proving concubinage between persons of Caucasian and Negro races); State v. Brown, 108 So. 2d 233 (1959) (interpreting a Louisiana statute, the court held that miscegenation meant “habitual cohabitation” and that “habitual cohabitation” meant customary or repeated acts of sexual intercourse and not an isolated case of intercourse).

38 See Army Regulation 635-200, ch. 15-2 (2000), available at http://www.usapa.army.mil/pdf/fields/r635_200.pdf. Service members can argue that the homosexual sexual conduct is “unlikely to recur,” 100 U.S.C. § 654(b)(1)(B); that it was “a departure from the member’s usual and customary behavior,” id. at § 654(b)(1)(A); and that the member “does not have a propensity or intent to engage in homosexual acts,” id. at § 654(b)(1)(E). See Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 STAN. L. REV. 353, 376–77 (2000). This has been dubbed the “Queen for a Day” approach. RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF 199 (1993). See also Andrew Koppelman, supra note 1, at 265 (quoting Shilts); Yoshino, supra at 376–77 (quoting Shilts and noting similar queen-for-a-day provisions in other contexts).

39 See Lonas v. State, 50 Tenn. (1 Heisk.) 287, 310 (1871).
homosexual offenders’ in a long list of people who will not inherit the
kingdom of God.”

If same sex marriages become lawful, then why not also recog-
nize it for other patterns of association. . . . Indeed, United
States Supreme Court Justice Anthony Kennedy concluded in
Planned Parenthood v. Casey that citizens have a constitutional
right to define their “own concept of existence, of meaning, of
the universe, and of the mystery of human life.” What he was
saying is that each of us can make our own rules, rather than
conforming to what the founding fathers referred to as “nature
and nature’s God.” If that idea takes root, the institution of mar-
riage will be finished.

Jerry Falwell coined a famous anti-gay phrase when he declared, “God
made Adam and Eve, not Adam and Steve.”

Many miscegenation cases appealed directly to the divine intent of
God, as the following quotations indicate.

[Marriage] is a public institution established by God himself, is
recognized in all Christian and civilized nations, and is essential
to the peace, happiness, and well-being of society.

Such equality does not in fact exist, and it never can. The God
of nature made it otherwise, and no human law can produce it,
and no human tribunal can enforce it.

Almighty God created the races white, black, yellow, malay, and
red, and he placed them on separate continents. And but for the
interference with his arrangement there would be no cause for

40 Bob Davies, What Does the Bible Say?, MOODY MAG. (May 1994), available at
41 James Dobson, Can Marriage Survive in the New Millennium?, FOCUS ON THE
html (Nov. 1999) (citations omitted).
42 Marc Sandalow, Gay Rally Bares Deep Divisions: Critics Say It’s Just an Excuse for
a Big Party, S.F. CHRON., Apr. 29, 2000, at A3. Justice Blackmun compared the trial
court’s statements in Loving to the Brief for Petitioner in Bowers that relied on the New
Testament and the writings of St. Thomas Aquinas to show that “traditional Judeo-
Christian values proscribe such conduct.” Id. at 211 (citing Brief for Petitioner at 20–21.
Loving and this case is almost uncanny. There, too, the State relied on a religious
justification for its law.” Id. at 210.
such marriages. The fact that he separated the races shows that he did not intend for the races to mix. 45

These last words are rather well known, for they come from the trial judge in Loving v. Virginia. 46

Some judges in anti-miscegenation cases cloaked their arguments in “natural law.” In 1871, an Indiana court noted that, “[t]he natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.” 47 Modern anti-gay activists rely on the old natural law arguments, as well. 48

Opponents of mixed-race marriage also relied on the status quo, or “tradition” to support the proposition that things should not change: “It has always been the policy of this state to maintain separate marital relations between the whites and the blacks.” 49 Similarly, opponents of same-sex marriage argue that tradition requires continuation of the marriage ban. The amicus brief for America’s Future Today in Baehr v. Miike, the Hawaii gay marriage case, claimed that the petitioners are seeking to . . . make marriage into something it has never been before, and to force the State to radically change the fundamental institution which historically has lain at the heart of all human, family, and social interaction, jettisoning long-recognized cultural values and drastically redefining the fundamental structure of society. 50

46 388 U.S. 1 (1967).
47 State v. Gibson, 36 Ind. 389, 404 (1871).
50 Brief of Amicus Curiae Hawaii’s Future Today at 3, Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), available at http://www.hawaiilawyer.com/same_sex/briefs/hftbref.txt; see also David B. Cruz, “Just Don’t Call It Marriage”: The First Amendment and Marriage as an Expressive Resource, 74 Cal. L. Rev. 925, passim (2001); Dobson, supra note 41 (“Of greatest concern for the family, I believe, is the vigorous campaign being waged by homosexual activists to change the very definition of marriage. For many thousands of years in cultures around the world, the union between the sexes has consisted of one man and one woman in a binding, permanent relationship. Although it sometimes failed, that was the intent and the usual result. But now, powerful forces are working to permit two men or two women to ‘marry.’ That will destroy the legal underpinnings of the family.”).
In the case of both mixed-race and same-sex relationships, marriage opponents have often made arguments about progeny. Courts explained the need for anti-miscegenation laws with references to the future of the race, white purity, or the health of future children. When Massachusetts passed a Colonial Act in 1705 preventing intermarriage, it was entitled “An Act for the Better Preventing of a Spurious and Mixed Issue.”51 Judge Henry of the Missouri Supreme Court explained that anti-miscegenation laws were necessary because mixed-race couples simply were incapable of producing children:

It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments.52

One Georgia trial judge, stopping just short of Judge Henry’s bizarre conclusion, justified anti-miscegenation laws by noting: “Our daily observation shows us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full-blood of either race.”53 This quote foreshadows some of the arguments made in opposition to gay parenting. Gay men are themselves supposed to be “effeminate,” and therefore boys raised by two fathers are considered to be in danger of becoming “ef-

---

51 An Act for the Better Preventing of a Spurious and Mixed Issue (1705), reprinted in The Charters and General Laws of the Colony and Province of Massachusetts Bay, 1628–779, at 160 (T. B. Wait & Co. 1814). In Dred Scott v. Sandford, 60 U.S. 393 (1856), Chief Justice Taney wrote that this Massachusetts law demonstrated that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

Id. at 409.

52 State v. Jackson, 80 Mo. 175, 179 (1883).

53 Scott v. Georgia, 39 Ga. 321, 323 (1869). Some scientists of the time also subscribed to the view that offspring of mixed-race couples were likely to be inferior, and thus creation of such offspring would weaken and contaminate both the black and white races. See Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 DUKE L.J. 624, 670, cited in Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: Assimilation and the Mexican-American Experience, 10 LA RAZA L.J. 1261, 1301 nn.179 & 181 (1998).
feminate.” Yet the supposed dangers of effeminacy also lurk when two women raise boys, because boys supposedly need fathers to become real men.

Even many sociologists of the Jim Crow period regarded the concern for “racial purity” as suspect. It was understood as an excuse to mask other motives. Given that the country did not have a long history of supporting children’s welfare, Southern opposition to interracial sexual intimacy was unlikely to be based on the welfare of children in future generations. Although future generations were often offered as justification for repressive laws, this argument was a front to make those who wished to prevent interracial sex and marriage appear high-minded. Opponents of same-sex marriage rely on this same argument today. They claim that it is better to raise children with one mother and one father, and they

---


56 See Stember, supra note 6, at 12. For a more contemporary view on how the myth of racial purity operated, see Saks, supra note 20, at 61.

57 The argument that mixed-race progeny would be weak hardly squares with the history of purposeful reproduction of “mulatto” children during slavery times to create valuable slaves for the master/father. See Angela Y. Davis, Women, Race & Class 12 (1981) (“And throughout the South, state legislatures adopted the principle of partus sequitur ventrem—the child follows the condition of the mother. These were the dictates of the slaveowners, who fathered not a few slave children themselves.”).


The State of Vermont similarly argued in its brief opposing same-sex marriage that society has seen an increase in parents who “fail[] to take [their] parental responsibilities
use concern for children and future generations as the reason to deny marriage rights. In fact, empirical studies show children raised by lesbians mothers do as well as children raised by heterosexual parents. Like the arguments made by segregationists, these assertions mask another purpose.

Arguments about the welfare of offspring may be understood as a coded means in both mixed-race and same-sex contexts of juxtaposing imagined purity with rebellious lust. Children are seen as innocent and untainted when compared with the sexual and sinful relationship. In the segregated South, parents feared that their children would themselves “fall prey” to interracial relationships as they grew into adolescents, thereby becoming impure themselves. According to an old Southern saying, “the key to the schoolroom door is the key to the bedroom door.” In other words, school integration was understood to lead directly to interracial sexual intercourse and marriage. One 1957 text spelled it out more pointedly:

Our helpless lost daughters, afraid to stay home, afraid to be delivered to those bold black eyes, black hands and blacker

---

seriously . . . . By encouraging the formation of same-sex unions, such a policy could be seen to advance the notion that fathers or mothers, as the case may be, are mere surplusage to the functions of procreation and child rearing.” See Brief for the State of Vermont (Part 2), Baker v. State, 744 A.2d 864 (Vt. 1999) (No. 98-32), available at http://www.vtfreetomarry.org/statepart2.htm.

59 For a list of these empirical studies see Mary Becker, Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One, 2001 U. Ill. L. Rev. 1, 51–52 nn.496–505 (2001). The cases themselves show, however, that children raised by same-sex couples would benefit in a practical sense if these couples were allowed to marry. The Plaintiffs’ Complaint in Goodridge v. Department of Public Health highlights a number of the difficulties for lesbian and gay couples trying to raise children, including the uncertainty of whether the non-biological mother’s relationship to the daughter will be respected should the biological mother become ill, and concerns about the possibility that they will need to argue with health care providers or other institutions in times of crisis if those institutions don’t acknowledge their status as mothers. Plaintiffs’ Compl. at ¶¶ 28–31, 104–107, 116–121, Goodridge v. Dep’t of Pub. Health, No. 01-1647-A (Suffolk Super. Ct. filed Apr. 11, 2001), available at http://www.glad.org/MAmarriagecomplaint.PDF. Additionally, the Baehr court found that allowing same-sex couples to marry would mean that “the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of marriage.” Baehr, 1996 WL 694235, at *18.

When anti-miscegenation laws were in effect, children born to interracial couples would also have benefited from the recognition of their parents’ marriages. These children were disinherit and considered “illegitimate,” a preposterous label that is still in legal parlance. See, e.g., In re A.S.L., 923 S.W.2d 814, 815 (Tex. App. 1996) (action to establish alleged father’s paternity). The label “illegitimate” is not limited to the miscegenation context, of course. The same-sex marriage ban accomplishes a similar end in a country where the American Pediatrics Association estimates that between one and nine million children have at least one gay parent. See Ellen C. Perrin et al., Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 341, 341 (2002), available at http://www.aap.org/policy/020008t.html.

60 Stember, supra note 6, at 22.
sperms, our daughters who now from the earliest grades must become accustomed to the sight and odor of the Negro so that what comes later will not seem so strange, so wrong.61

This image of young white girls who need to be protected from black men presages the current images of young boys who allegedly need to be protected from gay men.62 For while mixed-race marriage has gained legal recognition and increased social acceptance, same-sex couples are still at the beginning of their struggle.

The Supreme Court’s 1967 decision holding anti-miscegenation laws unconstitutional63 was not a magic bullet that brought immediate social acceptance.64 Yet, while many mixed-race couples still seek full accep-

61 Id.


64 Certainly the removal of the marriage ban for mixed-race couples was an important step toward gaining general acceptance for such couples and improving their daily lives. But social science analysis indicates that legal rights do not procure immediate public acceptance. Polls indicate a more gradual path toward social equality for mixed-race couples. In 1967, 72% of Americans were opposed to interracial relationships and 48% thought such conduct should be criminalized. E. J. Graff, What is Marriage For? 156 (1999). More recently, the numbers reflect waning disapproval, but certainly not unanimous acceptance of interracial relationships. See, e.g., James Trosino, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. Rev. 93, 93 n.2 (1993) (“A 1990 General Social Survey of predominantly white respondents . . . found that 65% object to a close relative marrying an African American.”) (citing Lynne Duke, 25 Years After Landmark Decision, Still the Rarest of Wedding Bonds, Wash. Post, June 12, 1992, at A3); Phillip W. D. Martin, Devoutly Dividing: U.S. Opponents of Interracial Marriage Say God Is On Their Side, Boston Globe, Nov. 7, 1999, at D1 (discussing a 1998 Washington Post poll that found 25% of Americans still viewed interracial marriages as “unacceptable”). In a national survey conducted in 2001, mixed-race couples reported some hardship, but the data revealed a marked trend towards increasing acceptance. See Darryl Fears & Claudia Deane, Biracial Couples Report Tolerance; Survey Finds Most Are Accepted by Families, Wash. Post, July 5, 2001, at A1 (despite its overall good news, the study found that 46% of black-white couples, 32% of Asian-white, and 30% of Latino-white couples believe their relationship was made more difficult by its biracial character).

65 For the proposition that, according to social science analysis, legal rights usually do not procure immediate public acceptance, see generally Gerald M. Rosenberg, The Hollow Hope (1991). See also Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 9 (1983) (arguing that law functions in part as “a system of tension or a
tance from their families and society, Americans have at least become less likely to sexualize mixed-race relationships. Instead, it is gay couples whose sexuality is today viewed as different and profane. Same-sex couples are apt to be perceived in a sexual manner even when they simply hold hands, and they are more likely to be asked if they are sexually satisfied or about what they do in bed. Even now a significant portion of gay couples continue to be closeted some or all of the time.

The present ban on marriage between same-sex couples helps to keep those relationships invisible. Ultimately marriage should provide visibility to gay relationships while rendering the sexuality within these relationships private and confidential, as it has done in the past for mixed-race couples. Same-sex couples are now marrying in some churches and synagogues and in non-denominational ceremonies. What is lacking is the state license and civil recognition.

---


66 For an interesting discussion of this point, see Cruz, supra note 50, at 942–44. Several progressive scholars have cautioned against putting too many resources into marriage as opposed to domestic partnership benefits, arguing that marriage will create hierarchies within the gay community and generally render the movement more conformist. See, e.g., Paula L. Ettelbrick, Wedlock Alert: A Comment on Lesbian and Gay Family Recognition, 5 J.L. & Pol’y 107, passim (1996); Nancy D. Polikoff, We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 Va. L. Rev. 1535, 1536 (1993); Paula L. Ettelbrick, Since When Is Marriage a Path to Liberation?, Out/Look Nat’l Lesbian & Gay Q., Fall 1989, at 9.

III. SIMILARITIES IN THE LIVES OF GAY AND MIXED-RACE COUPLES

SUPPORT THE MARRIAGE ANALOGY

A. The Loving Analogy

Any legal discussion comparing cross-racial marriage to same-sex marriage must begin with Loving v. Virginia, the Supreme Court case that held miscegenation laws unconstitutional. My introduction to Loving v. Virginia was in my first year of law school. Instantly, with all the enthusiasm of a law student, I recognized the seminal case to be solid precedent for same-sex couples to marry. Intellectually, prohibiting race discrimination in marriage statutes is a small step away from prohibiting sex discrimination in marriage statutes. I am continually surprised that others do not make the connection. Judges and lay people seem quite willing to analogize in the employment area from race to sex. So why is the Hawaii Supreme Court the only one to draw the anti-miscegenation analogy, the Loving analogy, when it comes to same-sex marriage?

68 388 U.S. 1 (1967).


70 See infra note 102. However, in the employment area, courts are not analogizing situations where the plaintiff is fired because he is gay to those where a person is fired because his girlfriend is of a different race. Cf. Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (holding that Title VII’s prohibition on sex discrimination did not protect against discrimination on the basis of sexual orientation).

71 The only appellate court to have reasoned that the prohibition on two men marrying or two women marrying constitutes discrimination based on sex is the Hawaii Supreme Court. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the prohibition on same-sex marriage triggered strict scrutiny as discrimination based on sex, and remanding for a de-
Recently, in *Baker v. State*, the Vermont Supreme Court ignored the persuasive force of the *Loving* analogy and rejected the notion that prohibiting same-sex marriage amounts to discrimination on the basis of sex—although the court did rule in favor of same-sex unions for other reasons. Given the weakness of the State’s argument against the *Loving* analogy, it is surprising that the Vermont majority did not hold that the marriage laws at issue impermissibly discriminated on the basis of sex. In its brief, the State had attempted to avoid the anti-miscegenation analogy by explaining that while racist statutes sought to separate the races, homophobic marriage laws integrate the genders. The State argued that although Vermont’s statutory scheme used sex to determine who can marry whom, it did so properly because the end sought was integration not separation, and because Vermont has a legitimate interest in celebrating this integration, this “complementarity of the sexes.” Following the State’s reasoning, it would pass constitutional muster to ban individuals from marrying members of their own race (thereby encouraging interracial marriage) since such a scheme would integrate the races! The State built this weak argument on fundamental differences between women and men, relying inappropriately on feminist Carol Gilligan’s “different voice” theory. But the concept of a fundamental difference

---

72 744 A.2d 864 (Vt. 1999).

73 The court relied upon the Common Benefits Clause of the state constitution, finding gay couples to have human relationships deserving of governmental protections and equitable distribution of state benefits. *Id.* at 889. “While many have noted the symbolic or spiritual significance of the marital relation, it is plaintiffs’ claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case.” *Id.* at 888–89. *Cf.* *id.* at 898 (Johnson, J., concurring in part) (recommending that the court enjoin the State from denying the plaintiffs a marriage license).


75 *See id.* at pt. 2.

76 In her partial concurrence, Justice Johnson accepted the *Loving* analogy. She dismissed the notion that all women are one way and all men another as “sex stereotyping of the most retrograde sort,” and pointed out that the State’s rationale could require people to marry between races to promote diversity. *Baker*, 744 A.2d at 910 (Johnson, J., concurring in part).


Carol Gilligan discusses a related theory of moral development, arguing that women tend to think and speak in a different way than men do when they confront ethical dilemmas. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982). Under the masculine ethic of justice, people judge themselves guilty if they do something wrong. Under the feminine ethic of care, people who allow others to feel pain hold themselves responsible for not doing something to prevent or alleviate the hurt. *See id.* at 50, 73. Gilligan is careful about using specific gender terminology because she realizes that some men follow an ethic of care and some women follow an ethic of justice. *See id.* at 173–74. Self-image determines whether fairness or
between how men and women feel and think has been discredited in equal protection theory. Law firms cannot refuse to hire women because they assume that women lack the “justice” based philosophy discussed in Carol Gilligan’s work. How then can these same stereotypes win the day in the marriage arena?  

Judges are not the only ones who find the Loving analogy unpersuasive. Around the time that the Hawaii Supreme Court adopted the analogy, I was explaining it to a group of lay persons and found a great deal of skepticism toward the comparison. “Didn’t you say the Loving case involved one man and one woman?” asked one dubious woman in the audience, “How do you jump from that case to gay marriage?” This skeptic was no bigot. Like all the people in the room, she had volunteered to go to a full day of training on gay issues and was patiently trying to understand the Loving analogy. But the comparison never made sense to her or to some others in the audience. I suppose my failure on that day was the genesis for this Article.  

In making the analogy between same-sex marriage and mixed-race marriage, I realize it is not enough to repeat the logical comparison.  

caring will be the basis for moral judgement. See id. at 73–74. Gilligan believes that gender differences in identity are grounded in early childhood experiences with the person who provides primary physical and emotional nurturance, usually the infant’s mother. The result is an adult population of men who see themselves as separate from others and of women who think in terms of connectedness. See id. at 7–8; see also Carol Gilligan, Getting Civilized, 63 Fordham L. Rev. 17 (1994).

In its brief, the State also cites Deborah Tannen to show that sex differences are observable in linguistic patterns. Brief for the State of Vermont, pt. 2, supra note 74 (citing Deborah Tannen, Talking from 9 to 5: Women and Men in the Workplace: Language, Sex and Power (1994)).  

One way to understand the Vermont high court’s choice to eschew the Loving analogy in Baker is to view the decision as result-oriented. Rather than mandate marriage, the Vermont court wanted to reach a result that would allow the legislature to choose a remedy. A decision analogizing gender to race may have precluded that result, unless the sex distinctions were shown to be narrowly tailored to further important governmental objectives. See Baker, 744 A.2d at 905 (Johnson, J., concurring in part).

One reason for the hesitance to compare mixed-race and same-sex marriage is objection from within the African American community to comparing bias against African Americans with bias against other groups, including gay people (a group that, of course, includes African Americans). See Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics, 47 Buff. L. Rev. 1, 14–17, 14 n.44 (1999) (rejecting these criticisms). As Beverly Greene notes, “African Americans and members of groups of other people of color often perceive a comparison between heterosexism and racism as oppressions, as one that trivializes their history of racial oppression.” Beverly Greene, Beyond Heterosexism and Across the Cultural Divide: Developing an Inclusive Lesbian, Gay and Bisexual Psychology: A Look to the Future, in Education, Research and Practice in Lesbian, Gay, Bisexual, and Transgendered Psychology: A Resource Manual 21 (Beverly Greene & Glady L. Croom eds., 2000). Trina Grillo and Stephanie Wildman argue generally against analogies between different types of oppression, but conclude that these analogies can be useful when made as comparisons of how biases operate. Grillo & Wildman, supra note 5, at 401–10. It may be useful, for example, to compare the murder of African American James Bird in Texas with the murder of Matthew Shepard, a gay college student from Laramie, Wyoming, to understand how deadly hatred operates.
Instead of relying on logic alone, we must start to grapple with the meaning these types of marriages carry in our society and draw additional parallels if we find them in the social science data. Unless this work is undertaken, courts will continue to eschew the obvious fact that making a marriage certificate dependent upon the male or female identity of the participants constitutes discrimination on the basis of sex.  

**B. Recent Social Science Data**

Looking more closely at the real-life similarities between couples whose marriages break race taboos and couples whose marriages break gender taboos should persuade skeptics that the analogy is not just a glib legal argument. Social science data reveals that same-sex and mixed-race couples experience comparable reactions to their non-traditional choice of mate from their families of origin and from the outside world. The data also demonstrates a similar range of reactions to this stigma among the couples themselves—from partial to full secrecy.

In *Love’s Revolution: Interracial Marriage*, psychologist Maria Root analyzes data she collected from five years of interviews with interracial mixed-sex couples and their families of origin. As Root describes some of the dynamics her subjects faced in dating and then marrying someone of a different race, readers may be struck by the similarities with gay experiences. Root’s work is based on a range of cross-racial marriages, not simply black-white relationships, but for the purposes of this Article, I will not separate the nuances that the distinct cultures raise.

---

80 Once a court concludes that prohibitions on same-sex marriage constitute sex discrimination, the court must announce what standard the state needs to meet to justify such discrimination. The court may employ one of several standards. It may require the state to show a compelling reason for prohibiting same-sex marriage. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding Hawaii’s ban on same-sex marriage unconstitutional, as violative of the state Equal Protection Clause). It may also employ an intermediate level of scrutiny, as is done in federal sex discrimination cases. *See*, e.g., Craig v. Boren, 429 U.S. 190 (1976). Lastly, a court may simply require the state to demonstrate a rational basis for the prohibition on same-sex marriage. *Cf.* Romer v. Evans, 517 U.S. 620 (1996) (employing rational basis scrutiny in holding unconstitutional an anti-gay amendment in Colorado). For a general discussion of how sex discrimination law operates in the context of gay and lesbian rights, see Koppelman, *supra* note 1, at 215–20.

81 *Root, supra* note 28.

82 The data was gathered recently, but it probes memories of relationships that may well have begun twenty or more years before.

83 Originally, racist laws were directed at American Indians and African Americans, but “white superiority . . . was later extended to each group subsequently constructed as non-white.” *Id.* at 112. For example, Latin America has a history of mixed marriage and the acceptance of mixed marriage quite different from the United States; yet, issues of marrying light or dark still come up in the Latino culture. *See*, e.g., Johnson, *supra* note 53, at 188 (recalling warnings the author received from his family that he not bring home an African American girlfriend). Johnson explains the increasing incidence of intermarriage within the Latino community between light and dark-skinned individuals and between Anglos and Latinos. While this intermarriage has increased diversity among Latinos, it has not served to assimilate darker skinned Latinos into the mainstream. *Id.* at 181.
more, this Article does not examine the double trespass of same-gender, mixed-race relationships.  

As part of her research, Root studied parental reactions to the decision to date or marry a partner of a different background, since the opinions of parents can have a large effect on the quality of life before and after a marriage. Parental reactions also often reflect the social norms of the times. As Root explains, parents had a wide variety of reactions when their children announced their interest in a man or woman of another race. This range of responses included: “It’s just a phase you’re going through;” “What did I do wrong?”; “You are doing this to hurt me;” and “You have always been different from the rest of the family.” Some parents ultimately accepted their children’s choice and welcomed the new family member while others cast out the son or daughter who “trespassed” by seeking a lifelong commitment to someone of the “wrong” race.  

This is the same range of reactions that gay men and lesbians experience when coming out to their families. Through true testimony and analysis of the diverse relationships between sexual-minority youths and their parents, Ruth C. Savin-Williams illustrates that “[f]or some youths, coming out to parents results in becoming alienated from their families, whereas for others, nothing is changed or the relationship improves once the secret is out.” The similarity of outsider couples’ range of experience informs us that both mixed-race relationships and same-sex relationships are alike in that they trespass on societal expectations and norms about love and marriage. Although one challenges racial norms and the other challenges gender norms, parents respond to the trespass in similar ways, from denial, self-doubt and accusation on one hand, to tolerance and acceptance on the other.  

One repeated theme that psychologist Root highlights in her interview data is that many families experienced the decision to marry outside the race as a loss—a loss of status for the family. Marriage may be an

27.

84 In this Article, I use the word “gender” interchangeably with the word “sex” to denote male or female. This avoids the tendency to conflate “sex” with “sexuality” or sexual acts, and no other word is available for this purpose. For a fuller explanation of why I choose to do this, see infra Part IV.

85 Root, supra note 28, at 17–19, 21. Root comments several times on the similarities between mixed-race and same-sex couples.

86 Id. at 17.


88 Savin-Williams, supra note 87, at 17.

89 Root, supra note 28, at 19, 88. While white families have traditionally seen intermarriage as a loss of social status and social mobility, real or imagined, families of color have seen intermarriage as a loss of ethnic solidarity, real or imagined. For both families of color and Caucasian families, the issue is more pronounced when daughters marry because
individual decision, Root explains, but it affects the whole family and impacts the way the family views the marriage and views itself after the marriage. “Although we live in an age in which people marry for love . . . when race is a factor in marriage, it becomes apparent that marriage still has an aspect of a business transaction.”\textsuperscript{90} One can understand the reactions above—“you are doing this to hurt me,” or “you have always been different from the rest of the family”—as examples of parents who register their child’s new happiness as a loss for themselves or their family. By labeling a son or daughter as “rebellious,” the child is separated out psychologically, and the family prevents itself from being impacted by the non-traditional marriage. A number of the families in Root’s study created provisions to make sure that neighbors or relatives did not come into contact with the wayward child and his or her betrothed. Again, these actions were designed to prevent a loss of status for the family.

Similarities exist for same-sex marriages. Families whose child chooses a partner of the same gender also may experience a loss of status, or a perceived loss of status.\textsuperscript{91} The gay son or daughter may be separated out from the rest, labeled as “different.” There is added stigma to gay relationships because gay marriages are still not recognized legally. This stigma may cause individual family members to enforce cultural norms in order to avoid a loss of status. Through the medium of family opinion, society induces individuals to keep within the acceptable bounds of marriage. One can readily understand how difficult it is to undo the ban on rebellious marriages—mixed-race and mono-sex—because the stigma against rebellious marriages is so embedded in cultural norms.

In addition to family reactions, another similarity between outsider mixed-race and same-sex couples is the “closet.” Some interracial couples interviewed by psychologist Root kept their relationships secret.\textsuperscript{92} I encountered this situation myself when I worked in Worcester, Massachusetts, in the 1980s. A white colleague informed me that his fiancée was black, asking that I not reveal this to anyone else. This man was hopeless in love and idealized his sweetheart, and yet hid that he was a

\textsuperscript{90} Id. at 23. Parental disapproval at its worst results in gay youths being disowned, thrown out of the home, or emotionally or physically harassed.

\textsuperscript{91} In one account, a young lesbian feared telling her parents because she dreaded the possibility of being a source of great hurt to her parents. Savin-Williams, supra note 87, at 27 (quoting C. W. Griffin et al., Beyond Acceptance 160 (1986)). In another account, a mother admitted that the idea that her son was somebody that society didn’t approve of scared her, not only for her son’s sake, but also for hers. As a result, she did everything possible to hide the fact of her son’s homosexuality. Id. at 28 (quoting Leroy Aarons, Prayers for Bobby: A Mother’s Coming to Terms with the Suicide of Her Gay Son 45 (1995)).

\textsuperscript{92} See Root, supra note 28, at 17. See also Hernton, supra note 10, at xii (discussing the people the author interviewed in the first half of the 1960s).
member of a mixed-race couple until after he had already been accepted as an individual, a white individual. I was the only one he was telling, he explained, because, as a lesbian, I must appreciate his desire not to expose that part of himself to disapproving, hurtful attitudes. I did understand. He wanted to control what was said about this personal part of himself, and control which people were informed that he was different—different from other white men, or from the expectations he believed were still prevalent in the 1980s. Whether or not he was right that the best way to alter bigotry was to become respected and liked as a lawyer and individual before coming out as part of a mixed-race couple, he was right that the closet is an experience that mixed-race couples might indeed share with same-sex couples.

Violence or the threat of violence by third parties is yet another reality common to both same-sex and mixed-race couples. Individuals within a mixed-race couple may feel completely safe in certain places as long as they are alone, but as soon as they are together that safety vanishes. Similarly, individuals in a same-sex relationship may feel unsafe only when they are visible as a couple, walking together. The violence against them is related to the stigma of being in an outsider relationship.

93 See Root, supra note 28, at 37. See also Mathabane, supra note 12 (conveying black author Mark Mathabane’s relationship with his white wife, as told from both of their perspectives). Mark Mathabane discusses the effect on him of a murder in Salt Lake City on August 20, 1980 when two black men were gunned down because they were jogging with two white women. “I’ll say that it was just because they were race mixing,” the perpetrator explained to a television interviewer. “[H]ad they not been race mixing, you know, it would have been a totally different story.” Id. at 173–74. One can compare this killing to the shotgun attack on two lesbians on the Appalachian Trail in Pennsylvania in 1988. The gunman killed one of the women. The other miraculously escaped and later wrote a book about the traumatic event and ensuing trial in which the perpetrator tried to argue a homosexual panic defense, namely that love-making between two women justified a homicidal response. See Claudia Brenner & Hanna Ashley, Eight Bullets: One Woman’s Story of Surviving Anti-Gay Violence 163 (1995). In 2000, a sixteen-year-old girl was sexually assaulted on a Boston subway by three other teenage girls because they saw her doing something that is common practice in her native country of Morocco—holding hands with another girl. David Kirby, What Makes a Bully?, Advocate, July 3, 2001, at 33.

94 This Article does not compare the number of same-sex couples that are victimized to the number of mixed-race couples that were victimized recently or in earlier eras. Quantity may be important, but I will leave that for future scholars. Violence against single gay men because they are gay does not detract from this concept of violence as a method of enforcing conformity in relationships and sexuality. As this Article points out, the concepts of taboo relationship and taboo sexual activity are often fused into the sexual in the minds of those who oppose mixed-race couples and those who oppose same-sex couples. While many gay men, lesbians, and bisexuals are not visible until they are seen as part of a same-sex couple, some individual men are surely targeted because they are perceived to be gay. Their apparent willingness to enter into a forbidden sexual relationship is the trigger. Similarly, the sexual aspect of the historic violence against individual black men during Southern lynching has been understood as connected to condemnation of sexuality between black men and white women, targeting the black man’s assumed willingness to enter into a taboo relationship. See Ariela Gross, Beyond Black and White: Cultural Approaches to Race and Slavery, 101 Colum. L. Rev. 640, 665 (2001) (“Recent research suggests not only that the roots of the myths that supported sexualization of politics and lynching in the
Violence is one of society’s ways of enforcing norms and punishing those who trespass. It also serves to keep mixed-race couples and same-sex couples less visible, if not entirely closeted.\(^95\)

The similarity that is of utmost concern in this Article, of course, is that both same-sex and mixed-race relationships have been perceived as purely sexual by those who oppose full recognition for them. As Root explains, “[i]n stereotypes of interracial relationships the first component—intimacy—is often dismissed and only sexual desire and attraction are given credence as motivating forces.”\(^96\) In fact, romantic love motivates couples to marry despite cultural barriers based on race or gender.\(^97\) People take risks for love, following their hearts rather than cultural tradition. Sexual attraction is one part of the modern definition of romantic love, but it is not the sole reason why those in mixed-race couples choose to commit to one particular mate.\(^98\) Generally, their decision to marry is post-Civil War era reach back to the antebellum period, but also that white servant women and enslaved African-American women shared many aspects of the experience of sexual exploitation.”)(citing Peter W. Bardaglio, Rape and the Law in the Old South, 60 J. Soc. Hist. 749, 766 (1994); Sharon Block, Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America, in Sex, Love, Race, 141, 141–63 (Martha Hodes ed., 1999); Diane Miller Sommerville, The Rape Myth in the Old South Reconsidered, 61 J. Soc. Hist. 481, 515 (1995)). As Darren Lenard Hutchinson writes:

Lynching, the imposition of the death penalty in the context of interracial rape, sexual harassment, and the rape of women of color are all institutions that involve a potent intersection of racial, gender, and sexuality hierarchies—colored by white fears and marginalization of the heterosexual practices of persons of color.

Darren Lenard Hutchinson, Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination, 6 Mich. J. Race & L. 285, 295 (2001); see also Stember, supra note 6 (discussing “sexualized racism”); Sumi K. Cho, Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suey Wong, 1 J. Gender Race & Just. 177 (1997) (analyzing “sexualized racial stereotypes” and “racialized gender stereotypes”); Stacey Pastel Dougan, With Justice for Whom? The Presumption of Moral Innocence in Rape Trials, 71 Ind. L.J. 419, 435–37 (1996) (discussing “racialized sexual stereotypes”); Hutchinson, supra note 79, at 79–96 (discussing the “sexualization of race”). Naomi Zack argues that “[t]he 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.” Naomi Zack, Race/Sex: Their Sameness, Difference, and Interplay 145, 147 (1997). She continues: “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.” Id.

Mark Mathabane writes that “as soon as we stepped out the door I became acutely sensitive to the way people regarded us.” Mathabane, supra note 12, at 47.

Root, supra note 28, at 172. Psychologist Robert Sternberg recognizes that romantic love includes a passion component “that drives the initial physical attraction and sexual desire,” but also includes an intimacy component and a commitment component. See id.

Root writes that romantic love was “the major motivating force in the marriage decisions of almost all of the participants in my study.” Id. See also Hernton, supra note 10, at xviii; Ellen Lewin, Recognizing Ourselves: Ceremonies of Lesbian and Gay Commitment (1998).

See discussion supra note 96. See also Cheshire Calhoun, Making Up Emotional
based on finding someone who will bring out the best in them—someone with whom they wish to spend their lives. Similarly, for same-sex couples seeking to wed, sexual attraction is but one aspect of their commitment. Love, intimacy and commitment are just as important for same-gender couples.99

Although the commonalities between these outsider couples are plentiful, there are differences as well. One is that, while there are support groups for people in multicultural families, there is no fully developed equivalent to the gay community for mixed-race couples.100 This is important because a person’s choice of partner can change one’s identity and one’s community. For example, in The Color of Water, James McBride writes about his mother who left behind her identity as a white Jewish woman to become part of a black community, her husband’s community.101 In contrast, most individuals in a same-sex relationship have both left behind their straight identities to a certain extent in order to join the larger gay community.

Another important difference is found in the language we employ to describe individuals who form rebellious love relationships. Gay men and lesbians call people involved in same-sex relationships “gay,” but there is no analogous word for those in mixed-race relationships.102 The question of why not calls for closer examination.103


99 Lewin, supra note 97. See generally Gretchen A. Stiers, From This Day Forward: Commitment Marriage and Family in Lesbian and Gay Relationships (1999); Graff, supra note 64.

100 Root, supra note 28, at 90 (noting that some mixed-sex couples “formed or joined multiracial family support groups”).


102 Samuel Marcosson coined the term “miscegenosexuals” to mean an individual who has a sexual preference for those of a different race. Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 Geo. L.J. 1, 6 (1992). His purpose in doing so was to analogize between anti-gay laws and laws that prohibited miscegenation. He did not actually suggest that interracial couples should adopt the term.

More scholarship on current and past usage of the term “gay” is still needed. John Boswell writes that in most modern languages the word “gay” is now regularly used “to designate a person who prefers erotic contact with his or her own gender.” John Boswell, Christianity, Social Tolerance, and Homosexuality 41 (1980). The term “gay” . . . probably antedates ‘homosexual’ by several centuries,” opines Boswell, perhaps from the thirteenth-century word gai in Provençal. But the precise origins of the word “gay” are not known. Id. at 43 n.6. But cf. George Chauncey, Gay New York (1994) (asserting that the term “gay” appeared relatively late in the 1940s as a code for homosexual), cited in Kwan, supra note 69, at 1284. I suspect that if a full investigation were undertaken, the term “gay” would prove to have many different meanings. In this Article, “gay” is used to mean those who are in a same-sex relationship or interested in having a same-sex intimate relationship, and who self-identify as gay. Some people who are only interested in the most casual sexual liaisons also might identify themselves as gay, and I would not exclude them, but I would not center the definition of gay on that approach to life and love.

103 This language difference can mask a world of similarity. In fact, it could explain why courts do not consider the bar against same-sex couples marrying to be sex discrimi-
IV. SHOULD THE TERM “SEXUAL ORIENTATION” APPLY TO MIXED-RACE DESIRE? TO SAME-SEX COUPLES?

The term “sexual orientation” has not been used heretofore to describe those whose romantic partners are of a different race. Is there some sociological reason to classify desire along gender lines and not along race lines? Does the omission benefit or harm those who seek full equality for mixed-race couples?

Mixed-race love is an “orientation” in the sense that although marriage itself is a choice, the attraction or “orientation” is not chosen, and not everyone is attracted to someone outside their race. As one African American interviewee explained to sociologist Calvin C. Hernton, she did not think she was attracted to white men “until a certain man came along.” Hernton writes, “When she saw him, she had the experience for the first time of being strongly drawn to a white man; she did not know why it was, but she had many daydreams and thoughts about him.”

nation. “It’s anti-gay discrimination, not sex discrimination, not gender discrimination” the courts generally opine as they deny claims of harassment of a male employee who has been harassed because his significant other is assumed to be a man. See generally Marconson, supra note 102. If a man were fired for dating someone of a different race, the courts would have little trouble naming that race discrimination. See, e.g., Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 114 (5th Cir. 1986) (recognizing cause of action under § 1981 where employer allegedly fired plaintiff because her husband was not white); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986) (recognizing cause of action under Title VII and § 1981 where employer allegedly refused to hire plaintiff because of his interracial marriage); Fiedler v. Marumco Christian Sch., 631 F.2d 1144, 1149 (4th Cir. 1980) (recognizing cause of action under § 1981 where white students alleged that private school had expelled them for associating with blacks); Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298 (S.D.N.Y. 1996) (recognizing cause of action under Title VII and § 1981 where employer allegedly fired plaintiff because he was married to an African American woman); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (ruling that Title VII provides a cause of action for a white plaintiff who is discriminated against because of the plaintiff’s relationship with African Americans). See also Patrick v. Miller, 953 F.2d 1240, 1250 (10th Cir. 1992) (finding that such causes of action under § 1981 are “clearly established”).

105 Hernton, supra note 10, at 150.
106 Id.
quote is reminiscent of actress Anne Heche explaining on national television that she didn’t consider herself attracted to women until she saw Ellen DeGeneres at a party. “I was not gay before I met her. I saw her from across a crowded room. I just all of a sudden felt—I’m in love with Ellen. I’m just glad I found her.”

Ultimately what is important about this comparison is that sexual attraction, or a pattern of attraction, could conceivably be categorized by race. Heterosexual relationships, whether mixed- or mono-race, differ in the quantity and quality of their sexuality, as do gay relationships, yet one is currently viewed as a sexual identity and one is not. Why should we treat these constructs differently when it comes to love?

Sex-positive theorists have taken the position that sexuality is the key to political growth, identity, and power. Transporting their arguments into the mixed-race marriage context, it would seem that mixed-race couples should adopt the “sexual orientation” label for themselves. By embracing and emphasizing the sexual difference of cross-racial desire, as opposed to “straight” mono-racial desire, interracial couples will find community and power.

The naming of mixed-race couples as a “sexual minority” or as individuals with a certain “sexual orientation” makes little sense politically, however. With the sexualized, prurient view of black-white relations as a historical backdrop, one can understand the reluctance of mixed-race couples to embrace sexuality as a self-identity.

107 Oprah (ABC television broadcast, Apr. 30, 1997). At one point, Anne Heche and Ellen DeGeneres were the country’s most celebrated gay couple; they have since broken up, and Heche is now married to a man. While many men and women tell of how they were attracted to members of their own sex from an early age, that is not the exclusive biography one finds among gay men and lesbians, and those who identify as bisexual certainly report different sexual attraction histories. Presently, most people operate with the assumption that mixed-race attraction is individual unlike same-sex attraction, which is perceived as more general. It would be useful to this query if a sociological study were undertaken to determine how interracial sexual attraction operates, as compared to same-sex or mono-race heterosexual attraction.

108 Consider the following argument by theorist Michael Bronski:

This historical categorization of homosexuality as a totally sexual experience continues today. Homosexuality is considered to represent a pure, unencumbered form of sexuality. Not engendering new life . . . [or] marriage, and apparently employing sexuality as the primary form of self-definition, homosexuality represents sex incarnate. In short, homosexuals are obsessed with sex. This obsession, along with the impulse to personal freedom that makes sexual activity possible, is at the center of the gay sensibility.

109 When I posed this question during a presentation at the University of Florida, no one in the audience embraced this label for mixed-race relationships. As one scholar there later pointed out, mixed-race couples no longer systematically face the discrimination same-sex couples do. They are not forbidden from marrying, denied custody of their children or fired from their jobs. Therefore there is no political aim for mixed-race couples that would be served by embracing the term sexual orientation to include mixed-race sexuality.
those in favor of equality should be hesitant to broaden the term “sexual orientation” to include mixed-race attraction; namely, focusing attention on the sexual aspect of mixed-race love would be demeaning. It would be a step backward toward the time that mixed-race love was openly sexualized and ostracized. As society finally jettisons the sexual labeling of couples that flout racial conventions, one need also question the wisdom of the gay community’s retaining the sexual label to mark couples that flout gender conventions.

If it is damaging to mixed-race couples to say they have a different “sexual orientation,” then what does this tell us about the use of this term to refer to those who love persons of the same sex? After all, the biggest barrier to same-sex marriage is the notion that gay relationships are a sexual rather than a committed form of love, though in reality heterosexual couples have as much variety and quantity of sex as do gay and lesbian couples.\footnote{David Cruz writes: “If it is particular sex acts that ought not be stamped with approval, the mixed-sex requirement is an ineffectual way of discouraging such acts, for the sheer number of mixed-sex couples who engage in oral or anal sex far outweighs the number of same-sex couples who do.” Cruz, \textit{supra} note 50, at 951–52. For another twist on the notion that marriage provides privacy around sexuality consider this quote from Richard Mohr: “One does not become a heterosexual by having heterosexual sex. Rather, marriage is the social essence of heterosexuality. In consequence, on the plane of symbols and identities, if one did not marry, one would not be fully heterosexual. And here’s the kicker: if others were allowed to get married, one wouldn’t be fully heterosexual either.” \textit{Id.} at 957 (quoting Richard D. Mohr, \textit{The Stakes in the Gay-Marriage Wars, in Same-Sex Marriage: The Moral and Legal Debate} 106 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997)).} Same-sex marriage is viewed as a jump from the profane to the sacred—too large of a jump for the majority of Americans.\footnote{See generally Ross, \textit{supra} note 18.} President George W. Bush, then Governor of Texas, did an excellent job of demonstrating the accuracy of my theory during the second presidential debate. He said:

\begin{quote}
I’m not for gay marriage. I think marriage is a sacred institution between a man and a woman . . . . I will be a tolerant person . . . . I don’t hire or fire somebody based upon their sexual orientation . . . . I don’t really think it’s any of my, you know, any of my concern how you conduct your sex life. And I think that that’s a private matter.\footnote{George W. Bush, Remarks at the Second Presidential Debate (Oct. 11, 2000) (transcript available at http://www.HERald-dispATch.com/2000/OcToBER/12/DebATeText.htm).}
\end{quote}

In other words, Bush contrasted the sacred—marriage, with the sexual—same-sex relationships.

Despite the damage done by anti-gay activists in focusing on the sexual aspect of same-sex relationships, there are varying attitudes within the gay community as a whole, as well as in the academic community, as
to whether the GLBT"¹¹³ civil rights struggle is a sexually centered cause. This dual-identity plays out most markedly in gay civil rights marches and gay pride parades, where Mardi Gras–like sexual exhibitionism often walks alongside moms and dads pushing baby carriages. In reporting the civil rights march on Selma, the Ku Klux Klan discredited the event by reporting it as “an interracial sexual orgy.”¹¹⁴ Similarly, anti-gay publications focus on sexuality within gay pride parades and marches on Washington for gay rights.¹¹⁵

In the academic world, feminist theory and queer theory recognize that, like race, both sex and gender are social constructs.¹¹⁶ Queer theorists view race, gender, and sexual orientation not as natural categories, but as identities that are subject to change.¹¹⁷ Although queer theory

---

¹¹³ GLBT stands for gay, lesbian, bisexual, transgendered and transsexual.

¹¹⁴ Stember, supra note 6, at 18 (setting forth text from a Klan publication, The Fiery Cross (1965)).

¹¹⁵ Those who oppose gay rights send observers to gay pride marches to report any behavior that can be used to discredit the event. In 1996, letters were written to the Boston Globe complaining that the paper failed to cover instances of sexual-type activity, including a flasher on stilts who unofficially entered the parade. Two Wrongs on Pride Parade, BOSTON GLOBE, June 24, 1996, at 15. See also Andrea Estes, Kelly: Gays’ Parade Behavior “Inappropriate,” BOSTON HERALD, June 12, 1996, at 18 (covering City Council President James Kelly’s call for greater enforcement of public morality laws in the wake of a Boston gay pride parade). One letter to the editor of the Baltimore Sun protesting gay and lesbian participation in the local Independence Day parade read:

Should gay and lesbian groups march in our parades carrying banners that promote their style of sexual activity? Is it really those of us who believe that they should not be allowed to do so who don’t understand what Independence Day is all about? I can tell you what it is not about. It is not about sex.

Gays and Parades, BALTIMORE SUN, July 15, 1994, at 10A. Similar letters appear in papers around the country. See, e.g., DAILY OKLA., June 20, 2001, at 6A (“After Bill Clinton’s election, the nation watched the Gay Pride parade in Washington, D.C. This in-your-face, public vulgarity was disgusting.”); LEDGER (Lakeland, Fla.), July 24, 1996, at A8 (“The parades are graphic and disgusting. How would you explain it to a small child who happened upon such a parade and said, ‘Mommy, why are those two men kissing?’”). See also Jane S. Schacter, The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents, 29 HARV. C.R.-C.L. L. REV. 283, 309–10 (1994) (arguing that opponents of gay civil rights construct sexual desire as “the totalizing aspect of gay and lesbian identity,” and quoting Florida minister Rev. James Sykes who argued that gay men want legal protection in order to “walk down the streets j—ing off” (citing Are Gay Rights A Civil Right? David Caton Says No, and He Wants Florida Voters to Close the Debate Forever, ORLANDO SENTINEL, July 18, 1993, at 8)).

¹¹⁶ See Leslie Espinoza & Angela P. Harris, Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race, 85 CAL. L. REV. 1585 (1997); see also Ian F. Haney Lopez, Race Ethnicity, Erasure, 85 CAL. L. REV. 1143, 1152 (“[R]acial identities . . . are intelligible only as social constructions”); 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. 3 (1995); Johnson, supra note 53, at 173, 179 n.17 (1998) (listing burgeoning academic literature on racial identity as a social construction). These scholarly approaches are also labeled as race crit and latcrit. See also Laurie Rose Kepris, Queer Theory: Weed or Seed in the Garden of Legal Theory, 9 LAW & SEXUALITY 279 (2000).

¹¹⁷ Carlos A. Ball, Essentialism and Universalism in Gay Rights Philosophy: Libera-
names gender as well as sexuality as foci of analysis, there is a tendency
in queer theory to let sexuality discourse dominate.\textsuperscript{118} To the extent that
queer theory considers gay lives, these individuals and couples are por-
trayed as “sexual minorities” rather than gender minorities.\textsuperscript{119} I am con-
vinced, however, that it is a mistake to focus on sex when discussing gay
lives.\textsuperscript{120}

The term “sexual orientation” promotes a sexual identity when there
are other terms that could be used that do not define gay men and lesbi-
ans by sexuality. For example, “relationship orientation,” “gender orien-
tation,” or “gay orientation” are terms that omit the word “sexual” and
thereby focus on relationships more than sexuality.\textsuperscript{121} I do not recommend

\textsuperscript{118} Kepris, supra note 116, at 282 (noting that queer theorists “treat[ ]
sexuality as the
product of intersecting cultural and historical events”). In discussing the practice of teach-
ing queer theory in law school classrooms, Kepris writes: “If the dialogue moves, because
of modesty, too far away from sex, nothing may remain to the discussion beyond the strug-
gles of identity politics groups.” \textit{Id.} at 303. Cf. Mary Coombs, \textit{Between Women/Between
Men: The Significance for Lesbianism of Historical Understandings of Same-(Male)Sexual Activities},
\textit{8 Yale J.L. & Human.} 241, 260 (1996) (noting the potential usefulness
of the concept of “queerness” for a coalition politics but arguing that if “queerness is to
serve such a role . . . it must shed its image (reality?) as a movement of young, predomi-
nantly male, sex radicals.”).

\textsuperscript{119} See \textit{Janet Halley, Reasoning About Sodomy: Act and Identity in and After Bowers v.
sexual side of their identities: “[I]t is time to recognize that further destabilizing the iden-
tity ‘heterosexual’ is an important goal that can be partly accomplished by an emphasis on
acts.” \textit{Id.} at 1770. Francisco Valdes specifically employs the term “sexual minorities” to
describe gay men and lesbians. \textit{See Valdes, supra note 116, at 14. Valdes probes the inter-
connected relationship between sex, gender and sexual orientation. In his discussion of the
miscegenation analogy, he points out that “discrimination on the basis of sexual orientation
always implicates sex.” \textit{Id.} at 201.

In describing queer theory in this manner, I do not mean to suggest that a less sexual
approach to gay identity falls outside queer theory’s purview. On the contrary, this Article’s
inquiry into whether mixed-race couples could be termed “sexual minorities” may be
seen as a form of queer theory because the question recognizes the flux of identity catego-
ries, a central tenet of queer theoretical thought.

\textsuperscript{120} I am not arguing that the term “sexual orientation” has no use at all. There are times
when one needs to discuss sexuality. “Homosexuality” denotes sexual conduct or sexual
atraction and is certainly a form of sexual orientation. Homosexual behavior or leanings
can be found in people who self-identify as straight, including married individuals. In
contrast, “gay” is a self-definition that means different things to different people, but often
refers to a person who is in a primary, open relationship with someone of the same gender
or who wishes to become involved in such a relationship. While it is true that the term
“gay” can be given the same meaning as homosexual, it certainly need not. What I point
out is the conflation of the sexual label with the term “gay.”

\textsuperscript{121} There is a tendency to view someone who chooses a same-sex partner as forever
gay while viewing someone who marries someone of a different race as if they could easily
have chosen a same-race partner. While it may be true that race is a more fluid concept
than gender when it comes to committing to long-term relationships, this is certainly not
always the case. I was struck when reading James McBride’s memoir that his mother al-
ways chose black men, first as boyfriends, then later as husbands. \textit{McBride, supra note

“sex orientation” because even though gay advocates could argue that the term is about biological sex, not sexuality, “sex orientation” as a label will likely make little headway in overcoming society’s perception that these relationships are purely sexual. Supreme Court Justice Ruth Bader Ginsburg acknowledged the problem of using the term “sex” when she was still an attorney litigating sex discrimination cases. She did not want to talk about sex before the Court, so she used the term “gender” as a synonym for male or female, thus avoiding any sexual connotations.\textsuperscript{122} The same language issue affects the movement for gay equality.

At a minimum, the sexualization of gay people has helped stigmatize same-gender relationships and hurt the quest for marriage. We should be as suspicious of the way same-sex relationships are sexualized as we are about using sexuality to define multicultural families.

\section*{V. Conclusion: Sexualization as Bias}

Imagine if the current president were asked whether he favors mixed-race marriages and he responded, “I don’t think it’s any of my concern how you conduct your sex life”—just as he responded when asked about same-gender marriage. Such an answer would define couples by their sexuality alone, an unfair and insulting categorization. To the extent this answer seems odd, it tells us that society no longer equates mixed-race couples with sexual licentiousness. Sixty years ago the same answer would not have raised eyebrows because mixed-race couples were viewed as prurient, their identity sexualized.\textsuperscript{123} This is progress. Sexualization of mixed-race marriages was part of a devaluation process—part of a process of denying respect, power and rights. This history teaches us that the current sexualization of same-gender love is part of the process of denying equal treatment.

Contrary to historically popular beliefs, most mixed-race couples are not different from other couples in the bedroom; rather, the sexualization of their relationships made mixed-race couples feel different in the public

\begin{footnotesize}
101. If individuals married to someone of a different race separate or divorce, their attraction and choice of partner may continue to be unorthodox, or they may fall in love with someone of the “correct” race. This is also true for individuals involved in same-sex relationships. Some have been married heterosexually before they form same-sex relationships, and some may divorce their same-sex partner only to marry someone of the opposite sex.


\textsuperscript{123} James Weldon Johnson stated in the 1940s that “at the core of the heart of the race problem is the sex problem.” \textit{Stember}, supra note 6, at ix. \textit{See also Hernton, supra note 10, at xii–xiii. 140. During the same decade, President Truman was asked if he thought black-white marriages would increase; he replied, “I hope not, I don’t believe in it . . . . Would you want your daughter to marry a Negro?” \textit{Washington, supra note 7, at 33.}
sphere. It was out of bed that mixed-race couples dealt with a world that viewed them as different. This is true for gay couples as well. Nor can gay sex be singled out as distinct, for the range of same-sex sexuality overlaps extensively with mixed-sex sexual behavior.124 Neither heterosexual nor homosexual sex is uniform. One gay couple may have more in common with a particular straight couple’s sexuality than another gay couple’s sexuality, and vice versa.

Robert Kennedy once prosecuted an artist for obscenity because his work showed a black man and a white woman in a sexual embrace.125 Recently, kissing on television received a parental warning, but only because the gender of the partners was the same.126 Again, it is not the act itself but the identity of the participants that determines whether the act is viewed as illicit. Mixed-race sex is different from mono-race sex only to the extent society endows race with meaning. To the extent society moves away from a view of the races as dichotomous and distinct, the concept of this embrace as different from an embrace between a white man and a white woman will fade. Similarly, as we move away from the notion that the two genders are dichotomous and distinct, the idea that same-sex sexuality is prurient or even different should begin to evaporate.127

American culture reflects a great ambivalence towards sexuality. Although sex is used to sell us everything from cars to liquor, there is a prevailing attitude that sexuality is bad. As recently as 1994, a Surgeon General of the United States was forced to resign because she did not immediately reject the idea of discussing masturbation during sex education classes.128 Not surprisingly, given this context, traits of licentiousness

124 Chai R. Feldblum, Sexual Orientation, Morality, and the Law: Devlin Revisited, 57 U. Pitt. L. Rev. 237, 285 n.222 (1996) (“[S]tudies indicate that over twenty percent of heterosexuals engage in anal sex and that seventy-five to eighty percent of heterosexuals engage in oral sex, with the highest rates of those regularly engaging in oral sex present among well-educated, non-minority heterosexuals.”). To say that a lesbian couple’s sexuality is somehow essentially different from a heterosexual couple’s sexuality is to ignore the many differences among heterosexual couples. Marriage creates a zone of privacy around couples, making differences among straight couples disappear in this way.

125 Stember, supra note 6, at 10.

126 Ellen DeGeneres complained about the “adult content” warnings placed on the television screen before one episode in which her character, Ellen Morgan, jokingly kissed her heterosexual best friend, Paige, and one in which her character briefly kissed a woman romantically, likening the warning to blatant discrimination. Bill Carter, Star of “Ellen” Threatens to Quit over Advisory, N.Y. Times, Oct. 9, 1997, at E3.

127 Sociologist Beverly Greene asked: “If we did not socially construct gender in dichotomous and fixed terms, if there were no assigned gender roles or gender attributes, would the concept of sexual orientation exist?” Greene, supra note 79, at 13. See also Kenneth Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 UCLA L. Rev. 263, 298–99 (1995); Eve Kosofsky Sedgwick, Epistemology of the Closet (1990).

and promiscuity are often part of the stereotyping process, and they attach to many powerless groups.\textsuperscript{129}

The stereotyping of mixed-race couples as licentious and the focus on the sexual aspect of their lives served its purpose by making others feel they were not licentious and sinful.\textsuperscript{130} It also made the criminalization of interracial sex seem appropriate, and the related denial of marriage rights seem earned. Those in power did not have to share their rights and privileges, and could retain all the benefits of marriage for themselves.\textsuperscript{131} The sexualization of gay men and lesbians accomplishes precisely the same end. Because it is such a large step for gay people to go from the profane to the sacred, deprivation of marriage rights appears fair. Gay people are seen as engaging in illicit behavior that deserves neither marriage nor the economic and security benefits that accompany

\textsuperscript{129} Black men were sexualized as having large sexual libidos; black women were assumed to be promiscuous. \textit{Hernton, supra} note 10, at 113, 165. Jewish men were considered “sexually perverse” in anti-Semitic American stereotypes, as well as manipulative, calculating, and ugly. E. Beck, \textit{Therapy’s Double Dilemma: Anti-Semitism and Misogyny, in Jewish Women in Therapy} (Ellen Cole & Rachel Siegel eds., 1990), \textit{cited in Daughters of Kings: Growing Up As a Jewish Woman in America} (Leslie Brody ed., 1997). Even white hillbillies were stereotyped as licentious and sexually promiscuous. Greene, \textit{supra} note 79, at 21; Hutchinson, \textit{supra} note 79, at 27–31.

\textsuperscript{130} To understand how sexualization aids the process of denying rights for mixed-race couples and same-gender couples, one must begin by considering how stereotyping and bias generally operate to enforce systems that empower one group at the expense of the dominant group. Stereotyping develops, psychologists theorize, when the majority projects the socially unacceptable parts of themselves onto “the other.” See Greene, \textit{supra} note 79, at 22. \textit{See also id.} at 3 (“’Fear is the glue that maintains existing biases . . . [F]ear becomes part of the process of projecting onto those whom we see as unlike ourselves all of the attributes that we would like to deny in ourselves.’”) (citing Rachel Josefowitz Siegel, \textit{Overcoming Bias Through Awareness, Mutual Encouragement and Commitment, in Racism in the Lives of Women} 295, 297 (Jeanne Adelman & Gloria Enguidanos eds., 1995)).

\textsuperscript{131} Sexual psychology is necessary for a full understanding of the belittlement and sexualization of mixed-race marriages. One theory was that white men wanted to keep a privileged position of being able to choose spouses or partners without black competition. Lesbian unavailability may be threatening to male privilege for similar reasons, with competition emanating from other women instead of from black men. See Koppelman, \textit{supra} note 1, at 236. \textit{See also Coombs, supra} note 118, at 257–59; Christin M. Damiano, \textit{Lesbian Baiting in the Military: Institutionalized Sexual Harassment under “Don’t Ask, Don’t Tell, Don’t Pursue,”} 7 Am. U. J. Gender Soc. Pol’y & L. 499, 509–10.

In addition, gay men may be sexually threatening to some men’s privilege because men are used to objectifying women and consider it a loss of privilege to be the object of other men’s gaze. See Andrew Koppelman, \textit{Gaze in the Military: A Response to Professor Woodruff}, 64 UMKC L. Rev. 179, 192 (1995). \textit{See also Coombs, supra}, at 257–58 (gay men’s perceived refusal to accept men’s dominant role in society may motivate anti-gay bias).

Whatever psychological theory one espouses, it is reasonable to understand that some of the sexualization of same-gender relationships involves similar convolutions as did the sexualization of mixed-race relations. See Greene, \textit{supra} note 79, at 22 (discussing white privilege).
it. Due to sexual stereotyping, the “privilege” that allows only some couples to marry does not have to be understood as a “structured advantage;” instead it is seen as “deserved and fair.”

As the marriage wars continue, it is important that we take certain lessons from the oppression of multiracial families and, with the help of those lessons, that we come to understand the interconnection between sexualization and power. History teaches that sexualization is a stigma that needs to be overcome in order to provide equality—regardless of gay or mixed-race relationship orientation.

---

132 Greene, supra note 79, at 22.