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Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation"

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by

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* Professor of Law, University of Miami. I thank the editors of the *Hastings Law Journal* for their vision and leadership in holding this long overdue Symposium—the first ever devoted to sexual orientation and intersectionality. This Essay stems from countless conversations, both formal and informal, with the many "Queers" of varied sexes, genders, colors, and sexualities who write or agitate from varied subject positions. I therefore begin by acknowledging the inspiration and support I draw from Tony Alfieri, Keith Aoki, Elvia Arriola, Pat Cain, Larry Catá Backer, Devon Carbado, Bob Chang, Sumi Cho, Ruth Colker, Barbara Cox, David Cruz, Jerome Culp, Jon Davidson, Adrienne Davis, Clark Freshman, Angela Gilmore, Neal Gotanda, Gil Gott, Isabelle Gunning, Angela Harris, Berta Hernandez-Truyol, Darren Hutchinson, Lisa Iglesias, Peter Kwan, Karen Lash, Chris Littleton, Jean Love, Akilah Monifah, Nancy Ota, Ruthann Robson, Jonathan Simon, Kendall Thomas, Robert Westley, and Eric Yamamoto. I thank also Linda Leali and Sholom Boyer, Miami class of '99, for expeditious and reliable research assistance. In particular I thank Clark Freshman, whose time, critical (white) perspectivity, and caring substantive feedback greatly benefited this Essay. Errors and gaffes are mine, as usual.

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Introduction

This occasion marks the first time that a law review in the United States holds a second symposium devoted to sexual orientation and the law.[1] It also marks the first time that a law review in the United States devotes a symposium specifically to sexual orientation and issues of "intersectionality."[2] This Symposium therefore is a milestone: it represents two first-ever events, both of which are crucial to the continuing quest for sexual orientation justice in the United States.

This quest is vibrant and viable, as the scholarship produced between the first symposium and this one can attest.[3] The prolific

1. The first symposium was *Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

2. The term refers to the interplay of multiple forms of social or legal bias, such as the combination of racism and sexism, and to the recognition that such biases operate on multiple axes simultaneously. Thus, the subordination of women of color results from the combined operation of racism and sexism. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. L. FORUM 139; *see also infra* notes 117-44 and accompanying text (discussing different forms of intersectionality in social analysis, legal analysis, and anti-discrimination case law).

3. The origins of this scholarship are surveyed in Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 31 n.83 (1995) [hereinafter Valdes, *Queers*].

discourse that has emerged since the 1979 symposium is described below, perhaps somewhat simplistically, as the "first stage" of sexual orientation scholarship to denote the evolutionary nature of critical knowledge and scholarly consciousness.[4] The issues engaged—or deferred—during this first stage in turn pose and frame the challenges that await the "second stage" of sexual orientation scholarship. Today, with this Symposium, we stand at the cusp of this second stage. This moment provides an opportune occasion to reflect both on the accomplishments registered by our first-stage efforts and on the challenges that await our second-stage efforts.

First-stage accomplishments of course include the very inception, at the 1979 symposium, and then the subsequent establishment, of a strong legal discourse that never before existed in this country. That discourse minted knowledge that exposed some of the injustices inherent in heterosexist prejudice. That knowledge problematized heterosexist hegemony and nurtured legal and social objection to its continuation. Perhaps first-stage efforts even emboldened ongoing activist struggles against sexual tyranny.[5]

Among the challenges awaiting a second stage of sexual orientation theorizing—sometimes described in this Essay as "Queer" legal theory[6]—is a similarly powerful and empowering engagement of race and

4. *See infra* notes 65-83 and accompanying text (discussing developmental aspects of the issues addressed in this Essay).

5. For an excellent recent history of sexual minorities in the United States, see JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983); *see generally* Valdes, *Queers*, *supra* note 3, at 59-61 n.154 (recounting the early history of sexual minority resistance of heterosexist oppression). Sexual minority activism no doubt was fueled during this time by the onset of the HIV pandemic and by the government's apparent indifference to its devastation of gay male and other vulnerable communities. *See* RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC (1987).

6. The term "Queer" remains controversial because it evokes the specter of a heterosexist regime of terror. As reclaimed and deployed in recent years, the term also signifies a prideful, iconoclastic, and egalitarian political stance toward all forms of subordination. Of course, professing or invoking a sensibility is not tantamount to honoring or practicing it, and "Queer" activism at times has suffered a gap between ideals and practices. For a discussion of the term "Queer" and its relationship to critical legal theory, see Valdes, *Queers*, *supra* note 3, at 344-77. In this Essay, "Queer" legal theory is employed occasionally to describe a second stage of sexual orientation scholarship that manifests in a critical manner the substantive anti-subordination values of "Queer" ideals; in this Essay, "Queer" legal theory sometimes is used to describe the sort of scholarship that second-stage theorizing could and should henceforth generate. *See infra* notes 59-64 and 99-113 and accompanying text (discussing the nature of "Queer" as opposed to "gay and lesbian" scholarship and discourse).

ethnicity, or, more precisely, an engagement of the interplay of racism and ethnocentrism in the formation of "sexual orientation" identity, community, and subordination—a critical investigation of the ways in which white and straight supremacy interlock to create social and legal conditions that permit or encourage the practice of permutated bigotries against the multiply diverse sexual minorities[7] of the United States. This pending engagement calls for, and entails, a collective and mutual move by the community of sexual orientation scholars that has formed since 1979.

It bears emphasis at the outset that this Essay's focus on these two constructs is not intended—though it may nonetheless seem—to privilege race and ethnicity in second-stage scholarship over other constructs that social and legal experience suggest cross-intersect with sexual orientation and with each other to structure and sustain the oppression of diverse sexual minorities. This focus additionally may tend to reify constructs, phenomena, or classifications in limited or underinclusive ways.[8] Thus, at the outset, I encourage all rejoinders to this Essay's focus on color as part of a developing body of anti-subordination scholarship; hopefully, this Essay will prove to be but a prelude to further dialogue on the complexities that cause and texture the subordination of lesbians, gay men, bisexuals, transsexuals, and the trans/bi-gendered of all colors, classes, creeds, sexes, genders, locations, and abilities.[9] This Essay therefore invites and celebrates further, widescale scholarly engagement of various sources and permutations of "sexual orientation" oppression.

In brief, I argue here that it is urgent, and both substantively and strategically imperative, for critical legal scholars who choose to write

7. The term "sexual minorities" is employed in this Essay to describe inclusively lesbians, gay men, bisexuals, transsexuals, and the trans/bi-gendered. This descriptor does not imply that persons in each of these populations is "the same" to others within or across these groups; this descriptor simply acknowledges that each of these "sexual minority" populations is perceived as aberrational under traditional heteropatriarchal ideology and therefore is subordinated through the interplay of sex, gender, and sexuality in Euro-American cultures. *See* Valdes, *Queers*, *supra* note 3, at 8 n.16, 248-75.

8. *See generally* Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR. AM. L. & POL'Y REP. 207 (1995) (observing the complexities of "identity" and of its analysis as a legal and social construct).

9. *See, e.g.*, Francisco Valdes, *Beyond Analogy, Toward Synergy: Rethinking Race and Sexual Orientation in Equal Protection Analysis and Anti-Subordination Theory*, 75 DENV. U. L. REV. ___ (forthcoming 1998) (elaborating a comparative analysis of "status" and "conduct" in race and sexual orientation equality contexts).

from a lesbian, gay, or bisexual subject position[10] to interrogate the racialized and ethnicized dynamics of sexual orientation identities and issues as part of an evolving anti-subordination discourse. I argue that this collective engagement is not only warranted but necessary because it is the "right" move substantively and strategically due to known facts regarding the diversity of sexual minority communities as well as to learned lessons taught by outsider jurisprudence[11] in recent years. Otherwise, as the emergent racial critique of extant sexual orientation legal discourse suggests,[12] the forms and functions of our scholarship will

10. The term "subject position" as employed in this Essay refers to the perspective or standpoint of the author regarding the topic of analysis. *See* Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687, 690-91 (1996).

11. The term "outsider jurisprudence" as employed in this Essay refers to the critical literature and discourses created in recent years by "minority" or outsider legal scholars. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989) (coining the term).

12. The absence of intersectional analysis in lesbian and gay legal discourse has drawn increasing critical attention from sexual minority scholars of color during the past few years. Indeed, this internal racial critique, as expressed in its written form within the law review literature of the United States, seems to have originated in the past three years. The term "internal racial critique" as employed in this Essay thus refers to the growing body of work critiquing the absence of intersectionality in first-stage sexual orientation legal scholarship; this critique is "internal" because it emanates from authors who explicitly write from a sexual minority subject position and it is "racial" because it oftentimes, though not exclusively, critiques the specific absence of race from "sexual orientation" analyses. *See, e.g.*, Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (analyzing the relevance of race and class to lesbian and gay politics and legal discourse); *see also* Isabelle R. Gunning, *Stories from Home: Tales from the Intersection of Race, Gender and Sexual Orientation*, 5 S. CAL. REV. L. & WOMEN'S STUD. 143 (1995) (recounting personal and general encounters with Eurocentrism in lesbian venues or discourses); Cynthia Petersen, *Envisioning a Lesbian Equality Jurisprudence, in* LEGAL INVERSIONS: LESBIANS, GAY MEN AND THE POLITICS OF LAW 118 (Didi Herman & Carl Stychin eds., 1995) [hereinafter LEGAL INVERSIONS] (arguing that lesbian legal theory must be intersectional because lesbian subordination is multifaceted); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 LAW & SEXUALITY 83 (1994) (questioning the benefits of lesbian and gay liberation to lesbians and gays who are of color, and/or poor, and/or trans/bi-gendered). Similar critiques aimed at court opinions or focused on class and other intersections also have begun to emerge in recent years. *See, e.g.*, Mary Eaton, *Homosexual Unmodified: Speculation on Law's Discourse, Race and the Construction of Sexual Identity, in* LEGAL INVERSIONS, *supra*, at 47 (arguing that the omission of intersectional analyses in sexual orientation anti-discrimination cases effectively codes sexual orientation as white and race as heterosexual); Eric Heinze, *Gay and Poor*, 38 HOW. L.J. 433 (1995) (noting how poverty can affect "gay cases" as well as "non-gay cases" brought by gay people); Ruthann Robson, *To Market, To Market: Considering Class in the Context of Lesbian Legal Theories and Reforms*, 5 S. CAL. REV. L. & WOMEN'S STUD. 173 (1995) (discussing the interplay of class and sexual orientation in lesbian legal theorizing). Gays and lesbians of color

suffer an increasing irrelevance to "our" communities—an irrelevance resulting from neglect of the legal experience and social conditions that oppress racially and ethnically diverse sexual minorities. Such neglect incrementally but steadily may diminish the substantive insight and efficacy of our theorizing; such neglect over time may undermine the transformative potential of our work.

This engagement, I thus argue, is mandated both by the accrual of substantive and strategic benefits as well as by the avoidance of substantive and strategic costs at a key juncture in the development of sexual orientation legal scholarship. My hope is that this Symposium, like the first one, effectively will mark the opening of a new era in the continuing enrichment and development of sexual orientation theorizing, especially regarding race and ethnicity. Advancing this hope is the main aim of this Essay.

In so doing, I seek also to advance a longstanding aim: to nudge greater mutual interaction between and among existing legal discourses of outsider and progressive critical scholars on mutually-reinforcing sources or structures of privilege and subordination.[13] Although each of the several genres of contemporary outsider jurisprudence has proven powerful and enriching in its own right, they sometimes tend to limit their analytical and transformative potential by a common disinclination to carry their examination of subordination beyond their primary self-ascribed domains.[14] Yet the work of outsider scholars has made it increasingly plain that all forms of social and legal oppression are multifaceted, because all forms of identity and identification are multiplicitious and multidimensional;[15] this point, in fact, is the thrust of

have advanced similar points about sexual diversities in non-legal discourse. *See, e.g.*, Valdes, *Queers*, *supra* note 3, at 359 n.1266.

13. *See* Valdes, *Queers*, *supra* note 3, at 358-59, 372-75 (urging collaborative projects and agendas between Queer, feminist, and critical race legal theorists).

14. *See generally* Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996) [hereinafter Valdes, *Latina/o*] (describing the failure of various outsider discourses to interconnect and urging the benefits of mutual and collaborative interconnection). *Compare* Devon W. Carbado, *Straight Out of the Closet* (unpublished manuscript on file with author) (articulating the interconnectedness of straight and white privilege from a black male heterosexual position).

15. The multidimensionality of subordination through law has been articulated in recent years by various scholars of color. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (demonstrating the multiplicity of all social and legal identities with the example of race and gender); Berta Esperanza Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) [hereinafter Hernandez-Truyol,

the emergent internal critique.[16] The intersectionalities created by the multiplicity of all human identities thus challenge critical legal analysts of all stripes to produce increasingly nuanced works that unpack the consequences of diversity and difference within and across social or legal hierarchies.[17] Accordingly, this Essay urges the importance of intersectional expansion within Queer legal theory as part of a larger move toward connection between and among legal anti-subordination discourses.

But the importance of this move to connect is not limited to the critical insights that mutual exchange can accrue. Intersectional analyses and projects are valuable to sexual minorities, racial and ethnic minorities, and other subordinated groups because they can enhance our joint capacity to understand the interconnectedness of multifaceted power systems that stand on intersected axes of privilege. And a better understanding of interlocked subordination systems can produce a greater joint capacity to unpack and dismantle them. As a practical matter, the

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Building Bridges—Latinas and Latinos at the Crossroads] (discussing the demographic multidimensionality of identity in Latina/o contexts); Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69, 71 (1996) (urging multidimensionality as critical legal method in race and ethnicity legal discourses); Hutchinson, *supra* note 12, at 636-44 (urging the creation of a multidimensional lesbian and gay legal discourse as an extension of intersectionality); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) (proposing cosynthesis as a post-intersectionality method of analysis); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 SO. CAL. REV. L. WOMEN'S STUD. 25 (1995) [hereinafter Valdes, *Sex and Race*] (proposing interconnectivity as a complement to intersectionality and related concepts).

16. Not surprisingly, then, the methods, lessons, and trajectories forged in outsider jurisprudence inform the emergent internal critique of sexual orientation discourse. Of course, engagement of this emergent racial critique necessitates familiarity with and understanding of the critique's jurisprudential underpinnings. Thus, to conduct responsibly the internal second-stage conversation started by the emergent racial critique requires a collective engagement of outsider scholarship on race and ethnicity, which has developed alongside first-generation sexual orientation scholarship. *See, e.g.*, Hutchinson, *supra* note 12, at 638-40 (pointing to critical race and feminist legal theory as sources of intersectional and multidimensional analyses for future lesbian and gay theorizing).

17. This observation of course implicates the sameness/difference discourse, which in recent years has examined from varied subject positions how complex and multidimensional categories of social or legal identity overlap or cross-relate. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); *see also* Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

interconnection of power and privilege across multiple sources and categories makes it incumbent on outsider legal scholars interested in material transformation to learn about, and respond critically to, those interconnections.

In fact, the development of common understandings and parallel movements to connect otherwise disparate anti-subordination struggles can be a key contribution specifically of outsider legal scholars toward the design and creation of an egalitarian post-subordination order through critical legal theory. But to do so we must learn about various critical perspectives, jurisprudential movements and historical experiences. We must involve ourselves with—and nurture the involvement of others in—communities or discourses that otherwise might be seen attenuated from or unconnected to each other. The point is to learn continually and critically from each "other" to better understand and resist the systems of supremacy that combine to produce the relative social and legal positions of all humans.

Though I devote the bulk of this Essay to the positive and negative reasons that compel an end to the first-stage silence on race and ethnicity within a second stage of sexual orientation discourse, I note now and again toward the end of this Essay,[18] as I have noted previously,[19] that the same reasons and points apply to corresponding silences within race and ethnicity legal discourses regarding sexual orientation; the same points and reasons elaborated below about first-stage sexual orientation legal scholarship apply to race legal scholarship. The imperative of engagement is mutual because the intersection of race, ethnicity, and sexual orientation marks the intersection of outsider jurisprudence and second-stage sexual orientation scholarship. The intersection of race, ethnicity, and sexual orientation marks a ready site of mutual exchange and jurisprudential convergence toward self-empowerment through legal theorizing.

Part I opens with a general overview of the sexual orientation scholarly status quo, both in legal doctrine and theory, as it has developed in the years since the 1979 symposium. Part II considers some pending issues raised for Queer legal theory by the first-stage record and

18. *See infra* note 115 and accompanying text (calling for a reciprocal and mutual engagement of race, ethnicity, and sexual orientation).

19. *See* Valdes, *Latina/o*, *supra* note 14, at 5-7 (addressing the general failure of critical race theory to adequately account for minority sexual orientations and for non-black people of color in its anti-subordination analyses and agenda).

by the emerging internal critique of it, stemming chiefly from the inattention of legal discourse to the interaction of race, ethnicity, and sexual orientation. This discussion urges not only collective engagement but also adoption and promotion of an ethic of caring, mutual recognition within and through Queer theorizing. Part III concludes the Essay with a comparison of intersectionality's triumphs and failures in various contexts to note its likely failure in cases involving race, ethnicity, and sexual orientation. This closing section urges the cultivation of intersectionality in Queer legal theory to uncover the *social* interaction of race and ethnicity in sexual orientation oppression while qualifying the prospects of its *legal* application under existing doctrinal conditions. These three parts jointly strive to help orient the further development of Queer legal theory during the second stage of sexual orientation legal scholarship—a stage effectively signaled by this Symposium.

I. The "Sexual Orientation" Anti-Discrimination Status Quo: A Survey

Since the 1979 symposium, and especially during the past ten years, a rich and growing body of legal scholarship on sexual orientation has emerged to help combat the oppression of sexual minorities in varied walks of contemporary life.[20] This literature has intervened in key life venues, including barriers against the employment and housing of our communities. It has marshaled common law, statutory law, and constitutional law on behalf of those communities. It has invoked state and local law, as well as federal law, to advance these broad anti-discrimination aims. It has, in short, embarked on a widescale attack against the many forms of discrimination that are integral to the structuring of life and law in the United States along sexual orientation fault lines.

A. Privacy, Equality, and Family: A Doctrinal Sketch

Doctrinally, the first-stage attack against sexual orientation discrimination has focused on three general areas. The first has been privacy law. The second has been equality law. The third has been

20. For a fairly comprehensive bibliography of this literature, see Standing Comm. on Lesbian and Gay Issues of the Social Responsibilities Special Interest Section of the Am. Assoc. Law Libraries, *Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law, 1969-1993*, 86 LAW LIBR. J. 1 (1994).

family law. This trio represents vast domains of law and life, and thus suggests the ambitious legal and political nature of first-stage efforts.

Privacy figures prominently in the development of sexual minority anti-discrimination efforts because the trajectory of doctrinal developments seemed promising during the formative years of sexual orientation scholarship. Judicial articulation of modern privacy principles beginning during the 1960s seemed to suggest that constitutional safeguarding of consensual intimacy applied equally to procreational and recreational activity.[21] A strict insistence on procreational purpose in all acts of consensual intimacy having been rejected as a constitutional litmus test in *Griswold v. Connecticut*,[22] *Eisenstadt v. Baird*,[23] and *Carey v. Population Services*,[24] there seemed to be no principled reason to distinguish same-sex from cross-sex recreational intimacy. The Eleventh Circuit in *Hardwick v. Bowers* effectively read that way the privacy line of cases preceding it.[25] The Supreme Court vehemently disagreed in *Bowers v. Hardwick*.[26]

Emphasizing—and exploiting—the language in its privacy precedents about marriage as "an association that promotes a way of life,"[27] the Supreme Court in *Bowers* called a halt to privacy when it involved the consensual coupling of two male adults because, the Court summarily asserted, it was "evident that none of the rights announced in [prior privacy] cases bears any resemblance" to same-sex intimacy and connection.[28] That conclusory assertion was made possible precisely because the prior privacy rulings had combined ambivalently the deregulation of sexual expression with a continued validation of the forms and values associated with traditional heteropatriarchal ideology: while striking down state regulation of "private" consensual cross-sex intimacy

21. Despite the relatively "liberal" results of those cases, the Court's reasoning was considerably traditionalist, reflecting a continued attachment to heteropatriarchal ideology. *See* Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Thoughts on Desire, Law and Ideology in the Politics of Expression at the Turn of a Century*, 1 IOWA J. RACE, GENDER & JUSTICE 213 (1997) (critiquing the ideological instrumentality of modern privacy jurisprudence and its suppressive tendencies).

22. 381 U.S. 479 (1965) (striking down an anti-contraception statute as applied to a married couple).

23. 405 U.S. 438 (1972) (extending *Griswold*'s right of privacy to sexual activity in unmarried, cross-sex couplings).

24. 431 U.S. 678 (1977) (extending *Griswold* and *Eisenstadt* to minors).

25. 760 F.2d 1202 (11th Cir. 1985) (reviewing the pre-*Bowers* rulings).

26. 478 U.S. 186 (1986).

27. *Griswold*, 381 U.S. at 486.

28. *Bowers*, 478 U.S. at 190.

that was recreational, the Court continued to extol the primacy of procreational standards and heteropatriarchal structures in constitutional law and analysis.[29] This ambivalence produced "liberal" results but continued traditionalist state ideology toward the regulation of sexual expression.[30]

The mixed pre-*Bowers* record thus had created a doctrinal environment fairly vulnerable to manipulation: the doctrinal status quo at the time of *Bowers* permitted any court to emphasize and embrace at will either the reformist or the traditionalist features of modern privacy jurisprudence. The *Bowers* Court simply chose to exercise its supreme discretion to pursue and bolster the latter, but it did so with rationalizations flimsy enough to spark a veritable flood of scholarly skepticism.[31] Thus, a body of legal scholarship devoted to exposing and critiquing the heterosexist premises and objectives of the *Bowers* privacy fiat burst into existence within a few years.[32]

With the privacy path summarily shut by *Bowers*, political activists and legal scholars searched for new avenues toward the recognition and protection of same-sex rights, and this search for alternatives continued to prioritize constitutional planes of attack against homophobic exercises of

29. *See* Valdes, *supra* note 21, at 230-37 (discussing the ambivalent combination of reform and tradition in modern privacy law).

30. *Id.* For further readings on modern privacy law, see *infra* notes 31 and 32 and authorities cited therein.

31. Various commentators have come to the conclusion that the majority opinion in *Bowers* was driven by "personal predilection" or "hidden determinants" rather than by sound legal analysis and impartial judicial reasoning. *See* Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988). Justice Powell, who cast the deciding vote that created the 5-4 majority for the *Bowers* ruling, later publicly acknowledged "I probably made a mistake in that one. . . . When I had the opportunity to reread the opinions a few months [after the ruling], I thought the dissent had the better arguments." Powell's statement was offered in response to a question at a student forum at New York University, where he was asked whether he thought he had made any mistakes while on the Court. *See* Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3.

32. *See, e.g.*, *supra* note 31 and authorities cited therein critiquing the *Bowers* opinion; *see also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992); Steven J. Schnably, *Beyond* Griswold: *Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Tracey Rich, Note, *Sexual Orientation Discrimination in the Wake of* Bowers v. Hardwick, 22 GA. L. REV. 773 (1988); Yvonne L. Tharpes, Comment, Bowers v. Hardwick *and the Legitimization of Homophobia in America*, 30 HOW. L.J. 829 (1987); Yao Apasu-Gbotsu, et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986).

state power. In light of the gains recorded during the immediately preceding years by the varied legal and political strategies of the civil rights[33] and women's liberation[34] movements, the obvious candidates for a second route to sexual orientation social justice were in/equality politics and equal protection law. The next wave of activism and scholarship therefore focused on equality goals and jurisprudence. Mounting a determined effort to demonstrate the illegitimacy of sexual orientation inequality in conventional equal protection terms, sexual minority advocates and scholars advanced claims and analyses that took seriously constitutional equal protection principles.[35]

But the courts would have none—or little—of it. Rather than meet these efforts on the merits, courts typically asserted that substantive equality analyses effectively were precluded, or the results preordained, by *Bowers'* privacy ruling. This conclusion originated in and is exemplified by the D.C. Circuit's ruling in *Padula v. Webster*, where the court asserted that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[36] In other words, because the *Bowers* Court's privacy ruling upheld the constitutionality of sodomy statutes as applied to a same-sex coupling, and because the *Padula* court supposed that sodomy was "the conduct that defines" lesbians and gay men, the D.C. Circuit concluded that Padula, a "practicing" lesbian,[37] could not claim the equal protection of the law. After *Padula*, a series of federal rulings repeated its status/conduct approach, oftentimes in the context of the military's anti-

33. For a general history of the strategies that accompanied the civil rights movement, see MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1989).

34. For a general history of the strategy behind the Equal Rights Amendment, see DONALD G. MATHEWS & JANE SHERRON DE HART, SEX, GENDER AND THE POLITICS OF ERA: A STATE AND THE NATION (1990).

35. *See generally* Elvia R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); John Charles Hays, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375 (1990).

36. 822 F.2d 97, 103 (D.C. Cir. 1987).

37. Margaret Padula is described in the court's opinion as a "practicing homosexual." *Id.* at 99. This fact and its use in the *Padula* analysis of course raises questions about the relationship of "sodomy" to lesbian status or identity, questions that are beyond the scope of this Essay.

gay exclusion policy.[38] The worthiness of sexual minority equality claims thus was judicially declared foreclosed, or at least fatally prejudiced, by *Bowers'* privacy ruling.

The stonewalling of sexual minority equal protection claims by an increasingly conservatized federal judiciary[39] redirected sexual minority initiatives toward state, as well as federal, venues and sources of law.[40] In federal contexts, the First Amendment began to receive newfound attention.[41] At the same time, both equality[42] and privacy[43] claims were

38. This line of equality cases thus also largely defines the courts' reaction to the monumental struggle over sexual minority access to military service, which continues more or less fitfully. *See generally* Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHT. L. REV. 381 (1994) (critically reviewing the cases); *see also* Janine M. Dascenzo & Neal A. May, Comment, *Cleaning Out the Pentagon's Closet: An Overview of the Defense Department's Anti-Gay Policy*, 23 U. TOL. L. REV. 433 (1992); Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992); Judith Hicks Stiehm, Comment, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685 (1992). *See generally infra* note 54 and authorities cited therein on status/conduct issues.

39. Though political affinity historically influenced judicial appointments to varying degrees, the administrations of Richard Nixon, Ronald Reagan, and George Bush systematically employed political ideology to consciously cause a jurisprudential counter-revolution that would roll back the civil rights gains of the 1960s. *See generally* Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989); David W. Rohde & Harold J. Spaeth, *Ideologgy, Strategy and Supreme Court Decisions: William Rehnquist as Chief Justice*, 72 JUDICATURE 247 (1989). The appointments of the past two decades have effectively reconstituted the federal judiciary, making it more hostile to anti-subordination claims. *See, e.g.*, William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990) (addressing the Court's doctrinal civil rights retrenchment in its 1989 term); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing the deployment of jurisdictional and prudential barriers to deflect civil rights claims); Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (analyzing the relative strictness of federal courts in analyzing the sufficiency of civil rights complaints). *See generally* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992) (describing the jurisprudential politics of the present-day Court).

40. *See, e.g.*, Justice Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723 (1991); Paula A. Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495 (1992). Of course, state and local lawmaking power also provides opportunities to maintain heterosexist supremacy. *See generally infra* note 45 and authorities cited therein on the use of state referenda to enact statutory or constitutional measures designed to stymie sexual orientation equality.

41. *See, e.g.*, David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994); William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route*

pressed under state constitutional schemes, or under state and local laws. This expanded yet regionalized anti-discrimination drive also produced momentum to enact state and local protective laws where none previously existed, which in turn helped to generate the politics of "cultural war" and majoritarian backlash[44] that, for now, still sway the land.[45]

The expansion from constitutional and federal planes to state and local efforts was accompanied by a newfound emphasis on the basics of everyday life—family arrangements and housing issues.[46] No doubt, this

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to Equality?: Some Reflections on the Construction of the Hate Speech Debate from a Lesbian/Gay Perspective, 2 LAW & SEXUALITY 19 (1992); Katie Watson, Note, *An Alternative to Privacy: The First Amendment Right of Intimate Association*, 19 N.Y.U. REV. L. & SOC. CHANGE 891 (1992).

42. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (challenging the state's same-sex marriage ban under the state constitution's equal protection clause); *see also* Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033.

43. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487 (1992) (challenging the state's sodomy statute under the state constitution's privacy guarantees); *see also Special Feature:* Commonwealth v. Wasson: *Invalidating Kentucky's Sodomy Statute*, 81 KY. L.J. 423 (1992-1993).

44. Cultural war against sexual minorities and other subordinated groups was declared by Republican presidential hopeful Patrick J. Buchanan from the podium of the 1992 Republican Convention. The purpose of cultural war is to reclaim public policy for the maintenance of traditional social arrangements and power hierarchies. *See* Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1 (reporting Buchanan's speech and related events); *see also* Keith Aoki, *Foreword: The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996) (discussing the political climate of backlash and the development of critical legal scholarship in Asian American contexts); *see generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

45. *See generally* Symposium, *The Constitutionality of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491 (1994); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153 (1993). This use of state referenda to stymie sexual minority equality claims or gains eventually produced the Supreme Court's ruling in *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996) (striking down on equal protection grounds Colorado's Amendment Two, which had amended via referendum the state constitution to prohibit any state entity from enacting any sexual orientation anti-discrimination policies); *see also* Colloquium, Romer v. Evans: *The Decision and Its Impact*, 2 NAT'L J. SEX. ORIENT. L. 1 (1996) <http://sunsite.unc.edu/gaylaw> (this journal is the nation's first on-line law journal); Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) (providing a constitutional analysis by the Senior Judge of the Oregon Supreme Court of the mis/use of majoritarian politics to formalize sexual orientation discrimination).

46. *See generally* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986); Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but*

emphasis coincided with and was facilitated by the increasing visibility of sexual minority couplings and communities in social terms.[47] The third doctrinal focus, concentrated on state or local regulation of family and residential arrangements, therefore arose.

Generally, this litigation and scholarship trained on states' discriminatory regulation of family life, questioning and resisting the heteropatriarchal premises and biases of the status quo to secure the integrity of same-sex unions and families.[48] This struggle centered not only on formal marriage equities but also on related issues: the establishment and recognition of domestic partnerships; the protection of same-sex procreation, custody of offspring, or adoption of children; the control of medical care for partners or loved ones; and the retention or disposition of property rights upon the demise of a partner.[49] These anti-discrimination fronts effectively covered the gamut of family life. This aspect of the first-wave attack on heterosexist hegemony over family relations therefore was as legally broad and politically ambitious as the constitutional claims to privacy and equality.

This account, in its brevity, of course oversimplifies the first-stage development of sexual minority anti-discrimination politics and scholarship. The status quo produced during these first-stage efforts in each of these three general doctrinal arenas therefore varies in manifold particulars. In each instance the struggle against social ignorance and legal prejudice has posted important gains, yet remains unfinished. Indeed, the gains posted have excited a politics of backlash and retrenchment even as they have helped to ameliorate sexual orientation injustice. This survey therefore is intended to provide a general and

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Not Hell Either, 73 DENV. U. L. REV. 1107 (1996); Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Ruthann Robson & S.E. Valentine, *Lov(H)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L. REV. 511 (1990); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991).

47. *See, e.g.*, D'EMILIO, *supra* note 5, at 9-219 (recounting the emergence of visible and vibrant sexual minority enclaves in various metropolitan centers of the United States during the second half of this century); *see also* ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, 1945-1990—AN ORAL HISTORY (1992) (presenting a collection of personal accounts).

48. *See generally supra* note 46 and authorities cited therein on sexual minority issues relating to family life.

49. *See generally supra* note 46 and authorities cited therein on family law and life.

momentary, rather than comprehensive or conclusive, sense of developments leading up to the present. And, as this depiction already suggests, the first-stage history of sexual orientation law and activism was accompanied by a scholarly or theoretical evolution that reflects these doctrinal and political developments.

B. Postmodernism, Status/Conduct Issues, and Gender: A Theoretical Sketch

The theoretical endeavors transpiring during the first stage have tracked but not mirrored these doctrinal and political contestations. First-stage theory, like first-stage doctrine and politics, has focused on three broad areas of inquiry and exertion, encompassing broad slices of sexual minority law and life. As with doctrine and politics, the anti-discrimination tasks and goals of first-stage theory remain unfinished.

Perhaps the most prominent theoretical step of the first-stage years has been about the de/construction of "sexual orientation" as a social phenomenon or legal concept. This theorizing questioned the view of sexual orientation as an essential or strictly biological trait, and advanced the notion that "sexual orientation" is instead a social construction. This step challenged the prevalence of modernism in contemporary understandings of "sexual orientation" and human identity.

This step thus joined the emergent field of sexual orientation scholarship to the ongoing, transdisciplinary discourse over modernism and postmodernism.[50] This broader discourse sought to overturn the modernist practice of viewing social and human phenomena in unidimensional, categorical, ahistorical, and decontextualized terms. Postmodernism charged that modernist scholarship overlooked context and particularity, thereby "essentializing"[51] its objects of analysis. Advocates of postmodernism therefore sought to replace modernist practices with new outlooks that recognized the constructedness of all knowledge and discourse, and that thereby would produce analyses

50. *See, e.g.*, Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's* Sex and Reason: *Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992) (book review); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993).

51. *See supra* note 50 and authorities cited therein on essentialism and postmodernism in gay and lesbian legal scholarship.

qualified by factual, historical, cultural, and discursive contingencies or particularities.

This dialogue over essentialism and constructionism became an early locus of sexual orientation legal scholarship for two reasons. First, the nascency of sexual orientation scholarship took place at the same time that the established primacy of modernist essentialism in legal and other theorizing was under challenge. Second, this controversy was/is directly relevant to social and legal understandings of sexual orientation identity.[52] This dialogue therefore not only helped shape first-stage theory, it also helped to import postmodernism into legal culture and discourse.

The essentialism/constructionism debate also produced a subdialogue about the distinction of "status" from "conduct" in legal doctrine and theory. This subdialogue was prompted in part by judicial pronouncements in status/conduct cases—cases like *Padula* and its progeny that denied constitutional protection to sexual minority-identified claimants on the grounds that their legal position pivoted on "behavior" rather than identity.[53] This judicial reaction, coupled with the larger postmodern discourse, prompted several articles critiquing the deployment of status/conduct notions to deflect or postpone the sexual minority equality quest.[54]

Additionally, first-stage sexual orientation theorizing took up the investigation of the relationship between sex, gender, and sexual orientation. This investigation subjected to critical scrutiny the intertwining of heterosexism and androsexism to produce male and masculinist privilege, but this investigation also queried the association of gender typicality with majority sexual orientation, or heterosexuality, and the corresponding association of gender atypicality with minority sexual orientations.[55] This investigation thus brought to bear critical

52. *See* Valdes, *Queers*, *supra* note 3, at 111-16 (discussing the relevance of the essentialism/constructionism discourse to sexual orientation and legal reform).

53. *See supra* notes 36-38 and accompanying text (discussing the *Padula* ruling).

54. *See, e.g.*, Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223 (1996).

55. *See, e.g.*, Elvia R. Arriola, *Gendered Inequality: Lesbians, Gay Men, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994); Elvia R. Arriola, *Faeries, Marimachas, Queens and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33 (1995) [hereinafter Arriola, *Faeries*]; Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Marc A. Fajer, *Can Two Real Men Eat*

consideration of the intricate and myriad forms of interplay among these constructs, and of the biases exercised through them, to reiterate sex, gender, and sexual orientation in culturally and legally cognizable ways.

These three general areas of scholarly inquiry and theorizing accompanied and approximated the doctrinal critiques and the litigation efforts of the period between the first symposium and this one. These three areas—the application of postmodern insights to sexual orientation scholarship, the contestation over legal conceptions and deployments of status and conduct, and the social and legal interplay of sex, gender, and sexual orientation—thereby effectively outline a loose framework and the general parameters of first-stage sexual orientation legal theory. Without doubt, this framework has advanced the struggle against sexual orientation discrimination, and it also has enriched contemporary critical legal knowledge and scholarship. But this framework simultaneously deferred areas of inquiry that are indispensable to a complete

Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511 (1992); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Francisco Valdes, *Unpacking Heteropatriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161 (1996); Valdes, *Queers*, *supra* note 3; I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991). This investigation is presaged in Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979), and, more recently, in Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187. A related inquiry is the anti-miscegenation analogy, which compares sexual orientation discrimination and racial discrimination by using sex and race. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); *see also* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

For more recent discussions of analogies, see Odeana R. Neal, *The Limits of Legal Discourse: Learning From the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679 (1996) (assessing the relevant similarities and differences in the use of race and sexual orientation civil rights analogies to address the failings of each movement); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65 (1997) (analogizing race and sexual orientation in the context of the military's anti-gay exclusion policy); Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33 (1994) (comparing and contrasting sexual and racial minority civil rights quests to urge careful and mutually beneficial coalitional projects); 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 (1994) (examining and questioning analogies and distinctions between sexual orientation and other constructs, especially as used to promote anti-gay state referenda); *see also* Eaton, *supra* note 12, at 59-68 (observing the dichotomizing and distorting effects of unidimensional analogizing); Gilmore, *infra* note 97 (describing some reasons for African American skepticism of such analogies); Hutchinson, *supra* note 12, at 583-84 (questioning the utility of unidimensional analogies).

understanding of "sexual orientation" discrimination and to a continuing dismantlement of straight supremacy.

C. Anti-Discrimination and Anti-Subordination Agendas: Diversifying Justice

The body of work created by sexual minority legal scholars since the first symposium on sexual orientation and law in 1979 evinces a consistent concern with combatting "sexual orientation" oppression. This concern has manifested itself time and again through cases, projects, and articles that address constitutional, statutory, and common law anti-discrimination issues.[56] These efforts display a collective first-stage concern with heterosexist supremacy expressed and enacted in varied social contexts through the force or complicity of law.

But the singular focus on "sexual orientation" excluded from first-stage scholarship any consideration of possible complexities in the legal or social oppression of sexual minorities. This exclusion effectively "essentialized" sexual minority communities and issues through analyses that apparently assumed and at least projected a monolithic "gay" community.[57] The essentializing first-stage failure to modify "sexual orientation" analyses with intersecting factors like race or ethnicity therefore left unexamined and unchallenged significant sources of oppression that affect the social and legal position of non-white members of sexual minority communities. The first-stage anti-discrimination agenda, though broad and ambitious, was limited by its unmodified approaches to "sexual orientation" issues.[58]

At the same time, nothing to date suggests that present-day Queer activism and theorizing, or a prospective second-stage scholarship, is inclined to abandon this broad anti-discrimination quest. In fact, the

56. *See supra* notes 20-55 and accompanying text (reviewing the first-stage record); *see also Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (surveying the manifold social and legal settings of first-stage anti-discrimination efforts); Jan K. Gray, *Current Developments in the Law: A Survey of Recent Cases Affecting the Rights of Gays, Lesbians and Bisexuals*, 3 B.U. PUB. INT. L.J. 379 (1993) (providing a similar survey).

57. *See* Hutchinson, *supra* note 12, at 585 ("Gay and lesbian legal theorists embrace essentialism by excluding issues of race from analysis."). Similar observations have been offered regarding feminist legal theory, both by lesbian and nonwhite feminist scholars. *See, e.g., infra* note 90 and authorities cited therein on essentialism and feminist legal theory.

58. *See generally* Eaton, *supra* note 12, at 65-69 (discussing the limitations of unmodified sexual orientation analyses).

critical, iconoclastic, and progressive anti-subordination ideals associated with Queer positionality would suggest the contrary.[59] Thus, second-stage theorizing constitutes an opportunity to carry forward the broad but hitherto unmodified anti-discrimination commitments of the first stage as part of an evolving anti-subordination agenda. This agenda, modified by second-stage consideration of sexual orientation's racialized and ethnicized dimensions—as well as other intersectional dimensions—would represent a continuing yet evolving articulation of basic anti-discrimination ideals and principles.[60] The transition from the first to the second stage in sexual minority theorizing might—and should—be the occasion for the transition from essentialized or unmodified anti-discrimination critiques to nuanced and multidimensional anti-subordination projects on behalf of diverse sexual minority interests.[61]

The move from an unmodified anti-*discrimination* agenda to an expansive anti-*subordination* commitment thus signals second-stage recognition and acceptance of sexual minority diversities. And because postmodern anti-subordination analyses (unlike first-stage anti-discrimination critiques) depend necessarily on the application of concepts like multiplicity, intersectionality, and multidimensionality,[62] this move also should commence a second-stage examination of those diversities' doctrinal and political ramifications. In light of the record established in outside jurisprudence during the past several years,[63] this

59. Though not always realized in practice, Queer sensibilities embrace expansive, resolute, and egalitarian anti-subordination stances. The Queer Nation chapter in New York City announced: "Being queer . . . means everyday fighting oppression, homophobia, racism, misogyny, the bigotry of religious hypocrites and our own self-hatred." ANONYMOUS QUEERS, QUEERS READ THIS (1990), *reprinted in* LESBIANS, GAY MEN AND THE LAW 45-47 (William B. Rubenstein ed. 1993); *see also supra* note 6 on the term "Queer" and its signification.

60. *See generally* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (elaborating a principle of anti-discrimination as a constitutional value and norm).

61. Thus, a key difference between a first-stage "anti-*discrimination*" agenda and a second-stage "anti-*subordination*" agenda is a broader commitment to resist all forms of oppression, and to recognize the interlocking nature of social systems or legal structures that construct and concentrate power and privilege along multiple axes at once. *See generally supra* note 15 and authorities cited therein on multidimensionality or cosynthesis in legal analysis and theory; *see also infra* note 84 and authorities cited therein on the cross-correlation of bigotries rooted in race, sex, and sexuality.

62. For readings on these and similar concepts, see *supra* note 15 and sources cited therein on these and similar concepts.

63. For a comparative critical account of outsider discourses on race, ethnicity, and sexual orientation, see Francisco Valdes, *Theorizing "OutCrit" Theories: Comparative Anti-Subordination Experience and Post-Subordination Vision as Jurisprudential Method, in*

move is imperative because it is necessary to a second-stage confirmation and advancement of the first-stage struggle against sexual minority oppression.

Given the past and present record of dedication to anti-discrimination ideals and goals, this Essay proceeds from the premise that Queer or second-stage scholarship remains earnestly committed to the continuing fight against sexual orientation oppression; though anti-*subordination* principles entail much more than unmodified anti-*discrimination* projects, both represent a quest for liberation from oppressive hierarchies. Given the first-stage record and the professed values of contemporary Queer sensibilities,[64] the discussion that follows accepts and argues that a central purpose of second-stage scholarship must be to promote anti-subordination principles and ideals in varied "sexual orientation" contexts—contexts that vary because they reflect not only the doctrinal but also the social diversities of sexual orientation issues, identities, and interests. The immediate query, then, is how to delineate and configure the parameters and projects of "sexual orientation" law, theory, and politics to promote diversified anti-subordination objectives.

D. Race and Ethnicity: A Pending Anti-Subordination Interrogation

As the foregoing account of the first-stage record suggests, sexual orientation anti-discrimination legal discourse is quite accomplished, both doctrinally and theoretically, though still quite young. But, as the foregoing account also indicates, conspicuously missing from first-stage accomplishments is a sustained, widescale effort to engage race and ethnicity in the disempowerment or marginalization of lesbian, gay, bisexual, transsexual, or trans/bi-gendered persons both within and beyond sexual minority communities.[65] Though race and ethnicity operate to oppress Queers of color both in law and society generally, as well as within "our" communities specifically, the first stage of sexual orientation scholarship has not yet attended to these aspects of "sexual

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CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS (Jerome McCristal Culp, Jr. et al. eds., forthcoming 1998) [hereinafter Valdes, *Theorizing*].

64. *See supra* notes 6 and 59 (describing professed Queer sensibilities).

65. The failure to engage race and ethnicity is made even more conspicuous when contrasted to the relatively rich engagement of sex and gender during the same period. *See, e.g., supra* note 55 and authorities cited therein on the interplay of sex, gender, and sexual orientation.

orientation" discrimination. This section of the Essay therefore turns to that pending concern, urging an engagement of race and ethnicity at this time for both substantive and strategic reasons.

It bears mention at the outset that the very project of a symposium centered on sexual orientation and intersectionality speaks of the changes that have transpired in law and throughout society since the 1979 symposium. The years since these two first-ever symposia have witnessed the emergence of new subjectivities and identities that both enrich and complexify "sexual orientation" discrimination in its many social and legal forms. Among these are cross-communities of lesbians, gay men, bisexuals, transsexuals, and trans/bi-gendered persons, all of which are diverse in and across multiple dimensions—in and across class, race, ethnicity, religion, location, dis/ability, and more.[66] This bundle of overlapping identities and communities vividly portray, in concrete cultural terms, why "sexual orientation" equality issues are normatively and politically textured by race, ethnicity, and other diversities.

Thus, in the past several years, an internal racial critique of first-stage scholarship has begun to emerge, pointing out the absence of race or ethnicity in current analyses of sexual orientation subordination and articulating some implications of this absence.[67] This critique complains that, with few and limited exceptions, first-stage legal scholarship focused on and presented an "essentialist" conception of "sexual orientation" as if sexual minority communities were racially and/or ethnically homogenous:[68] that is, first-stage analysis seems to presuppose that all members of "the community" are "the same" racially or ethnically.[69] Moreover, and directly related to that appearance of homogeneity, is the apparent first-stage sense that "sexual orientation"

66. This diversity is represented by the rich and growing literature authored by sexual minorities of color in cultural and other studies. *See, e.g.*, Hutchinson, *supra* note 12, at 562-63 & n.9 and authorities cited therein authored by lesbians and gays of color; *see also* Valdes, *Queers*, *supra* note 3, at 358-60 (presenting similar writings and their relevance to Queer legal theory).

67. *See supra* note 12 and authorities cited therein advancing this critique.

68. *See* Hutchinson, *supra* note 12, at 583-635 (presenting examples of essentializing tendencies and their ramifications for sexual minority political discourse and legal theory).

69. This observation must be qualified with recognition of efforts to express inclusive or broadened analyses, including, but not limited to, scholarship like RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996) and Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); *see also supra* note 12 and authorities cited therein on sexual orientation and various intersecting issues.

constituted the only socially or legally contested aspect of sexual minority lives and hopes.[70] Thus, "sexual orientation" discrimination generally was approached by both scholars and courts as a discrete category of social and legal experience, an experience essentially unmodified by race and ethnicity, or by racism and ethnocentrism.[71] But, of course, we know now—and could or should have known then—that such essentializing unidimensionality is and was untenable.[72] The emergent internal critique therefore is generally accurate on two counts: the actual diversities of sexual minority communities as well as the overall absence of those diversities, and of any critical analysis of their socio-legal ramifications, in first-stage legal scholarship.

Undoubtedly, several developmental reasons can help to explain why first-stage theorizing generally neglected the operation of race and ethnicity, or white supremacy, both within sexual minority communities and throughout law and society more generally. For instance, it is true that the field is young; our scholarly exertions simply have not yet been able to attend to all that they must.[73] In addition, first-stage efforts were basically survivalist in nature. Following quickly on the heels of the Stonewall Riots, first-stage legal scholarship proceeded from a position of literal nonexistence to confront an establishment disinclined to treat

70. This view is perhaps most graphically represented by claims that same-sex marriage rights or sexual orientation anti-discrimination legislation would effectively bring to an end the need for any further anti-subordination efforts on behalf of sexual minorities. *See* Hutchinson, *supra* note 12, at 585-602 (critiquing such claims).

71. *See* Eaton, *supra* note 12, at 52-66 (voicing a racial critique of the case law).

72. Numerous commentators over the years have pointed out the actual diversities in sexual minority identities and interests, and have called for express recognition and incorporation of those diversities in sexual minority discourses, politics, and organizations. *See, e.g.*, *supra* notes 12 and 69 and authorities cited therein on the actual diversity of sexual minority communities and interests.

73. For instance, critical legal scholars writing from varied subject positions have described or recounted the emergence of outsider genres in similar developmental terms. *See generally* Cain, *supra* note 50, at 54-60 (urging deferral of race and ethnicity in lesbian legal discourse because of discursive infancy); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xix-xxxii (Kimberlé Crenshaw et al. eds., 1995) (recounting the chronological and conceptual development of critical race theory in relationship to civil rights liberalism and critical legal studies); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994) (describing the development of critical race theory through its negotiation of the tensions between its modernist and postmodernist elements); MARI J. MATSUDA, WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER AND THE LAW 25-26 (1996) (providing a three-stage road map for developing a jurisprudence of color consisting of storytelling, doctrinal analysis, and theorizing). *Compare* Hutchinson, *supra* note 12, at 613-18 (taking exception to Professor Cain's use of a developmental rationale to defer race and ethnicity in lesbian legal discourse).

seriously any in/justice claims based on minority sexual orientations.[74] In those circumstances, perhaps a focus on "sexual orientation" unmodified by race or ethnicity was valiant and progressive enough; embarking on a long-term struggle to dislodge the supremacy of heterosexism may have been enough to occupy the intellectual and political consciousness of first-stage pioneers, thereby keeping issues of white supremacy in the background during those early years. But the passage of time challenges us to resist complacency, and time has passed.

Similarly, first-stage efforts also may reflect the influence of a pragmatic "choose your battle" mentality—a perception, whether fully conscious or not, that the sexual orientation anti-discrimination agenda must be narrowly contoured due to strategic, if not substantive, reasons. But this strategic mentality begs the fundamental question: the "sexual orientation" agenda must include race, ethnicity, and other intersections because these diversities are part of the sexual orientation communities beset by social and legal injustice. A choice of "sexual orientation" battles that depends on the sacrifice of some members of "our" community based on race and ethnic affiliation is doomed to failure because that choice depends on a false demographic picture, and also because it forsakes powerful interconnective opportunities in intellectual and political terms.

In addition, the postmodern insights of multiplicity and intersectionality appeared relatively recently on the legal scholarly scene—the late 1980s and early 1990s.[75] These tools or techniques of mutidimensional analysis were thus perhaps tardy for timely or meaningful incorporation into ongoing first-stage projects or agendas. In some sense, first-stage sexual orientation legal scholarship simply reflected the larger discursive status quo of its era. But then, like above, the passage of time and the changes it produces requires us to keep up.

74. *See generally* Arriola, *Faeries*, *supra* note 55, at 49-76 (recounting the Stonewall Riots, the years of extreme persecution leading up to them, and the leading role of drag queens and people of color in them); MARTIN DUBERMAN, STONEWALL (1993) (presenting personal accounts of the Riots and of the conditions then prevailing); DONN TEAL, THE GAY MILITANTS (1971) (providing a history of the post-Stonewall gay liberation movement of the 1970s and the obstacles it confronted).

75. Intersectionality and multiplicity were pioneered by Kimberlé Crenshaw and Angela Harris. *See supra* notes 2 and 15 and authorities cited therein on intersectionality and multiplicity; *see also infra* notes 117-44 and accompanying text (further discussing these concepts and their application in anti-discrimination law).

These reasons no doubt help to explain the race/ethnicity contours of first-stage efforts, but they do not account for all the probable causes of those contours. Another reason, also developmental in nature, may help to explain the racially and ethnically homogenized contours of first-stage theorizing precisely by focusing on the role of racism and ethnocentrism in constructing the first stage: the hegemony of white privilege in American society and in its legal culture, including the legal academy, may have helped to structure and direct first-stage investigations in ways likely to marginalize nonwhite persons and interests.[76] No doubt, in some instances this marginalization may have occurred unconsciously, reflecting the very problem of racism's penetration into social and scholarly cultures.[77]

The real question, however, cannot be reduced to the causes or motivation for first-stage deferrals; the real question is whether the product—the potency of first-stage anti-discrimination analyses—would have been greater if they had been sensitive to race, ethnicity, and other intersecting constructs.[78] In other words, the unmodified first-stage concentration on sexual orientation may have been driven, at least in part, by the impact of race and societal racism in the very formation, composition, and consciousness of the first-stage ranks of sexual orientation legal scholars, but the detriment ultimately redounds to the value and quality of critical legal scholarship.

76. The sometimes subtle but always relentless power of white privilege has been identified in various works. *See, e.g.*, Peggy MacIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies, in* POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22 (Leslie Bender & Daan Braveman eds., 1995) (describing specific but commonplace instances of white privilege that permeate everyday life); Barbara Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (discussing the impact of white privilege, including the privilege of racial obliviousness, on the construction and application of law). These and similar works have spawned a new field of critical legal studies. *See generally* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

77. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (articulating the concept and consequences of unconscious racism).

78. *See generally* Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1568, 1594 (1995) (reviewing RICHARD A. POSNER, OVERCOMING LAW (1995)) (arguing that the question is not whether Judge Richard A. Posner intended his critique of Patricia Williams to be "racist," but whether the advancement of legal scholarship would have been better served by a more sophisticated appreciation of Professor Williams' own project).

Of course, depending on perspective, each of these reasons may be regarded as more or less "valid" or persuasive—that is, more or less justificatory of the first-stage omissions regarding race, ethnicity and white supremacy. And retrospective analyses also involve judgments informed by subsequent events, which may in turn overlook or misapprehend important features of the actual experience under inspection. But the fundamentally developmental nature of all these first-stage reasons suggest that they cannot explain—much less justify—a continuing disengagement of race and ethnicity as we enter a second stage of sexual orientation scholarship; the value of reasons tied to questions of time and timing, or to levels of knowledge and consciousness, dissipates with the passage of time, the accumulation of knowledge, and the progression of consciousness. Thus, a continuing second-stage disengagement increasingly becomes an act of choice, a willful election to marginalize or ignore the possible, if not actual, relevance of race, ethnicity and white supremacy in second-stage anti-subordination sexual orientation analyses. And, as such, a present decision to remain disengaged requires its own contemporary justification.

But no valid justification exists. On the contrary, the persistence of first-stage de facto essentialism into the second stage of sexual orientation legal scholarship is likely to prove progressively problematic because it effectively overlooks both the jurisprudential experiences of critical legal studies[79] and feminist legal theory[80] as well as the substantive lessons derived from those experiences. The histories of each experience display, at the very least, an appearance of de facto essentialism that occluded the myriad forms of bias that combine to oppress vulnerable groups on the basis of race, class, gender, sexual orientation and other constructs.[81] Such oversights truncate critical analysis, thereby provoking

79. *See infra* note 92 (describing the rupture between minority and majority critical legal scholars over the failure of critical legal studies to incorporate a diverse discourse about race within its analysis of social injustice).

80. *See infra* note 90 (describing the critique of feminist legal theory's failure to account for race and sexual orientation in its analysis of gender and gender subordination).

81. *See* Valdes, *Latina/o*, *supra* note 14, at 4-7 (briefly recounting this history in the context of critical race theory's relationship to diverse Latina/o interests, and addressing the implications of that history for the emergence of LatCrit theory as a distinct genre of critical legal scholarship). For further readings on LatCrit theory, see Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996); Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996-97); Symposium, *LatCrit Theory: Naming and Launching a New Discourse*

internal critiques and objections of the sort now emerging within sexual orientation legal discourse. Consequently, those jurisprudential movements over time produced refined tools for sophisticated anti-subordination analysis—tools that include multiplicity, intersectionality and multidimensionality.[82] These—and others under development—are tools available to second-stage scholarship, or Queer legal theory, to avoid the costs and dangers of de facto essentialism and to capture the substantive and political gains of broadened or multidimensional analyses.

Indeed, these analytical tools are useful and beneficial to Queer theorizing precisely because they were forged from the circumstances that face our second-stage scholarship: those tools are designed to avert de facto or inadvertent essentialism in critical legal scholarship, thereby strengthening the substantive insights of all critical anti-subordination scholarship. Those jurisprudential experiences thus provide insightful historical and substantive lessons for second-stage sexual orientation scholarship.

Moreover, a persistent avoidance of race and ethnicity in second-stage scholarship also would run contrary to the demonstrated and demonstrable diversities of sexual minorities.[83] Prevailing circumstances regarding both the state of legal theory and demographic knowledge counsel against the belief that a principled justification can be proffered for the continuation of first-stage disengagement into a second stage of development. Thus, the experience of critical legal studies and feminist legal theory with anti-essentialism critiques, the substantive insights or analytical tools derived from those experiences, and the knowledge that sexual minorities in fact are demographically diverse, counsel for the move from anti-*discrimination* to anti-*subordination* in the second stage of sexual orientation legal scholarship. This view, as explained below, is grounded in both substantive and strategic factors.

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of Critical Legal Scholarship, 2 HARV. LATINO L. REV. 1 (1997); Symposium, *Latinas/os, LatCrit Theory and the Law*, 85 CAL. L. REV. 1087 (1997); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO-LATINO L. REV. (forthcoming 1997).

82. *See supra* notes 2 and 15 (describing intersectionality, multiplicity, and multidimensionality).

83. *See supra* note 12 and authorities cited therein expressing some such diversities.

II. The Second Stage and Legal Theory: At the Intersection of Color and Sexuality

Because the substantive and strategic considerations that counsel for a genuine engagement of race and ethnicity commingle, the discussion properly begins with the bottom line: a willful continuation of first-stage deferrals on race and ethnicity is likely to truncate our conception and understanding of "sexual orientation" identities, interests, and issues among and across various and diverse sexual minority communities. This truncation results from the fact that "different" expressions of privilege and prejudice in fact tend to operate in interlocking or correlated fashion: though white supremacy technically is not "the same" as patriarchy, and neither of those structures is "the same" as heterosexist hegemony, persons and forces affiliated with one will tend to affiliate with the others.[84] These structures, on the whole, operate in mutually-reinforcing ways. Their resistance, consequently, must be similarly structured.

And even if social science and experience did not demonstrate the interconnectedness of oppressions, the fact remains that each of these structures—patriarchy, white supremacy and heterosexist hegemony—affect the "community" of multiply diverse lesbians, gay men, and other sexual minorities that sexual orientation legal scholarship seeks to shield from discrimination.[85] For these reasons, the benefits of anti-discrimination analyses can accrue to the ostensible social constituency of sexual orientation legal scholarship only if those analyses account for the impact on "our" communities of all relevant forms of oppression. For these reasons, a failure to move beyond first-stage gains and insights increasingly will constrain the further development of sexual minority legal discourse.

Substantively, this truncation therefore is likely to overlook postmodern lessons and diverse particularities that will compromise the analytical scope and depth of sexual orientation theorizing, thereby

84. *See, e.g.*, Clark Freshman, Note, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241 (1990) (discussing the normative inter-relationship of various strains of bias); Valdes, *Queers*, *supra* note 3, at 55-56 n.148 (describing studies that correlate racist, sexist, and homophobic attitudes); *id.* at 89 n.247 (describing studies that correlate sexist and homophobic socialization processes).

85. *See supra* note 12 and authorities cited therein reflecting sexual minority diversities based on race, class, nationality, and ethnicity.

weakening the ultimate reformatory potential of Queer legal theory. Strategically, this truncation is likely to incite alienation among sexual minorities of color from sexual orientation discourse and to invite increasingly sharp internal critiques pointing out the substantive deficiencies caused by disengagement. A refusal to venture affirmatively into the intersection of race, ethnicity, and sexual orientation, in short, is a self-defeating exercise for second-stage scholars.

A. Costs and Benefits of Dis/Engagement: A Substantive and Strategic Analysis

As the emergent internal critique has begun to demonstrate, ignoring race and ethnicity in sexual orientation law and scholarship effectively codes "sexual orientation" as white and "race" or "ethnicity" as heterosexual, a coding that is factually inaccurate.[86] This coding in turn erects an equally false dichotomy between "sexual orientation" and "race" or "ethnicity" in social and legal conceptions or perceptions of the persons and groups implicated by anti-subordination struggles linked to this trio of constructs. This inaccuracy, necessarily imported into scholarly (and doctrinal) analysis, cannot help but to distort anti-discrimination theorizing (and adjudication).

This coding and its unidimensional dichotomizing additionally instill among and beyond sexual minority communities and discourses a simplistic and false notion that anti-subordination projects require sexual minorities simply to "build bridges" or merely to "form coalitions" with communities of color.[87] These effects—the unidimensional dichotomy and simplistic notions of coalitional dynamics—are pernicious because they erase the presence of persons of color within and throughout multiply diverse sexual minority communities; Queers of color already

86. *See* Eaton, *supra* note 12, at 59-68 (critiquing such coding in judicial analysis of sexual orientation equality claims and in legal discourse generally).

87. Coalitional sensibilities and projects, I have urged elsewhere, are important and necessary. *See* Valdes, *Sex and Race, supra* note 15, at 65-70. While I adhere to that strong inclination, the point here is that the related notion or image of "building bridges" suggests that sexual minorities are "here" and people of color are "there"—a simplistic, false and unproductive image because sexual minority people of color are both "here" and "there" already. For more on coalitions, see Sharon Parker, *Understanding Coalition*, 43 STAN. L. REV. 1193 (1991) (providing a pragmatic outlook on the difficulties and benefits of coalitional work); Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STAN. L. REV. 1197 (1991) (discussing anti-subordination coalitional politics in Hawai'i).

help to constitute "our" communities.[88] Thus, ignoring the presence and relevance of race and ethnicity *within* sexual orientation communities degrades the existence and importance of color to sexual minority lives and to sexual minority experiences with discrimination.[89] This practice over time fosters cynicism and destabilizes opportunities for synergistic anti-subordination critiques because the erasure of human existence or experience in any setting is antithetical to normative and intellectual justice expectations.[90] By overlooking the demonstrated and demonstrable facts or ramifications of sexual minority diversities,[91] second-stage theorizing helps to sow the seeds of internal critique and, perhaps, ultimately, alienation, division, or separation.[92]

Incrementally but steadily, second-stage theorizing that acquiesces to the first-stage essentialism of sexual orientation scholarship consequently compromises the creation of a strong and diverse sexual minority community of scholars; rather than contribute to a positive cultivation of intra-group solidarity in the struggle against sexual orientation subordination in its many forms and settings, a continuing disengagement of race and ethnicity is likely over time to fracture Queer legal theory along color lines. Internal fragmentation along diversity fault lines cannot help but hobble second-stage capacities to mobilize collective exercises of political will and intellectual insight toward sexual minority self-empowerment.

88. *See generally supra* note 12 and authorities cited therein voicing a "Queer of color" perspective.

89. *See, e.g.*, Hutchinson, *supra* note 12, at 567-635 (outlining such oversights, both in "real life" and in legal or political discourses).

90. This point is at the core of the anti-essentialist critiques leveled in recent years at feminist legal theory both by scholars writing from an explicitly lesbian subject position, who complained of sexual orientation erasure, as well as by scholars writing from a women-of-color perspective, who complained of racial erasure. *See, e.g.*, Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-1990) (writing from a lesbian perspective); Harris, *supra* note 15 (writing from a black woman's position).

91. *See supra* note 12 and authorities cited therein on sexual minorities of color.

92. The danger of critique turning into division or separation is the lesson to be drawn from the experience of critical legal studies with race or, more specifically, with its failure to engage race. That failure triggered an explosive confrontation at a key conference, eventually yielding the body of scholarship now known as critical race theory. *See* CRITICAL RACE THEORY, *supra* note 73, at xxii-xxvii (describing that confrontation and its role in the formation of critical race theory as a genre and community separate from, though sometimes in sympathy with, critical legal studies); *see also*, Harlon L. Dalton, *The Clouded Prism: Minority Critique of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 435 (1987) (describing the conference in more detail). This rupture produced Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. REV. 297 (1987).

Moreover, the practice of erasure inevitably inflicts discursive violence on lesbians, gays, bisexuals, and trans/bi-gendered persons of color, thereby effectively replicating the dynamics of hierarchy and invisibility that "we" complain about regarding heterosexist privilege and supremacy.[93] This practice therefore undercuts more than the political project of community formation and intra-group solidarity as a tool toward self and collective empowerment; this practice inflicts within "our" communities the same wrongs about which we complain more generally. This practice, in other words, undercuts the intellectual integrity and moral force of sexual orientation justice claims that at the very least acquiesce to, thereby perpetuating, similar patterns of social or legal injustice.[94]

Neglecting the interplay of race, ethnicity, and sexual orientation, and the interlocking dynamic of white and heterosexist privilege, similarly fosters tensions between second-stage scholarship and the antiracist imperatives of the ongoing anti-subordination struggle being mounted by scholars and communities of color—a struggle that directly affects Queers of colors, as well as nonQueer peoples of color. These intra- and inter-group tensions are counterproductive because they impede coalitional collaboration both within and beyond sexual orientation contexts in ways that perpetuate both white and heterosexist hegemony.[95] This practice, in short, is politically self-defeating and intellectually problematic in many ways and forms.

Significantly, the perils of this practice are not merely abstract. The material effects of first-stage erasure or marginality already may have helped to define the anti-discrimination sexual orientation agenda in actual or concrete ways because, over time, ignoring or erasing race and ethnicity skews not only political priorities and legal analyses but also the deployment of sexual minority material resources. Not surprisingly, this

93. From inception, a key complaint of sexual minority critiques has been the social and psychological violence of the Closet and its imposition both of invisibility and of oppression. *See, e.g.*, Valdes,, *supra* note 21, at 223-28 (discussing the prominence of in/visibility issues and strategies in sexual minority anti-discrimination theory and politics).

94. Of course, this sort of passive complicity can be exacerbated by affirmative calls to reject outright the struggle against racism and white supremacy (or sexism and patriarchy) as relevant to "gay" anti-discrimination projects. *See, e.g.*, RICHARD MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW 328 (1988) (asserting that struggles against racism (and sexism) are not "gays' fights").

95. *See, e.g.*, Valdes, *Sex and Race*, *supra* note 15, at 34-50 (describing and discussing similarly problematic tensions along sex and race lines within sexual minority settings).

concern over skew and consequence surfaces as part of the internal racial critique of sexual orientation legal scholarship and political advocacy.[96]

If the goals or contents of sexual minority anti-discrimination campaigns effectively reflect primarily the interests of racially or ethnically privileged segments within diverse sexual minority communities, current or recent anti-discrimination campaigns may not serve the long-term anti-subordination interests of diverse sexual minority communities in equitable ways. Because they not only ignore but may help to preserve existing racialized power relations both within and beyond sexual minority communities, such campaigns may feed the suspicion of exploitation, and the consequential alienation, that already festers among some lesbians, gay men, bisexuals, transsexuals, and the trans/bi-gendered of color due to first-stage neglect.[97] If so, the racialized priorities reflected and projected via these campaigns may tend to hasten a hardening reluctance among sexual minorities of color to join sexual orientation liberation projects during a second stage of activism and scholarship.

In sum, a failure to begin accounting for race and ethnicity in second-stage projects and scholarship can exact both substantive and strategic costs. Such a failure may interfere with substantive analyses of sexual orientation inequality because it serves to limit "our" collective ability to detect, unpack, expose, and critique complex sources and intersectional patterns of sexual minority subordination. Such a failure may impede anti-subordination politics both within and beyond sexual minority communities because it serves to create tensions with ongoing antiracist struggles against white supremacy. But even more so, a continued disengagement of race and ethnicity disregards the opportunity occasioned by second-stage discourse to announce and nourish an ethic of mutual care, respect, and support that resolutely rejects and repudiates white supremacy as integral to the fight against straight supremacy; an

96. *See, e.g.*, Hutchinson, *supra* note 12, at 585-602, 619-30 (discussing the racialized implications or ramifications of recent prominent controversies or initiatives, including same-sex marriage and military exclusion).

97. *See, e.g.*, Angela Gilmore, *They're Just Funny That Way: Lesbians, Gay Men and African-American Communities as Viewed Through the Privacy Prism*, 38 HOW. L.J. 231 (1994) (discussing some hostilities, and the reasons for them, that exist between those who identify both with lesbian and gay communities and with African American communities); *see generally supra* note 12 and authorities cited therein expressing the disenchantment of lesbians and gays of color with "mainstream" gay and lesbian priorities or politics.

ethic that ultimately is necessary to the dignity, harmony, and equality that all humans deserve regardless of color or sexuality.

On the other hand, a collective and proactive engagement of race and ethnicity in second-stage scholarship will more than avert these substantive and strategic costs; the pending engagement affirmatively will accrue both substantive and strategic benefits in the cause of sexual minority empowerment and liberation, and these likely gains provide the more compelling reasons for engagement. Engagement will deepen and broaden the discourse and knowledge of second-stage theorizing, enhancing the incisiveness of Queer legal theory and promoting a positive standard of community-building and group empowerment through legal scholarship. These gains can only translate into a sharper and stronger sexual minority anti-subordination movement.

Perhaps most importantly, this engagement can be employed as an opportunity for Queer legal theory to elaborate and demonstrate an ethic of mutual care and recognition for the general betterment of contemporary political discourse and critical legal scholarship. In short, collectively and mutually embracing the engagement of race and ethnicity at the threshold of a second stage in the development of sexual orientation legal theory amounts to doing the right thing. In light of known demographics and discourses, it would be ethically Queer indeed to decline or circumvent this pending engagement; but mutual and collective engagement would put the critical and egalitarian ethos of Queer values and ideals to practice.[98]

B. Mutual Moves: From De Facto Essentialism, Toward an Ethic of Caring Recognition

Because all humans deserve dignity and equality, and because sexual minority legal scholars consistently profess adherence to that basic ideal,[99] it is incumbent upon second-stage scholars collectively to create a discursive environment and community where dignity and equality

98. *See supra* notes 6 and 59 (discussing "Queer" sensibilities and ideals).

99. A fundamental element of sexual orientation anti-discrimination scholarship is a broad assertion of human entitlement to dignity and equality. *See generally supra* notes 20-49 and accompanying text (discussing the centrality of "equality" to sexual minority justice claims). This point is expressed, sometimes explicitly and sometimes implicitly, in the practice of analogizing sexual orientation discrimination to race or other forms of discrimination. *See generally* Hutchinson, *supra* note 12, at 624-31 (noting expressions of, and objections to, this practice); *see also supra* note 55 and authorities cited therein in analogies.

flourish. To do so, we must craft and practice an ethic of mutual and caring recognition. Though not susceptible to fixed or technical detailing, the basic purpose of such an ethic—to promote anti-subordination scholarship reflective of and responsive to sexual minority diversities—would mandate a collective and sustained engagement of race, ethnicity and sexual orientation. This ethic envisions the same level of attention to intra- and inter- group claims, positions or issues that recently have drawn the increased attention of outsider scholars in race and ethnicity legal discourses.[100] This engagement, however, must be approached from all quarters with a clear and accepted anticipation of vigorous exchange and disagreement tempered always by the commitment to remain mutually engaged.

To inaugurate a second stage of sexual orientation legal scholarship with an ethic of mutual and caring recognition, sexual minority legal theorists of all stripes must commit to exertions hitherto lacking. Both white and nonwhite legal scholars who write from a lesbian, gay, bisexual or trans/bi-gendered subject position must listen to and learn from each others' insights and perspectives; a mutual commitment to the advancement of anti-subordination knowledge and discourse on behalf of a diverse constituency provides good reason for mutual attention. We must, therefore, accept personal responsibility for the further development of sexual orientation scholarship in a manner called for by the histories of social and jurisprudential experience; we must make foundational of second-stage theorizing an express acknowledgment of, and continuing respect for, both the actual diversities of sexual minorities as well as postmodernism's lessons about the analytical and discursive significance of historicity, particularity, and construction.[101]

Furthermore, an affirmative cultivation of such an ethic is at a premium at this time precisely because the existing record on race, ethnicity, and sexual orientation is wanting.[102] Thus, white or otherwise privileged sexual minority scholars must unambiguously resist the tendency, or temptation, to essentialize second-stage analyses, recognizing that sexual orientation essentialism reaps or exploits the benefits to them of society's racial stratification. Queer legal theorists

100. *See, e.g.*, Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN-PAC. AM. L.J. 33 (1995); *see also* HARLON L. DALTON, RACIAL HEALING (1995).

101. *See supra* notes 50-64 (on diversity and postmodernism in relationship to sexual minorities and legal scholarship).

102. *See supra* notes 65-72 and accompanying text (discussing first-stage essentialism).

should signal their grasp of preceding anti-essentialist critiques by refusing, even tacitly, to accept within our work the racist structures of subordination that privilege whiteness both within and beyond sexual minority communities and the legal academy.[103] Second-stage scholars must reject positions or analyses that project privilege or a sense of de facto essentialism.[104]

In this vein, sexual minority theorists likewise ought to exercise care in recognizing, denoting, and factoring the racial(ized) subject position from which we conceive and articulate our analyses. A scholar's failure of racial and ethnic self-awareness effectively indulges the danger that the resultant analysis will miss the race/ethnic issues that interlace and permeate sexual minority communities and issues. This failure of conscious subjectivity in turn is likely to project dominant norms (like whiteness) as an implicit or intrinsic feature of sexual orientation law, politics, and theory. In doing so, this cramped approach is likely to miss the racialized and ethnicized dimensions of social and legal issues folded into sexual orientation lives and concerns.

Concomitantly, nonwhite sexual minority scholars should, at least for the time being, recall the developmental reasons that at least partially may underlie the belatedness of the still-pending engagement of race and ethnicity within sexual orientation legal scholarship.[105] Though separatist inclinations based on past experience may prove sound, and though past disappointment may cause some scholars, whether white or of color, to be skeptical of the present prospects for collective mutuality,[106] the potential benefits of a mutual and collective engagement in the context of second-stage scholarship are significant enough to warrant some allowance and encouragement of an opportunity for a timely demonstration of the present capacity to progress. And because the developmental nature of first-stage circumstances causes the reasons for

103. Technically no outright calls for essentialism have yet issued from within the sexual minority legal scholarship, but they have surfaced in other sexual minority discourses that impact on legal discourse. *See, e.g.*, *supra* note 94 (pointing to Richard Mohr's assertion that racist and sexist struggles are not "gays' fights").

104. *See* Hutchinson, *supra* note 12, at 600-18 (taking exception to essentializing arguments posited by sexual minority legal scholars in various contexts, including the same-sex marriage debate, and questioning the liberational potential for diverse sexual minorities of de facto essentialism in sexual minority politics and theorizing).

105. *See supra* notes 73-82 and accompanying text (outlining some developmental reasons that may help to explain the first-stage deferral of race and ethnicity).

106. *See, e.g.*, Hutchinson, *supra* note 12, at 634 n.311 (expressing skepticism about collaborative or coalitional efforts due to past experience).

deferral to lose their explanatory value over time, only time—and what second-stage scholars jointly do with it—will tell whether an honest, sustained, and mutual ethical commitment to care and recognition exists.

Ideally, the immediate future will witness articles, conferences, and projects that affirmatively manifest an inclusive though critical recognition of sexual orientation's racial and ethnic dimensions.[107] Ideally, the immediate future also will produce lively exchanges, including intellectual disagreement, between diverse sexual minority scholars over the social and legal interplay of race, ethnicity and sexual orientation in the cross-construction of white and straight supremacy. Ideally, this mutuality and collectivity of engagement will foster a strong discursive community and forestall or negate calls to distance, separation, alienation, or faction within the still-growing ranks of second-stage sexual minority legal scholars.

Of course, no one can judge for all the period of time that should be allowed to pass before further conclusions are drawn. I decline to speculate here because no benefit inheres in such speculation. More useful is to emphasize now that, with the passage of time, all concerned scholars will have the opportunity, and a better-developed record of experience, to determine how the future of Queer legal theory and related anti-subordination politics ought to be shaped in light of a prospective second-stage non/engagement of race and ethnicity.

Clearly, no single scheme or suggestion should be mistaken for a panacea. And like any scheme, the ethics and values urged here can be convoluted or abused, especially by sophisticated rhetoricians. But to honor this ethic in the breach would ensure a devolution of second-stage legal discourse to the detriment of all sexual minorities, both substantively and strategically.[108] Thus, it behooves *all* second-stage legal scholars not only to cultivate an ethic of mutual care and recognition directly through our projects and activities, but also to urge that our colleagues in sexual minority scholarship do likewise. A genuine and good faith commitment to the second-stage engagement of race and ethnicity must be our aim and standard, and we should do no less.

107. *See, e.g.*, Symposium, *Entering "New" Intersections: Race, Ethnicity and Sexual Orientation in Law and Legal Theory*, 2 NAT. J. SEX. ORIENT. L. (forthcoming 1998) <http://www.sunsite.unc.edu/gaylaw>.

108. *See supra* notes 86-98 and accompanying text (summarizing the substantive and strategic reasons for the race/ethnicity engagement).

C. Queering Second-Stage Sexual Minority Scholarship: Ways and Means

To maximize the law's responsiveness to the diverse sexual minority communities that second-stage scholars seek to benefit, each Queer legal theorist must exercise direct responsibility for bridging the gaps of the first stage; each of us, in our work as teachers, scholars and activists, must practice what the lessons of the recent past make plain. This process might appropriately be described as the Queering of sexual orientation legal scholarship because Queer values, sensibilities, and imperatives are relentlessly egalitarian, and suspicious of all essentializing categorization.[109] And so I proffer here four specific suggestions as to how second-stage scholarship might take and exercise this sort of responsibility—the responsibility to carry sexual orientation legal scholarship beyond the gains and limits of the first stage—in an ongoing way that reflects Queer positionality through constructive and empowering ways and means.

The first suggestion is to adopt, in a conscious and consistent way, the jurisprudential method that Professor Mari Matsuda has called "ask the other question":[110] regardless of the subject position taken in any project, we must learn to step back from that position and query ourselves how the analysis might be broadened or deepened if the topic or issue were to be approached from another subject position. Professor Matsuda explains her use of this method: "When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?'" Through this method, Professor Matsuda explains, she and other anti-subordination legal scholars work "to understand the interconnection of all forms of subordination."[111] And though the critical insights derived from "asking the other questions" may not shift the main focus of the project at hand, their incorporation into the analysis can only enrich and expand the reach of second-stage work.

A related suggestion similarly involves raising and addressing another set of questions left unasked by first-stage scholarship. These "other questions" include: What are the intersectional *effects* of a given

109. *See* Valdes, *Queers*, *supra* note 3, at 346-75 (describing one vision of Queer legal theory).

110. *See* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

111. *Id.*

analysis, strategy or initiative . . . will the impact of our work be racially or ethnically disparate . . . will our work tend to replicate and reinforce the extant marginalization of lesbians and gays of color within "our" communities, organizations, or projects? Asking, and responding to, this intersectional self-questioning—and specifically focusing on the (disparate) *effects* that we create through our work—can help sexual minority scholars to become more self-aware and self-critical of our direct implication in the construction or maintenance of "sexual orientation" as a de/racialized or de/ethnicized socio-legal phenomenon; these questions can nudge second-stage scholars toward the exercise of greater responsibility in the development of a scholarly culture that resists complicity in a false race/ethnicity homogenization of "sexual orientation" interests and agendas.

The third suggestion is, simply, to do the homework—the hard work of reaching beyond the intellectual territories that we already occupy. Ultimately, second-stage sexual minority scholars can only benefit from becoming acquainted with the richness (and limitations) of outsider jurisprudence, and with the increasing literature in cultural studies devoted to the interconnection of race, ethnicity, sexuality and other systems of power and domination.[112] Given today's status quo, a cross-jurisprudential and cross-disciplinary approach to our research is not only substantively enriching but analytically indispensable.

Finally, and more generally, the fourth suggestion is to encourage and support colleagues, students, institutions, and organizations to engage proactively in multidimensional or intersectional projects that can help foster a discourse that is self-consciously endeavoring to carry out these intensified interrogations. We must personally encourage and continually support with our direct involvement or supervision students who express interest in intersectional projects or papers; we must persistently nudge the deans, faculties, or law reviews at our institutions to sponsor symposia on subjects such as this one; we must systematically inquire of our friends and colleagues at seminars, conferences, and presentations how race or ethnicity might affect their developing analyses of heterosexism; we must vocally push the professional or community organizations that purport to serve sexual minority interests (and that seek to claim our loyalty and support) to account for race and ethnicity in all of their activities. That is, second-stage scholars must individually and

112. For representative sources, see Hutchinson, *supra* note 12, at 562-63 n.9.

collectively endeavor to create an environment and a culture in which all of us are conscious of whether or not we seriously and earnestly are engaging in this sort of work.

These four steps may be modest in isolation, but they can become powerful in accumulation. If second-stage scholars begin to take these steps in earnest, we will strengthen ourselves as scholars, and our movement as a community. If we do not, then we foreclose the substantive or analytical benefits of prior experience and insight offered by recent jurisprudential experiences, histories, and discourses. Additionally, we may doom second-stage scholarship to replay the limitations recorded by the similar experiences of critical legal studies, feminist legal theory and, to some extent, critical race theory.[113] Our good fortune is that we can learn from those histories without necessarily repeating them; our good fortune depends on our doing so.

D. Qualifying Engagement: A Note on Limits and Progress

This call for a sustained and caring collective engagement of race and ethnicity in the second stage of sexual orientation scholarship must be tempered by a recognition of the limits involved in that task. Most notably, this call does not require that every text or project follow a standardized script, nor does it imply an obligation to center racial or ethnic dimensions of sexual orientation discrimination in every analysis of heterosexism. This call also cannot and does not contemplate an absolute equation of race or racism with sexual orientation or heterosexism, nor does this call insist that every analysis of heterosexism allocate "equal time" to its interaction with racism or ethnocentrism. Finally, neither this call nor the emerging internal critique seek to impose on any single project the obligation of exposing definitively or conclusively the linkage of white supremacy to heterosexist supremacy in law and society.[114]

Instead, this call—and the emerging internal critique—strive for progressively more self-critical considerations and articulations of anti-heterosexist assumptions, premises, claims, or analyses that in fact

113. *See generally* Valdes, *Latina/o*, *supra* note 14, at 3-7 (discussing these experiences); *see also* Valdes, *Theorizing*, *supra* note 63 (comparing QueerCrit, RaceCrit, and LatCrit discourses).

114. In fact, these caveats express limitations similar to those acknowledged by scholars raising the racial critique of first-stage scholarship. *See, e.g.*, Hutchinson, *supra* note 12, at 565 n.14 (acknowledging the limitations of the racial critique, and expressing the aspiration that it "will serve as a starting point for a more intense examination of the various complexities" that cause the subordination of diverse sexual minority communities); *see also* Harris, *supra* note 8 (expressing similar sentiments).

implicate racism or ethnocentrism in the operation of sexual orientation discrimination. This call is for the termination of unmodified, monolithic or essentializing projections of sexual orientation identities, interests, and issues that necessarily obscure or erase social diversities and their legal dimensions. In short, this call is for expressly denoting the reach and constituencies of second-stage scholarship with ever-more thought and texture than accompanied first-stage scholarship. Over time, this call and the emergent internal critique aspire to a mutual engagement of complex issues that is more likely to produce within the body of second-stage works a sensibility that more accurately reflects, and responds to, the lived experience and anti-subordination needs of the diverse populations affected by "sexual orientation" discrimination.

E. Sexual Orientation and Critical Race Theory: A Call to Reciprocity

It also bears emphasis that the omission of race and ethnicity in the first stage of sexual orientation scholarship is mirrored by the omission of sexual orientation in the first decade of critical race theory; as a whole, the body of work known today as critical race theory reflects an almost complete lack of concern for the oppression of people of color with minority sexual orientations.[115] This omission is problematic for similar reasons: it erases the actual sexual orientation diversities of communities of color; it obscures the mutually-reinforcing operation of racism, ethnocentrism, and heterosexism in law and society; it disregards the subordination of racial and ethnic minorities on sexual orientation grounds; it truncates the scope and depth of critiques of white supremacy; it factionalizes rather than coalesces progressive intra-group relations; and it acquiesces to the perpetuation of homophobic inhumanity in the name of antiracist liberation.[116] This omission therefore should be addressed and rectified for the same substantive and strategic reasons urged above for the second stage of sexual orientation scholarship. Yesterday's omissions, regretfully mutual, now should be replaced with a mutual entry into the intersection of race, ethnicity, and sexual orientation. This brief notation thus constitutes, and issues, a call for reciprocity.

115. *See generally* Valdes, *Latina/o*, *supra* note 14, at 6 (addressing why critical race theory sometimes still wonders "what sexual orientation has to do with race").

116. *See supra* notes 86-98 and accompanying text (discussing these points regarding the omission of race and ethnicity from sexual orientation legal discourse).

III. The Second Stage and Legal Doctrine: Sexual Orientation and Intersectionalities

To close this Essay, this final part addresses why second-stage scholarship and theorizing must recognize that the engagement of race and ethnicity urged above is not a call merely to practice "intersectionality" as we know it in sexual minority equality claims or analyses. Though intersectional social analysis can help to uncover and unpack the intertwining of race, ethnicity, and sexual orientation in the United States, its legal or doctrinal utility is limited. The cure for first-stage inattention to racial and ethnic aspects of sexual orientation discrimination is not, and cannot be, a mere extension of existing intersectional practices to the interplay of white supremacy and heterosexist supremacy in legal analysis because the current configuration of existing anti-discrimination doctrine under federal law makes such an extension unworkable.

A. Race and Gender: A Triumph of Intersectionality

The analytical tools known as multiplicity and intersectionality were pioneered by critical race feminists to bring into sharp relief, and to spotlight, the particularized interplay of white racism and androsexism.[117] This interplay targeted women of color for discrimination in ways that did not apply either to men of color or to white women because this particularized form of discrimination combined both race and gender. Therefore, single-axis frames of analysis would tend to overlook this form of intersectional bias, even though it literally and operationally was based on two features of identity formally protected by current anti-discrimination statutes: race and gender. Single-axis analyses and their likely oversights would license hybrid forms of discrimination that otherwise would be deemed outlawed, and simply because these hybrids were "based" on more than one protected construct or category. Intersectionality and multiplicity were developed to halt that perversion of result.

This scenario is aptly illustrated by *Lam v. University of Hawai'i*,[118] where the Ninth Circuit adopted intersectionality as applied to race and gender discrimination claims. Lam, a Vietnamese American woman,

117. *See supra* notes 2 and 15 and authorities cited therein noting the development of intersectionality and multiplicity as tools of legal and social analysis.

118. 40 F.3d 1551 (9th Cir. 1994).

claimed that the University of Hawai'i's law school denied her a position in the Pacific Asian Legal Studies program (PALS) due to a combination of race and gender biases. The district court entered summary judgment for the defendant because of the law school's "favorable consideration of two other candidates for the PALS position: one an Asian man and the other a white woman."[119] On appeal the Ninth Circuit reversed, citing the work of critical race feminism on intersectionality.

The Ninth Circuit's intersectionality discussion began with the observation that, "In assessing the [evidentiary or analytical] significance of these candidates [to Lam's claim], the [district] court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of evaluating two separate tasks: looking for racism "alone" and looking for sexism "alone," with Asian men and white women as the corresponding model victims."[120] But, "[r]ather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experience" with hybrid forms of discrimination, the court continued.[121] Thus, "when a plaintiff is claiming race and sex bias, it is necessary to determine whether the [defendant] discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex," the court concluded.[122]

The *Lam* court's articulation and application of intersectionality as a matter of anti-discrimination doctrine was cogent and coherent because it captured the social dynamics of hybrid strains of prejudice. The *Lam* analysis permitted the tribunal to comprehend and reach the social operation of discrimination that combines the exercise of white and male privilege to unfairly disadvantage specifically women of color. But the *Lam* analysis hinged on the formal illegality of both race and gender discrimination; had either race or gender been excluded from the text of applicable anti-discrimination statutes, Lam's claim would have been placed in an entirely different analytical position. And because the practice of sexual orientation bias is perfectly legal under federal anti-discrimination statutes, this is the position in which sexual minorities of color find ourselves.

119. *Id.* at 1561.
120. *Id.*
121. *Id.* at 1562.
122. *Id.* (emphasis in original).

In *Lam*, this difference in legal position would have required the plaintiff to shoulder the burden of proving that the bias against her was concentrated in, or targeted at, the protected rather than the unprotected feature of her identity. The defendant, on the other hand, simply would need to profess that its bias was motivated by the unprotected, rather than the protected, identity category. In other words, if either race or gender were unprotected, the law effectively would have constructed a cover, or loophole, for the practice of discrimination against the formally protected category. Thus, intersectionality's effectiveness depends on the formal protection of all relevant identity categories.

B. Sexual Orientation and Gender: A Failure of Intersectionality

The doctrinal experience with race and gender suggests that intersectionality is not well suited to sexual orientation equality claims because "sexual orientation discrimination" is not formally prohibited by federal anti-discrimination statutes.[123] And though the case law does not provide ready examples of intersectional analyses in sexual orientation cases,[124] it does provide a line of examples that involve combinations of discrimination based on sex or gender and on sexual orientation. These cases suggest that similar cases involving combinations of discrimination based on race or ethnicity and on sexual orientation likely would fail.

Title VII case law includes a number of cases involving socially gender-atypical men; that is, men that social gender norms would classify

123. *See generally* Valdes, *Queers*, *supra* note 3, at 136-75 (noting the legality of sexual orientation discrimination under federal civil rights statutes). Conversely, this observation suggests that intersectional claims or analyses may succeed under local or state laws that prohibit sexual orientation discrimination, an observation that underscores the importance of regionalized anti-subordination efforts especially during times of federal indifference or antipathy. *See generally supra* notes 40 and 45 and authorities cited therein on state or local issues.

124. Only one intersectional federal anti-discrimination case involving race and sexual orientation, *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (1989), is recorded. *See* Eaton, *supra* note 12, at 54-56 (discussing the facts and results of the case). In *Williamson*, an African American gay man claimed that his termination due to "unruly behavior" that involved his workplace manifestation of gay identity constituted race discrimination because white gay men who similarly manifested their sexual orientation in the workplace were not dismissed. *See* Williamson, 876 F.2d at 70. The court rejected the claim, holding that Title VII does not "prohibit discrimination against homosexuals." *Id.* Though *Williamson* provides only a single example, the viability and consequences of the loophole for the practice of otherwise unlawful prejudice that is created by sexual orientation's vulnerability is confirmed by the series of cases that involve sex, gender, and sexual orientation in similar doctrinal contexts. *See infra* notes 125-40 and accompanying text (discussing this additional doctrinal record).

as "sissies" and, by association, also "queer."[125] Ironically, more often than not these cases apparently involved men who, though deemed socially effeminate, were also heterosexually self-identified; in other words, the cases involved both gay and straight men who apparently were socially gender-atypical.[126] These cases therefore implicated discrimination based on sex and gender as well as discrimination based on sexual orientation, whether perceived or actual. No doubt existed that each case presented actual instances of sex and gender discrimination; but each case also included some form of sexual orientation discrimination.[127] Importantly, in each case one of the relevant identity categories—sexual orientation—did not enjoy formal legal protection.

As the intersectional cases on sex, gender, and sexual orientation illustrate, the omission of the latter category from anti-discrimination statutes or doctrines can facilitate discrimination based on the protected categories of sex and gender. Thus, whereas intersectional legal analyses can capture discrimination and combat its operation in race and gender cases, when the intersecting categories are equally protected, the sex/gender and sexual orientation cases indicate that a similar analysis is likely to falter when the intersecting categories are not equally protected; in these cases, the focus of analysis and decision is shifted by defendants and courts from the protected to the unprotected category. The probable result of this shift is predictable: exoneration through obfuscation.

In each such case, therefore, the defendants claimed that their discriminatory acts were motivated by heterosexist, rather than androsexist, bias.[128] Relieved of any need to deny their practice of discrimination altogether, the legality of sexual orientation discrimination in fact permitted the defendants to deploy their practice of a formally lawful bigotry as their defense against allegations of a formally prohibited bias. In effect, the defense in each of these cases was the interposition of "sexual orientation" discrimination to deflect attention away from, and to exonerate, "sex" and "gender" discrimination; in each case the defense effectively amounted to a confessed exercise of prejudice against the plaintiff's "queerness" to facilitate denial of prejudice against the plaintiff's "sissiness." In each case the courts accepted that defense,

125. *See* Valdes, *Queers*, *supra* note 3, at 136-68 (reviewing the case law).

126. *See id.*

127. *See id.* (analyzing the interplay of sex/gender and sexual orientation biases in these cases).

128. *See id.* (describing defendants' strategies and pleadings).

thereby licensing the practice of both sex/gender and sexual orientation discrimination.[129]

This line of cases is exemplified by the first of the series, *Smith v. Liberty Mutual Insurance Company*.[130] In *Smith*, a heterosexual man claimed that he was denied employment on both sex/gender and perceived sexual orientation grounds. In response to Smith's interrogatories during discovery, the defendant candidly admitted that it refused him employment because its interviewer had regarded Smith as "effeminate" and "thus suspected Smith of homosexuality."[131] During both the trial and appellate processes, Smith framed his claims by emphasizing the sex/gender discrimination entailed by the defendant's effeminacy bias; the employer, however, framed its defense by consistently emphasizing its suspicion of same-sex orientation.[132]

Not only did Smith at all times, and with increasing vehemence, assert his cross-sex orientation,[133] he also stressed that his actual or perceived sexual orientation was irrelevant to his sex/gender discrimination claim.[134] The defendant at all times agreed that Smith's actual sexual orientation was irrelevant but insisted that its discriminatory acts were motivated by, and targeted at, Smith's "suspected" sexual orientation.[135] At both the trial and the appellate levels, the defendant prevailed.

At the trial level the district court simply mis/re-characterized Smith's actual and explicit framing of his effeminacy claim, accepting the defendant's strategy of using his "suspected" sexual orientation to eclipse, and ultimately exonerate, sex/gender discrimination.[136] On appeal, the Fifth Circuit effectively did the same despite Smith's insistent framing of his claim to focus on sex/gender atypicality.[137] In *Smith*, as in the subsequent sex/gender/sexual orientation cases, the defendants thus devised explanations for their discriminatory actions that manipulated and exploited a "sexual orientation loophole" to the anti-discrimination

129. *See id.* at 186-97 (observing the consequences of these rulings).

130. 395 F. Supp. 1098 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978).

131. Valdes, *Queers*, *supra* note 3, at 139-40 (quoting discovery documents retrieved from court records).

132. *See id.* at 140-43 (summarizing the pleadings and claims).

133. *See id.* at 146 (noting the intensifying nature of Smith's position on this point).

134. *See id.* at 140 (framing the "sole" issue as sex/gender discrimination).

135. *See id.*

136. *See id.*

137. *See id.* at 142-51 (summarizing and critiquing the appellate opinion).

mandate of Title VII law.[138] In each instance, the courts rewarded that strategy with exoneration of bigotries that targeted sex and gender issues.[139]

Smith and its progeny therefore display how the textual omission of "sexual orientation" from otherwise fairly comprehensive anti-discrimination schemes can create a license for the practice of formally outlawed discrimination. The omission of sexual orientation from federal equality statutes thereby encourages not only the practice of heterosexism but, under its cover, also the practice of androsexism. The ramifications of that omission consequently extend across various anti-subordination categories, communities, and constituencies.[140]

C. Race, Ethnicity, and Sexual Orientation: Beyond Intersectionality

The immediate point of concern for second-stage sexual orientation theory is that, in all likelihood, a similar record of failure would result from intersectional cases involving the combination of racism or ethnocentrism and heterosexism. No reason exists for believing that plaintiffs would be more successful in race/ethnicity and sexual orientation cases than they have been in sex/gender and sexual orientation cases. No reason exists for believing that defendants would restrain their use of the sexual orientation loophole, as illustrated by the sex/gender and sexual orientation cases, in analogous race/ethnicity and sexual orientation cases. The experience thus far at the doctrinal intersection of sex, gender, and sexual orientation suggests a similar adjudicative scenario when race, ethnicity and sexual orientation intersect and are challenged in the courts.

The record established by these cases therefore does not bode well for cases involving a combination of racism, ethnocentrism and heterosexism. Though intersectionality can help to illuminate the interplay of white and heterosexist supremacy in social analysis, the implication of sexual orientation in anti-discrimination claims under the present configuration of federal law suggests a likely failure of doctrinal intersectionality in federal litigation. The immediate observations, of course, are the utility of intersectionality in social analysis and critical

138. *See id.* at 146-47 (discussing this "sexual orientation loophole" and its impact on gender discrimination cases).

139. *See id.* at 153-69 (reviewing the subsequent Title VII rulings).

140. *See id.* at 205-06 (arguing a joint feminist and Queer interest in the interplay of sex/gender and sexual orientation biases in these and similar cases).

theorizing, as well as the doctrinal importance of formal or textual anti-discrimination mandates; therefore, these observations underscore the importance of securing such mandates for "sexual orientation" discrimination at both federal *and* local levels.[141]

But under existing *federal* statutory and doctrinal circumstances, the engagement of race and ethnicity in second-stage sexual orientation scholarship must focus on devising means that go beyond a mere extension of intersectionality and that are capable of alerting courts and other legal decisionmakers to the interplay of biases based on this trio of constructs. While continuing to employ intersectionality in *social* analysis and legal theory, second stage scholarship must explore ways of exposing and counteracting intersectionality's limited application in *legal* analysis and doctrine. The development of tools and techniques that permit and advance transformative legal analysis in light of sexual orientation's formal vulnerability therefore is one of the key tasks pending for the second stage of sexual orientation theorizing.

Fortunately, that effort already is incipient and promising. Sexual minority scholars of color in recent years have begun to articulate "multidimensionality"[142] and "cosynthesis"[143] to produce analytical approaches or frameworks that go beyond intersectionality and that therefore may be capable of responding to the unique scenarios that implicate hybrid forms of sexual orientation bias. These efforts are a first step toward a meaningful and empowering anti-subordination

141. As the history of struggle during the first-stage years illustrates, these mandates must include both state and federal levels. *See supra* notes 20-49 and accompanying text (noting the vicissitudes of first-stage anti-discrimination efforts in light of federal and state politics). State, local, or private schemes therefore make it possible to test intersectional claims in state courts under state or local laws. *See supra* notes 40 and 45 and authorities cited therein on state and local issues; *see also* Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1701 (1997) (describing local private law arrangements that also provide protection from sexual orientation bias).

142. *See* Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads*, *supra* note 15, at 432-33 (urging multidimensionality and indivisibility as useful anti-subordination devices); Berta Esperanza Hernandez-Truyol, *Borders Engendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 920-26 (1997) (further developing multidimensionality and indivisibility in the context of Latina/o legal studies); Hutchinson, *supra* note 12, at 636-44 (also urging multidimensional anti-subordination analyses).

143. *See* Kwan, *supra* note 15, at 1280-81 (introducing the concept of cosynthesis as an analytical method that, like multidimensionality, goes beyond intersectionality).

engagement of the racialized and ethnicized dimensions of sexual orientation oppression.

To fully develop and operationalize these concepts, the second stage of sexual orientation scholarship must conduct a critical conversation about these and other analytical frameworks, a conversation informed by the insights (and limits) of outsider jurisprudence. And to conduct this critical and informed conversation, second-stage scholars must make and honor a commitment to engage race and ethnicity as integral components of sexual orientation identities, interests, and issues. Finally, and as urged above, this conversation can realize its highest productive potential only if it is guided by an ethic of mutual and caring recognition.[144] If second-stage theorizing responds seriously to the emerging internal critique, if it specifically explores multidimensionality or cosynthesis, and if it exhibits an ethic of mutual and caring recognition in doing so, then we will be able to look back on the coming years with pride.

Conclusion

This first-ever Symposium creates an opportune occasion to reflect both on the emergence and progress of sexual minority scholarship since the first sexual orientation symposium in 1979 and on the future depth and direction of Queer legal theory. The first-stage accomplishments include the assertion of a resolute and powerful critique of heterosexist and androsexist supremacy in all walks of life, but first-stage accomplishments also entailed the postponement of issues that matter greatly to the diverse sexual minority communities that help to form this scholarship's constituency. This Symposium therefore can help to draw attention to pending issues, and to herald a more expansive and inclusive agenda for a second stage of sexual orientation theorizing that is consistent with the advent of Queer sensibilities, values and ethics in sexual minority communities and discourses.

Among the pending issues is a thoroughgoing interrogation of race and ethnicity in the law, theory, and politics of sexual orientation community and subordination. Because lesbians, gay men, bisexuals, and the trans/bi-gendered segments of sexual minority communities are populated by both white and nonwhite persons, this interrogation is indispensable to a complete critique of the permutated practices through

144. *See supra* notes 99-108 and accompanying text (urging the cultivation of an ethic of mutual and caring recognition among outsider scholars).

which sexual orientation discrimination is practiced socially and legally. And though the developmental circumstances of the first stage may help explain a postponement of this interrogation, those circumstances no longer can be invoked to continue a second-stage disengagement of the racial and ethnic dimensions of sexual orientation communities and concerns.

Thus, a continuing disengagement will be construed, and correctly so, as a willful refusal to include in the sexual orientation equality agenda the issues that complexify the lives of racial or ethnic minorities within sexual minority communities—and beyond. That refusal would be unfortunate and self-defeating for several reasons: it ignores the actual diversities of sexual minority lives and interests, it limits the scope, depth, and nuance of second-stage anti-subordination critiques, it replicates historic patterns of injustice, it fosters division and contention within and across various sectors of sexual minority communities, and it squanders the opportunity to articulate and practice a progressive and empowering ethic of caring recognition as we enter a second stage of sexual orientation scholarship. For these substantive and strategic reasons, second-stage scholars, theorists and activists mutually, collectively, and proactively must engage the anti-subordination struggle against white supremacy with a vigor and dedication equal to that shown during the first stage against heterosexist supremacy.

To do so, however, second-stage theorizing must go beyond a mere application of conventional intersectionality to race, ethnicity, and sexual orientation. Though intersectional analyses are necessary to identify the interlocked operation of white and heterosexist supremacy culturally, a simple extension of intersectional analysis to anti-discrimination legal issues that implicate sexual orientation is unworkable because the doctrinal potency of intersectionality depends on the formal illegality of all biases under inspection. Because sexual orientation prejudice is not generally illegal, it does not generally lend itself to intersectionality's doctrinal deployment. Thus, among the key tasks that await a second stage of sexual orientation scholarship is the development of anti-subordination tools and techniques that can account for race and ethnicity in "sexual orientation" discrimination. Fortunately, that critical effort seems already underway, but its progress and power will depend on a sustained willingness and informed commitment among second-stage theorists to take race and ethnicity seriously as integral components of the "sexual orientation" anti-subordination struggle.