TO HAVE AND TO HOLD: PROPERTY AND STATE REGULATION OF SEXUALITY AND MARRIAGE

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INTRODUCTION

In the 1967 decision *Loving v. Virginia*,[1] the Supreme Court ended centuries of state prohibition of interracial sexual relationships.[2] In *Loving*, the Court admitted that anti-miscegenation laws, which criminalized interracial sexual contacts and marriage, had contributed to the systemic subordination of people of color.[3] In order to regulate marriage between whites and people of other races, anti-miscegenation laws defined who would be considered "white" and "black" by the state.[4] This categorization allowed the larger legal system to allocate and deny rights according to racial labels. By policing the borders of racial categories, anti-miscegenation laws promoted the fiction of naturalized races, providing an ideological foundation for racial hierarchy, and thus insulating white privilege. *Loving* was a landmark decision because the Supreme Court for the first time acknowledged that racial categorization institutionalizes racism.

Today, the spirit of *Loving* is mocked by the existence of sodomy laws[5] and the legal ban on lesbian and gay marriage. Laws regulating same-sex

* J.D. candidate, 1999, N.Y.U. School of Law. I would like to thank the following people for making this article possible: Professor Paulette Caldwell, for providing the opportunity and the tools to write the paper, and for her critical edits; Alex Reinert for the idea; the board of the *Review of Law & Social Change* for accepting the article and working with me to improve it; and Meg Satterthwaite, Jennifer Friedman, and Sidhu Nadkarni for spending time with me honing the issues, for sharing their insight, and most importantly for cheering me on.

1. Loving v. Virginia, 388 U.S. 1 (1967).

2. While the statute at issue in *Loving* specifically prohibited interracial marriage, anti-miscegenation laws historically regulated not only marriages but also sexual unions between people of different races.

3. *Loving*, 388 U.S. at 10-11.

4. This paper examines the social construction of identity markers such as "white," "black," "heterosexual," and "homosexual." A theoretical underpinning of the paper is that these labels are not biologically determined or static, but rather that they are in flux and are determined by cultural context. Rather than placing quotation marks around each term, the reader should be aware that each time a label is utilized it should be understood as a fluid concept.

5. Six states have sodomy laws which criminalize sexual behavior only between people of the same sex, fourteen states have sodomy laws which address both same-sex and opposite-sex behavior, and thirty states have no sodomy laws. National Gay and Lesbian Task Force, *The Right to Privacy in the U.S.* (last modified June 1998) <http://www.ngltf.org/downloads/sodomy698.gif>. While some statutes are not same-sex specific, the construction of sodomy in American society has been targeted towards same-sex sexuality, and some statutes are enforced only against gay men and lesbians despite their neutral language.

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intimacy categorize individuals on the basis of sexual identity in the same manner that anti-miscegenation laws categorized on the basis of racial identity. By excluding gay men and lesbians from the definition of the "family," state regulation of sexual intimacy once again creates a hierarchy on the basis of identity (here sexual orientation) and protects the privilege of being heterosexual. In a system where only heterosexuals have access to tax breaks for married couples, sodomy laws and the ban on gay marriage play a central role in producing the heterosexual/homosexual dichotomy and determining who does and does not "deserve" these benefits.[6]

In Part I of this article, I explore the process of categorization employed by both anti-miscegenation laws and laws banning same-sex intimacy. State regulation of sexual relations among people of different races and people of the same sex has contributed to the production of racial and sexual identities. Legislators have used legal interdictions on sexuality not only to categorize individuals on the basis of race and sexual orientation, but also to provide advantages to those whom the state designated white and/or heterosexual. By comparing the history of anti-miscegenation laws with the current sodomy laws and the ban on gay marriage, I argue that today the state is implicated in "invidious" discrimination against gay men and lesbians in the same way that the state perpetuated racism through anti-miscegenation laws before *Loving*.[7]

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6. This paper explores the regulation of same-sex sexual acts and intimate relationships and the state's role in marginalizing gay and lesbian identity. While people who identify as "bisexual" and "transgendered" and possibly others who identify as "queer" are also implicated in this analysis, there are particularities to their cultural constructions that are beyond the scope of this paper. Nevertheless, when the terms "same-sex" or "gay and lesbian" are used in this analysis, they may also reflect the experiences and identities of others who are not explicitly named.

7. Various scholars have written about the problems associated with analogizing among oppressed groups, especially analogizing to racial oppression. Activists have documented how some movements for social change have ignored the experiences of people of color within their membership. For a discussion of feminism's ignorance of black women's experiences living with both sexism and racism, see ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988), and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory, in* CRITICAL RACE THEORY: THE CUTTING EDGE 253 (Richard Delgado ed., 1995). When these movements analogize to the victories of anti-racism movements to promote their own goals, the significance of race can be trivialized and obscured. *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms), in* CRITICAL RACE THEORY: THE CUTTING EDGE, *supra,* at 564 (discussing how efforts to compare racism and sexism have minimized the impact of racism). Any comparison of state-sponsored oppressions must be written with a sensitivity to the critiques of analogical reasoning. At the same time, civil rights movements should avoid re-arguing the same issues and should use each other's victories as leverage for their own struggles. I agree with Elizabeth Rush, who recognized that "[c]omparing one situation with another and looking for ways in which they are both similar and different can be a useful way for legal decision-makers to identify significant factors that informed the first situation and are relevant to deciding the subsequent one." Sharon Elizabeth Rush, *Equal Protection Analogies - Identity and "Passing": Race and Sexual Orientation,* 13 HARV. BLACKLETTER J. 65, 71 (1997). In addition, even if comparisons are inapt, they are a legal reality. For example, in the

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In Part II of the paper I investigate the depth of privilege enjoyed by whites and heterosexuals as a consequence of claiming these identity labels. I characterize this racial and sexual-preference privilege as property. Traditionally, American society has treated private property as sacred, elevating it above intangible privileges such as legal rights. In his book *And We are Not Saved*, Derrick Bell exposes the centrality of private property in our system of law through a conversation between the members of the Constitutional Convention and a time-traveling black woman from the present day named Geneva Crenshaw.[8] In this dialogue Crenshaw asks the founding fathers to explain their choice of private property over human rights (in deciding not to abolish slavery). One of the delegates quotes Gouverneur Morris of Pennsylvania (an outspoken opponent of slavery) stating "life and liberty were generally said to be of more value than property . . . [but] an accurate view of the matter would nevertheless prove that property was the main object of Society."[9]

Since property has been given substantial attention in our society, I will use the concept of "property" to quantify the full range of tangible and intangible privileges of whiteness and heterosexuality. Cheryl Harris has developed a theory that in protecting settled expectations based on white privilege, American law has recognized a property in whiteness.[10] I argue in Part II that the extent of privilege associated with being heterosexual converts heterosexuality into a form of property similar to whiteness. Thus "having" the label "white" or "heterosexual" is analogous to possessing a form of property. I examine both the tangible and intangible aspects of the property gained by being within the dominant racial and sexual-preference group. In addition, I posit that personhood[11] is a form of property that is also distributed according to racial and sexual identity. I contend that one's sense of self as an individual—one's humanity—is stolen when one is black, a gay men or a lesbian and is reserved through the law for those who "own" whiteness and heterosexuality.

A story recited by Patricia Williams in her book *The Alchemy of Race and Rights* illustrates the relationship between identity and personhood.[12] Williams presents a story about a transsexual student, S., who approaches

history of the Equal Protection doctrine, the United States Supreme Court has used analogies to race in order to expand strict scrutiny. Hence, other minorities are compelled by courts to prove their similarities to race in order to advance their Equal Protection claims. *Id.* at 73-76. *See* Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (making analogy between race and gender); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994) (same); Mathews v. Lucas, 427 U.S. 495, 505 (1976) (making analogy between race and illegitimacy).

8. DERRICK BELL, AND WE ARE NOT SAVED 29 (1987).

9. *Id.* (*quoting* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 VOL. I 533 (Max Farrand ed., 1911), *reprinted in* STAUGHTON LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 181-82 (1967)).

10. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

11. See *infra* notes 151-155 and accompanying text for an explanation of the term "personhood property."

12. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 122-25 (1991).

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Williams because she has been outcast by both the male and female populations at the school where Williams is teaching. S. goes to speak with Williams about her experience because she feels that Williams would be more understanding since she is black. Williams explains how she is initially put off by the student's assumption that she would understand S.'s feelings of being a "nobody," since Williams was in the middle of her own process of coming to define herself as "somebody." But Williams quickly realizes that an element of her identity as black is "to be part of a community of souls who had experienced being permanently invisible nobodies; 'black' was a designation for those who had no place else to go . . . ."[13] One message to glean from Williams' narrative is that there is an element of "nobodiness" that is common to unprivileged identities. State-sponsored racism and homophobia rob blacks, gay men and lesbians of their sense of being a "somebody." This paper demonstrates how laws that regulate sexuality contribute to the unequal distribution of somebodiness, and as a result, being a "somebody" becomes a form of property.

PART I: STATE REGULATION OF SEXUALITY AND SOCIAL HIERARCHIES

State intrusion into individuals' intimate relationships was and is closely linked to state promotion of white supremacy and the superordination[14] of heterosexuality. By predicating legal rewards on certain relationships, the state attempts to coerce individuals into certain sexual behavior and penalizes those who do not follow the state's guidelines. Legislators adopted anti-miscegenation laws to deter individuals from interacting with people of other races in order to maintain a strict demarcation between white and black. Those in power were only able to maintain white supremacy if people of different races remained in their own communities and did not challenge the myth of two naturally distinct races. Today, laws prohibiting same-sex sexuality and marriage aim to prevent sexual behavior between people of the same sex, and thus to reinforce the prominence of heterosexuality. By defining who falls inside and outside of the privileged institution of the family, the state creates a social ordering of sexual identities, placing heterosexuality above gay and lesbian identities as the favored sexual preference.

A. *Anti-miscegenation Laws and the Perpetuation of Racial Hierarchy*

Anti-miscegenation laws were state laws that prohibited marriage and/or sexual unions between whites and people of color.[15] These laws were

13. *Id.* at 124.

14. I borrow the word "superordination" from Janet Halley's article, *Reasoning about Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993). I use the term to describe the process whereby heterosexuality is elevated above gay and lesbian sexuality and identity in the hierarchy of sexual orientations.

15. While anti-miscegenation laws prohibited sex and marriage between whites and other races, this paper will focus on the effect of anti-miscegenation laws on the polarity of a

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first developed in the colonial period, and while several states had eliminated their anti-miscegenation laws by the 1967 *Loving v. Virginia* decision, at that time sixteen states still outlawed and set penalties for interracial marriages.[16] Anti-miscegenation laws also assigned racial identities to the children of interracial unions, and those identities carried specific legal rights (or lack of rights). In regulating sexual intimacy and constructing racial classifications, anti-miscegenation laws created the fiction of two distinct racial categories, black and white. Before and after the Civil War, these laws facilitated a system of white supremacy and accorded economic, social, and political privileges and burdens on the basis of racial classifications.

1. *History of Anti-miscegenation Laws*

Anti-miscegenation laws in the United States were first passed during the colonial period, as the structure of a slavery system was solidifying.[17] Virginia law first addressed interracial sex in a 1662 statute that, for the first time, imposed more severe treatment for interracial sex than for intraracial sex: "if any Christian shall commit fornication with a Negro man or woman, he shall pay double the fines of the former act."[18] The first general statutory proscription against interracial marriage was included in "an act for suppressing outlaying slaves" in 1691.[19] The stated purpose of the act was to prevent the "abominable mixture and spurious issue" caused by intermarriage, a phrase connoting a concern for racial purity.[20] If convicted of the crime, the free white partner would be banished from the colony. In addition, any "English woman" who had an interracial child out of wedlock would have to pay a fine of fifteen pounds to the church or be

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black/white racial structure, conscious that both the structure and the analysis overlook the complexity of race when one considers other people of color.

16. *Loving*, 388 U.S. at 6 n.5.

17. This analysis is focused on the history of slavery and its implications for racial categorization. Hence, the research is drawn mostly from the history of the South (and more specifically Virginia), despite the fact that there were black populations and anti-miscegenation laws in other states as well. For example, at the time of *Loving*, Delaware, Missouri, Oklahoma and Texas still prohibited interracial marriage. *See Loving*, 388 U.S. at 6 n.5. By focusing on the South, the confluence of race and slave status may be oversimplified. At the same time, this narrow examination is worthwhile since the association of race with slavery has had an impact on the construction of race in American culture irrespective of geographical area.

18. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 43 (1978). The term "Christian" refers only to whites. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1993 (1989).

19. Walter Wadlington, *The* Loving *Case: Virginia's Anti-miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191-92 (1966).

20. *Id.* at 1192.

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taken "into possession" by the church and sold into indentured servitude for five years.[21]

Virginia anti-miscegenation laws evolved over time but always retained the prohibition against interracial marriage. In 1878 penalties were extended to both black and white partners, perhaps reflecting the law's acknowledgment of blacks as individual legal actors.[22] In 1924 the anti-miscegenation laws were again restructured in "An Act to Preserve Racial Integrity."[23] Legislators heightened the involvement of officials in policing interracial marriages by allowing them to delay the issuance of a marriage license until they were assured that the races claimed by the individuals were correct. The act also included provisions that voided interracial marriages, imposed civil and criminal penalties for evasion (citizens of Virginia who traveled to another state to get married and then returned), and applied criminal sanctions to the person performing the marriage ceremony and to both parties involved in the marriage.[24] The 1924 version of the law was in force until overturned in the *Loving* decision.

2. *The Construction of Racial Categories*

Anti-miscegenation laws developed simultaneously with racial categorization laws. Since legal rights and privileges were dependent on an individual's race, once individuals of different races began to procreate legislators created legal classifications for the multiracial population. Penalties for interracial sex suggest that the law imposed punishment not only for the sexual act but also for the production of interracial children.[25] Multiracial children were a problem for white Virginians because they did not fit into the "natural order" of racial categories which had been the basis of the slavery system.[26] The presence of individuals who could not be classified as white or black threatened not only the social order of racial difference but also the legal and economic system predicated on the exploitation of black slaves, which was justified by the belief that blacks were racially inferior. Thus, Winthrop Jordan has analyzed the psyche of the white male Virginian:

> Perhaps he sensed as well that continued racial intermixture would eventually undermine the logic of the racial slavery upon which his society was based. For the separation of slaves from

21. HIGGINBOTHAM, *supra* note 18, at 44-45. *See also* Higginbotham & Kopytoff, *supra* note 18, at 2000-2001. Only the white partner of the couple was punished by pre-Civil War Virginia anti-miscegenation laws. Higginbotham and Kopytoff are unsure why this is the case but speculate that perhaps whites or "Christians" were held to a higher standard than blacks. They also suspect that in practice the black partners were punished either by their masters if they were slaves, or by the state under the pretext of punishment for other crimes.

22. Wadlington, *supra* note 19, at 1197.

23. *Id.* at 1200.

24. *Id.*

25. Higginbotham & Kopytoff, *supra* note 18, at 1994.

26. *Id.* at 2005.

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> free men depended on a clear demarcation of the races, and the presence of mulattoes blurred this essential distinction.[27]

The existence of multiracial individuals threatened a social structure which advantaged whites. In constantly reinforcing the lines between the races and reminding white Virginians that blacks were "other" than white, legislators relied on anti-miscegenation laws to provide a justification for racial inequality. Nathaniel Gates writes, "[The] process of differentiation which enthroned the binary opposition of the deviant 'black' to the normative 'white' gave rise, almost ineluctably, to a sense of 'natural' or inherent otherness that, in its turn, served to justify an escalation of the degree of dominion exercised over all persons of African extraction."[28] Anti-miscegenation laws contributed to racial hierarchy by convincing whites that blacks were not "like them," thus providing a justification for disparate legal, social, and economic status.

In 1662, when the Virginia legislature passed its first anti-miscegenation statute, it included a provision intended to legally classify biracial children:

> Whereas some doubts have arrisen [sic] whether children got by any Englishman upon a negro woman should be slave or free. Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shalbe [sic] held bond or free only according to the condition of the mother . . . .[29]

Under the statute, children with similar racial heritage would be identified as slave or free (read also as black or white) depending on the status of their mother. The 1662 law began an evolution of provisions which placed multiracial children into separate racial boxes.

After the Civil War, the process of racial categorization continued via the "fractional blood count" which determined race according to one's ancestry. The blood count was used not only to classify the legal rights of biracial offspring but also to determine an individual's race for the purpose of marriage.[30] This system first appeared in a 1787 statute, which provided that if a person was one fourth black (or more) they were "mulatto" (i.e. black[31]) under the law.[32] The 1866 code eliminated the term "mulatto"

27. WINTHROP JORDAN, WHITE OVER BLACK 178 (1968).

28. E. Nathaniel Gates, *Estranged Fruit: The Reconstruction Amendments, Moral Slavery, and the Rearticulation of Lesbian and Gay Identity*, 18 CARDOZO L. REV. 845, 855 (1996).

29. Higginbotham & Kopytoff, *supra* note 18, at 1971. This statute demonstrates the conflation of "negro" and "slave" which occurred within the law and social perceptions, despite the reality that some blacks were free. This conflation is apparent because if the law were addressing the child of a white man and a free black woman the child's status would not be an issue.

30. Wadlington, *supra* note 19, at 1196.

31. While the identifier "mulatto" suggests that the law recognized a category outside of the black/white schema, during slavery this term had only social and no legal significance;

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from racial definition and merely provided that "every person having one-fourth or more of negro blood, shall be deemed a colored person."[33] As the twentieth century progressed, the definition of "colored" came to encompass more individuals, while the label "white" was reserved for a smaller group within the multiracial population. In 1910 one sixteenth black ancestry made a person colored.[34] Virginia's 1924 anti-miscegenation law shifted the focus from the definition of colored to the definition of white. While colored remained at one-sixteenth black ancestry; the law announced that it was unlawful for a white person to marry anyone with any "trace whatsoever of any blood other than Caucasian."[35] The changes in the dividing lines dictated by the fractional blood count test expose the instability of a notion of racial difference as natural. And yet, for years the law was commissioned to maintain a separation between the races, a separation that facilitated the subordination of blacks and the insulation of white privilege.

3. *Jurisprudence on Anti-Miscegenation*

For many years courts facilitated racial oppression by denying legal challenges to anti-miscegenation laws. However, the Supreme Court's ultimate acknowledgment that anti-miscegenation laws were expressions of white supremacy demonstrates that courts can expose the state's role in social injustice.

During the late nineteenth century and the first half of the twentieth century individuals mounted state court challenges to anti-miscegenation laws; all but one were unsuccessful.[36] The opinions reflected the legislators' norms about racial purity and white supremacy. For example, in a Georgia Supreme Court case, *Scott v. Georgia*, the court declared:

> the amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race. It is sometimes urged that such marriages should be encouraged, for the

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mulattoes had the same legal rights and obligations as blacks. *See* Higginbotham & Kopytoff, *supra* note 18, at 1976. After the Civil War, the Virginia Code used the term "colored" to refer to both groups, and that term was later replaced by "black" in the Code. *Id.* at 1967 n.2.

32. Wadlington, *supra* note 19, at 1194.

33. *Id.* at 1196.

34. *Id.* at 1201.

35. *Id.*

36. The California Supreme Court struck down its anti-miscegenation law in Perez v. Lippold, 198 P.2d 17 (Cal. 1948).

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purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior.[37]

The Supreme Court first reviewed an anti-miscegenation law in 1882 when it considered the constitutionality of an Alabama law in *Pace v. Alabama*.[38] In *Pace*, a black man and a white woman challenged the state statute as a violation of the Equal Protection Clause. The Court rejected their claim and stated that because the anti-miscegenation law punishes black and white offenders equally, there is no discrimination on the basis of race.[39] The Court refused to see the role of anti-miscegenation laws, and racial segregation generally, as perpetuating the oppression of blacks by white society. After *Pace*, virtually every judicial challenge to anti-miscegenation laws was defeated until the Supreme Court re-approached the issue in the 1960s.[40]

The Supreme Court began to chip away at the support for anti-miscegenation laws in its 1964 decision, *McLaughlin v. Florida*.[41] The majority opinion, written by Justice White, used the Equal Protection Clause to strike down a Florida statute that punished unmarried interracial couples who habitually live in and occupy the same room at night (i.e., live together). The Court overruled its decision in *Pace*, recognizing that the statute did classify on the basis of race even though both white and black participants were penalized.[42] Since racial classifications are "constitutionally suspect" and deserving of "rigid scrutiny," Justice White demanded that the state provide a statutory purpose requiring this classification.[43] The Court ultimately rejected the state's claimed interest in regulating promiscuity on the basis of the race of the participants.[44] While the decision did not address the validity of Florida's anti-miscegenation law, it dismissed

37. Scott v. Georgia, 39 Ga. 321, 323 (1869).

38. Pace v. Alabama, 106 U.S. 583 (1882).

39. *Pace*, 106 U.S. at 585.

40. James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. Rev. 93, 106 (1993). The Supreme Court twice denied to hear a challenge to Virginia's anti-miscegenation law. Naim v. Naim, 350 U.S. 891 (1955); Naim v. Naim, 350 U.S. 985 (1956) (denying certiorari). After the Virginia Supreme Court upheld the anti-miscegenation law in 1955, the Supreme Court on appeal remanded the case for more information on the relationship of the parties to Virginia at the time of marriage. *Naim*, 350 U.S. 891. When Virginia failed to comply with the remand and the case was once again before the Court, the Court denied certiorari on the grounds that the case was devoid of a substantial federal question. *Naim*, 350 U.S. 985.

41. McLaughlin v. Florida, 379 U.S. 184 (1964).

42. The majority held that "[j]udicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The court must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin*, 379 U.S. at 191.

43. *Id.* at 192.

44. *Id.* at 193.

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the anti-miscegenation law as an inadequate justification for the co-habitation law.[45] In *McLaughlin* the Court began to acknowledge the inherent racism of laws that proscribed interracial intimacy.

The Court finally embraced this realization in its 1967 decision *Loving v. Virginia*, when it struck down Virginia's anti-miscegenation law as unconstitutional. The petitioners, Mildred Jeter, a black woman, and Richard Loving, a white man, had left Virginia to get married in the District of Colombia. Shortly after they returned, they were indicted for violating Virginia's ban on interracial marriage. Subjecting the law to strict scrutiny, the Court found no legitimate state interest in anti-miscegenation laws, and exposed the maintenance of white supremacy as the motivation for the policy.[46] As it had in *McLaughlin*, the Court also rejected the "equal application" argument the state had reiterated from *Pace*. The Court finally acknowledged the connection between racial categorization and racial inequality: "this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"[47] Chief Justice Warren specifically identified the maintenance of white privilege as the core of anti-miscegenation laws, "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[48] The decision also recognized the due process right to marry, which "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[49] In *Loving*, the Court finally confronted the implications of promoting racial segregation through marriage laws. *Loving* is imbued with an awareness that restricting interracial marriage is one prong in the state's historic campaign to use racial categorization as a means to promote racial oppression.

B. Laws Proscribing Same-Sex Intimacy and the Construction of Sexual-Preference Hierarchy

The legacy of anti-miscegenation laws lives on in sodomy laws and the ban on same-sex marriage. Despite the many differences between anti-miscegenation laws and laws regulating sexuality, and despite the differences between race and sexual orientation,[50] the similarities are potent. As anti-

45. *Id.* at 195.
46. Loving v. Virginia, 388 U.S. 1, 11 (1967).
47. *Id.* at 11 (*quoting* Hirabayahsi v. United States, 320 U.S. 81, 100 (1943)).
48. *Loving*, 388 U.S. at 11.
49. *Id.* at 12.
50. There are many critical differences between laws prohibiting sexuality and marriage on the basis of race and those which classify on the basis of sexual preference. Most obviously, anti-miscegenation laws banned relationships between those in the dominant class and those in the subordinate class, whereas sodomy laws and marriage laws address intimate relationships among individuals within the outcast group. There are also multiple

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miscegenation laws helped to erect the boundaries of race, laws restricting same-sex intimacy have shaped the cultural organization of sexual identities. The state has used the regulation of sexual intimacy and marriage in both cases to coerce individuals into the types of relationships (i.e., same-race and heterosexual) that do not threaten white supremacy or the prominence of heterosexuality. State regulation of sexuality re-emphasizes the dichotomy of white/black and heterosexual/homosexual and predicates state approval on staying within the confines of same-race, opposite-sex relationships.

The definition of the family as heterosexual is central to the de-legitimation of gay and lesbian identity. While anti-miscegenation laws were fueled by beliefs in racial superiority, sodomy laws and marriage bans are generated by hegemonic constructions of family as heterosexual. As many historians have documented, sexual-orientation as an identity only arrived in American culture at the end of the nineteenth century after the rise to prominence of Freud and other psychologists who studied human sexuality.[51] But gay and lesbian identity grew out of early conceptions of sodomy as an act against the family. Since the colonial period, American law has penalized certain sexual acts between individuals of the same sex. While these laws have changed over time, a common historical thread has been the law's privileging of opposite-sex sexuality as normal and as inherent in the definition of family, while same-sex sexuality has been labeled deviant and has been excluded from the law's construction of family. The definition of family as heterosexual parallels the legal construction of family as one race. Just as anti-miscegenation laws used legal marriage restrictions to deter interracial relationships, legislators have denigrated same-sex sexuality and promoted a hierarchal identity dichotomy of heterosexual/homosexual.[52]

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divergences between the constructions of racial identity and sexual preference which affect the differential treatment by the state of people of color and gay men and lesbians. For example, most would argue simplistically that race is identifiable by appearance whereas sexual orientation is not. (However, this is only superficially plausible given the phenomenon of "passing" among both groups.) In addition, sexual-preference identity is generally rooted in the choice of sexual partner, whereas race is contingent on ancestry, possibly country of origin, appearance, and many other factors. The centrality of intimacy for gay men and lesbians means that sodomy laws and marriage bans are at the core of state oppression, whereas anti-miscegenation laws were one among many tactics used by the state to segregate and disempower blacks.

In addition, by comparing black Americans and gay men and lesbians I do not mean to suggest that these groups are mutually exclusive. Obviously gay men and lesbians who are also black would experience both forms of discrimination and would be affected by the distribution of property both in whiteness and in heterosexuality.

51. See *infra* notes 64-72 and accompanying text for a discussion of the emergence of gay and lesbian identity.

52. My investigation of the social construction of identities focuses almost entirely on the state's power to impose second class status upon racial and sexual minorities. This argument can obscure the role of individual agency in composing identity. While structures of identity are drastically shaped by social institutions such as the law, resistance to oppression

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1. *History of American Sodomy Laws*

a) *Colonial Period*

Since the early colonial period, the state has criminalized sexual acts between members of the same gender. Before the nineteenth century, American society conceived of same-sex sexuality as an act rather than an identity. The term "sodomy" referred to "unnatural" sexual acts which could be performed between two men, a man and a woman, or a man and an animal.[53] Sodomy generally did not describe sex between women; however, the colony of New Haven listed among capital offenses women's acts "against nature."[54] Records from New England, the Middle colonies, and the Southern colonies document almost twenty cases involving charges of sodomy or other erotic acts between men from 1607-1740.[55] During the seventeenth century, the crime of sodomy carried the death penalty, and at least five men were executed for sodomy or "buggery."[56]

During the colonial period, criminalization of sodomy was justified by the belief that it was a sin against marriage, the family, and procreation.[57] For example, John Winthrop described William Plaine's crime of sodomy as "dreadful" because it "tended to the frustrating of the ordinance of marriage and the hindering of the generation of mankind."[58] Colonial social and economic structure generally centered around the household. The family often served as a school, as the primary source of vocational and religious training, and as the basic unit of production, so colonial society interpreted sodomy as a serious breach of the legally established and strictly enforced social and economic organization of family life.[59]

Sodomy was most fundamentally perceived as a sin against procreation. Since the organization of economic production tended to center around the family unit, non-procreative sex inhibited the reproduction of

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can subvert mainstream categorizations and ultimately contribute to the cultural production of identities. Clearly gay men and lesbians are creating relationships and communities, and constantly intervening in the construction of what it means to be gay or lesbian in America. Gay and lesbian campaigns against sodomy and marriage restrictions also affect the heterosexual/homosexual construct. As with many social constructionist theses, this appraisal reduces racial and sexual identity solely to their meanings within paradigms of oppression. While the role of resistance to state efforts to control interracial and same-sex relationships is beyond the scope of this paper, it is important to note that a recognition of resistance does not dispute the reach of the state in enforcing social hierarchies through the regulation of intimacy. The push and pull of oppression and resistance create the contours of racial and sexual identities.

53. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS 30 (1988).

54. *Id.*

55. JONATHAN NED KATZ, GAY/LESBIAN ALMANAC 29 (1983).

56. D'EMILIO & FREEDMAN, *supra* note 53, at 30. "Buggery" seems to refer to sex with animals or between men. *See* KATZ, *supra* note 55, at 36-37.

57. KATZ, *supra* note 55, at 31.

58. *Id.* William Plaine was executed for sodomy in New Haven colony in 1646.

59. *Id.* at 33.

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new labor.[60] Because sodomy threatened the production of sons, colonial society also viewed sodomy as jeopardizing the system of property inheritance—the transfer of land, houses, implements, and agricultural products from men to their male children.[61] The language of sodomy statutes reflected the cultural designation of sodomy as "unnatural" (i.e. non-procreative).[62] The New Haven 1656 statute prohibited any "unnatural and shameful filthiness," and a 1697 Massachusetts law described sodomy as "contrary to the very Light of Nature."[63] The construction of sodomy as anti-family has remained in American law and culture even throughout periods of social change and has attached to the construction of sexual-orientation identities.

b) The Emergence of "Homosexual" as an Identity

At the end of the nineteenth century, medical writers began to describe homosexuality not as a discrete punishable offense but as a description of a person, encompassing emotions, dress, mannerisms, behavior, and physical traits.[64] These writers observed the emergence of sexual identities, which had been facilitated by changes in American (and European) social structure and economy.[65] By the turn of the century, the spread of a capitalist economy and the growth of cities allowed gay and lesbian desires to coalesce into a personal sexual identity.[66] Labor became dissociated with the family so that men (and some women) moved to cities without family ties and created relationships according to their sexual preferences. As these men and women found each other and formed communities, they began to perceive themselves as different from other members of society.[67]

While individuals started to define themselves by their sexual preferences, the mainstream culture recognized these emerging identities as growing out of the legal definition of sodomy. Michel Foucault describes the "birth" of homosexual identity: "Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species."[68] The cultural association of the crime of sodomy with gay and lesbian sexual

60. *Id.*
61. *Id.* at 35.
62. *Id.* at 43-44.
63. *Id.* at 43. Sodomy laws were partly shaped by religious institutions, and the construction of same-sex identities has been significantly affected by religious dogma. However, the influence of religion on interracial and same-sex sexuality and the production of racial and sexual identities is beyond the scope of this article.
64. D'EMILIO & FREEDMAN, *supra* note 53, at 226.
65. *Id.* at 226-227.
66. *Id.* at 227.
67. *Id.*
68. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION 43 (1976).

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identities has contributed to the construction of homosexual identity as "deviant" and as a threat to moral structure.

Just as lesbian and gay identities and cultures became more coherent and more visible, state authorities stepped up persecution against sexual minorities and reinforced the exclusion of gay men and lesbians from American society. During the 1950s and 1960s, federal, state and local governments mobilized against gay and lesbian communities.[69] Politicians initiated witch hunts among government employees.[70] Local police forces harassed gay men and lesbians and targeted them at places of association (i.e., bars, parks, and certain streets).[71] Historians John D'Emilio and Estelle Freedman speculate that the growth of gay subculture was perceived as threatening to the post-World War II rediscovery of the family as Americans returned from the war to domesticity as a form of social stability.[72] As with colonial conceptions of sodomy, same-sex intimacy was once again perceived as a threat to the family structure and hence a threat to social organization. Consequently, political officials attempted to suppress gay and lesbian expression and association.

c) Recent Sodomy: Bowers v. Hardwick

The legal conception of sodomy today and its relationship to the law's treatment of sexual identities has been significantly shaped by the 1986 Supreme Court case *Bowers v. Hardwick.*[73] The *Hardwick* decision continued the American cultural tradition of defining gay and lesbian sex as beyond the sanction of the law. Justice White's reasoning in the majority utilized the historical construction of sodomy (the act) as a means to defeat legal protection for gay men and lesbians on the basis of sexual orientation. The decision thereby fortified the marginalization of gay and lesbian identities and simultaneously conferred privilege in being heterosexual.

Respondent Michael Hardwick was charged with violating the Georgia sodomy statute by having sex in his own bedroom with another man. Hardwick brought suit in federal court challenging the constitutionality of the sodomy law. Justice White presented the legal issue in the case as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[74] In denying Hardwick's challenge, the Court stated that a "homosexual right to sodomy" is not a part of the right to privacy, which covers only such issues as child rearing, education, family relationships, procreation, marriage, contraception, and abortion.[75] Justice White drew upon and reiterated the historical barrier between same-sex

69. D'EMILIO & FREEDMAN, *supra* note 53, at 289.
70. *Id.* at 292.
71. *Id.* at 293-294.
72. *Id.* at 294.
73. Bowers v. Hardwick, 478 U.S. 186 (1986).
74. *Hardwick*, 478 U.S. at 190.
75. *Id.*

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sexuality and the family: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or respondent."[76] The Court admitted that it had previously read substantive rights out of the Bill of Rights that are not enumerated, but these must be "implicit in the concept of ordered liberty or deeply rooted in this Nation's history and tradition," and given the history of sodomy laws, the claim that sodomy falls within this class "is, at best, facetious."[77] The Court also examined Hardwick's protestation that even if "the conduct at issue" is not a fundamental right, there must still be a rational basis for the law. The Court found a rational basis in the presumed moral beliefs of the Georgia electorate that "homosexual sodomy" is immoral.[78]

The *Hardwick* decision reconfirmed the constitutionality and moral justification for criminal sodomy laws. In addition, by locating the right to privacy within the heterosexual family and thereby excluding same-sex intimacy from its protection, the Court reinforced the hierarchy of sexual-orientation identities. In an article exploring *Hardwick*, Janet Halley demonstrates that the *Hardwick* decision rests on the characterization of sodomy as both an act and an identity. This duality, she explains, "is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity."[79] *Hardwick* conflates same-sex sodomy with same-sex identity, enabling the Court to say that moral disapproval of homosexuality (an identity) is a rational basis for the Georgia law.[80] Recent courts have also used *Hardwick* to deny Equal Protection to gay men and lesbians on the ground that sodomy is the "behavior that defines the class" of homosexuals.[81] But in its fundamental rights analysis, *Hardwick* treats sodomy as an act, recognizing that it can apply to both homosexuals and heterosexuals. (The sodomy statute at issue in *Hardwick* covered both heterosexual and same-sex activities.) Justice White began his opinion stating that the Court will not provide a judgment on "whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable."[82] This claim to neutrality suggests that the decision has nothing to do with sexual identity and merely

76. *Id.* at 191.
77. *Id.* at 191-194.
78. *Id.* at 196.
79. Halley, *supra* note 14, at 1722.
80. *Id.* at 1747-48.
81. *Id.* at 1734-1736 n.42. *See* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (denying lesbian FBI applicant the status of suspect class for equal protection analysis, citing *Hardwick*). *See also* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (holding that homosexuality did not merit strict or heightened scrutiny review because *Hardwick* declared it was not a fundamental right or liberty); Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992) (dismissing high school teacher's claim of discrimination based on homosexuality, citing *Hardwick* as casting a "shadow" on applicability of equal protection).
82. *Hardwick*, 478 U.S. at 190.

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addresses the acts that are outlawed in the Georgia statute.[83] Halley asserts that with this analytical sleight of hand, "the unstable relationship between act and identity . . . allows the Justices to exploit confusion about what sodomy is in ways that create opportunities for the exercise of homophobic power."[84] The *Hardwick* decision, in reaffirming the legal and cultural disapproval of sodomy and then grafting sodomy onto sexual orientation identity, contributes to the production of gay and lesbian identity as contrary to the law and social norms. *Hardwick* functions similarly to anti-miscegenation laws; both act as legal regulators of sexual behavior and thereby promote social hierarchies and elevate the privilege of being in the dominant group.[85]

2. *Same-Sex Marriage*

The jurisprudence on same-sex marriage mirrors the pre-*Loving* considerations of anti-miscegenation laws. With the rise of the gay liberation movement during the 1970s, several gay and lesbian partners brought suits to compel their states to issue marriage licenses. Just as judges viewed interracial relationships as challenging the "natural" division between the races,[86] the state courts denied each of these claims on the basis that gay and lesbian couples definitionally could not be married because marriage requires a man and a woman. Denying gay men and lesbians the right to marry,[87] courts continue to exclude gay men and lesbians from the confines of the legally-defined family and thus superordinate heterosexuality.

In the 1971 Minnesota case *Baker v. Nelson*,[88] a gay couple filed a mandamus proceeding for a marriage license. Petitioners contended that there was no express statutory prohibition against same-sex marriage in Minnesota law. The court responded that the statute employs the term

83. Halley, *supra* note 14, at 1767.

84. *Id.* at 1770.

85. For many gay and lesbian civil rights activists and litigators, *Hardwick* seemed to sound a death knell for the struggle for sexual equality. However, the 1996 Supreme Court decision *Romer v. Evans*, which voided a Colorado referendum denying gay men and lesbians access to a variety of political rights, suggests that the Court may be amenable to future civil rights claims. Romer v. Evans, 517 U.S. 620 (1996). While *Romer* may be utilized at some point by the Supreme Court to overturn *Hardwick*, or to grant gay men and lesbians the right to marriage, at this point the effect of the *Romer* decision on a variety of gay and lesbian legal issues is uncertain.

86. The trial judge in *Loving* wrote in his opinion, "Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangements there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Loving*, 388 U.S. at 3.

87. Every state in the United States refuses to give same-sex partners marriage certificates. However, religious marriage is not regulated by the government, thus many gay and lesbian couples have been married by religious officiants, or have been joined in religious or non-religious commitment ceremonies.

88. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

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"marriage" according to common usage, "meaning the state of union between persons of the opposite sex."[89] The couple also asserted that if "marriage" was determined to apply only to members of the opposite sex, then the law is unconstitutional because it denies Due Process and Equal Protection. The Supreme Court of Minnesota denied this second claim, citing to United States Supreme Court right to privacy cases to advance the position that "the institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[90] The court dismissed the petitioner's analogy to *Loving*: "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[91] While acknowledging that anti-miscegenation laws were invalid due to invidious racial discrimination, the court refused to recognize that bans on same-sex marriage are also rooted in discrimination on the basis of identity. The Justices of the Supreme Court of Minnesota continued the tradition of legal ostracization of gay and lesbian relationships and reconfirmed the privilege in heterosexual identity.

Two years later, the Kentucky Court of Appeals heard the case *Jones v. Hallahan*[92] in which a lesbian couple applied for a marriage license. Since there was no explicit definition of marriage in the Kentucky statute, the court cited three dictionary definitions of marriage. Satisfied with the dictionaries' consensus that marriage is between members of the opposite sex, the court stated: "It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into marriage as that term is defined."[93] In deferring to dictionaries, the court ignored the law's role in perpetuating cultural definitions of social institutions, thereby contributing to the exclusion of gay and lesbian identity from the construct of family. This exclusion predicates the conferral of privileges associated with being a family in American society on being heterosexual.

In *Singer v. Hara*,[94] a gay couple in Washington asserted several challenges to the denial of a marriage license: first, the Washington statute did not prohibit same-sex marriage; second, the lower court order denying the license violated the state's Equal Rights Amendment (ERA); and third, the court order violated the Eighth, Ninth, and Fourteenth Amendments of the United States Constitution. In response to appellants' first claim, the

89. *Id.* at 186.
90. *Id.*
91. *Id.* at 187.
92. Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).
93. *Jones*, 501 S.W.2d at 589.
94. Singer v. Hara, 522 P.2d 1187 (Wash. 1974).

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court concluded that the term "persons" in the Washington marriage statute was intended by the legislature to refer to a male and a female.[95] Denying their second claim that the statute violated the ERA, the court insisted that the state's decision not to issue a license to appellants was not based upon their gender but rather on the societal view that marriage is the "appropriate and desirable forum for procreation and the rearing of children."[96] With respect to appellants' final claim, the court only considered the Fourteenth Amendment Equal Protection argument. The court dismissed the claim on the basis that "marriage is so clearly related to the public in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage law to the legal union of one man and one woman."[97] Even though the court admitted that the law does not require heterosexual married couples to have children, the decision still resurrected the rationale that same-sex sexuality threatens procreation to maintain a heterosexual definition of marriage.

The 1993 Hawaii Supreme Court decision in *Baehr v. Lewin* suggested that the judicial tradition of denying gay marriage rights may be eroding.[98] The *Baehr* plaintiffs alleged that Hawaii's marriage statute denied them the right to privacy and Equal Protection. After denying the right to privacy claim, the court applied an Equal Protection analysis and concluded that under Hawaii's Equal Rights Amendment (which, unlike federal constitutional law, defines gender as a suspect category), the denial of the marriage license discriminates on the basis of sex. Strict scrutiny must therefore be applied to determine whether the state has a compelling state interest that is narrowly tailored to justify the classification by sex. In its application of Equal Protection doctrine, the court used *Loving* to demonstrate the problems with the circular reasoning of *Jones*:

> Analogously to Lewin's argument [that by definition, marriage denotes a relationship between a man and a woman] and the rationale of the *Jones* court, the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the 'custom' of the state to recognize mixed marriages, marriages 'always' having been construed to presuppose a different configuration . . . as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.[99]

95. *Singer*, 522 P.2d at 1189.
96. *Id.* at 1195.
97. *Id.* at 1197.
98. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
99. *Baehr*, 852 P.2d at 63.

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The Hawaii Supreme Court recognized that the definition of "marriage" is not timeless and fixed, but rather that it evolves with fluctuations in social structure and cultural values. The language in *Baehr* gave advocates hope that, following in the tradition of *Loving*, courts would ignite a revolution in the law's treatment of gay and lesbian marriage and of sexual minorities in general.

The outcome of *Baehr* is not yet determined; the Hawaii Supreme Court remanded the case to the lower courts to apply strict scrutiny analysis to the statute.[100] The trial court found that the state had failed to meet the strict scrutiny test, and the case was again appealed to the Hawaii Supreme Court.[101] However, several recent legal developments have made it unlikely that same-sex marriage will be legal in Hawaii or any other state in the near future. In response to the pending decision in *Baehr*, Congress passed the Defense of Marriage Act, which was signed into law by President Clinton.[102] The Act establishes a federal definition of marriage as "the legal union between one man and one woman" and allows the federal government and each state to deny legal recognition of gay/lesbian marriages. In addition, thirty states have enacted anti-gay marriage laws since 1995.[103] The state anti-marriage laws provide that if a gay/lesbian couple is married in another state, they can be denied marital status when they return to their home state. These laws mirror the anti-miscegenation provisions that prosecuted couples like the Lovings for leaving their state of residence in order to get married.

Most recently, on November 4th, 1998 Hawaii voters passed a referendum by sixty-nine percent, amending the state constitution to empower the state legislature to reserve marriage for opposite-sex couples.[104] This action will likely lead to a legislative ban on same-sex marriage in Hawaii and determine the outcome in the *Baehr* case. Taken together, the various anti-gay marriage measures indicate that despite the promise of *Baehr*, strong elements of society are not willing to reshape their construction of marriage and are invested in a depiction of same-sex sexuality as separate and in conflict with the concept of family.

PART II: PROPERTY IN WHITENESS AND HETEROSEXUALITY

In his article entitled *Re-reading Property*, Joseph Singer challenges legal scholars to re-examine the concept of property by centralizing issues, such as gender and race, which have traditionally been conceptualized as

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100. *Id.* at 68.

101. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996)

102. 28 U.S.C. § 1738c (1996).

103. National Gay and Lesbian Task Force, *Anti Same Sex Marriage Laws in the U.S.* (last modified Dec. 1998) <http://www.ngltf.org/downloads/marriage1298.gif>.

104. National Gay and Lesbian Task Force, *Decision '98* (last modified Nov. 4, 1998) <http:\\www.ngltf.org/vote98.html>.

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peripheral to studies of property.[105] Singer suggests that if we would shift our focus, we would begin to question our old definitions of property and identify new forms of property. While property is often defined as "legal relations among persons with respect to things," this definition of property does not adequately describe the range of interests that are protected as property in society, including stocks, partnerships, patents, and—in the realm of the family—rights in unmatured pension funds, enhanced earning potential generated by graduate degrees, and business goodwill.[106] By diverting our attention away from these and other less tangible forms of property, the conception of property as "things" obscures the social contexts (i.e., race, gender, etc.) in which the law distributes wealth and poverty and conceals the ways in which the legal rules in force contribute to both gender and racial inequality.[107]

In the spirit of Singer's challenge, I adopt an expansive definition of property, one that moves beyond the common language understanding of property as the ownership of tangible things to an assessment of the allocation of social and economic privilege among individuals of different racial and sexual groups. The notion of "property" is used as an analytical tool to concretize the wide range of privileges exercised by those who fall into dominant identity categories, specifically white and heterosexual. Deploying the rhetoric of property, I aim to convey the depth of privilege that is allocated along racial and sexual-orientation fault lines that have been created and reinforced by laws regulating sexuality.

In addition, I use the notion of property to focus my analysis of inequality on those accorded privilege rather than on those oppressed by the dominant culture. Traditional investigations of social hierarchies tend to focus on the harms suffered by those who are disadvantaged by their identity markers. While this method is effective, it also diverts attention away from those who are privileged by the system, permitting them to pretend that social issues like racism and homophobia do not affect their lives. By inverting our current analysis of race and sexual orientation and illuminating the advantages accorded to those in dominant groups, both privileged and unprivileged individuals can better understand the manner in which the law distributes benefits and burdens on the basis of identity and how this distribution impacts all of our lives.

In her article *Whiteness as Property*, Cheryl Harris presents the notion that whiteness is a form of property.[108] This form of property originated in the conflation of race and property during slavery. While there were free blacks, the predominant categorization in the South before the Civil War

105. Joseph William Singer, *Re-reading Property*, 26 NEW ENG. L. REV. 711, 712 (1992).
106. *Id.* at 722-723.
107. *Id.* at 723.
108. Harris, *supra* note 10, at 1715-1724.

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was black as slave and white as free. Despite the abolition of slavery after the War, the legacy of this association of race and rights remained entrenched in American law and society, and was perpetuated by anti-miscegenation laws and other laws promoting racial segregation. Harris asserts that the historic economic and social subordination of blacks during and after slavery gave rise to a property interest in being white.[109] In this section, I explore the property in whiteness and demonstrate the role of anti-miscegenation laws in distributing property to whites. I apply my analysis of property in whiteness to sexual orientation to demonstrate the existence of a property in heterosexuality and to illustrate how legal regulations on sexuality create and perpetuate this form of property.

In this section, I dissect the properties in whiteness and heterosexuality by examining three property sub-rights: the right to actual property (i.e., wealth, land and objects); legal rights as property; and the property right in personhood. I propose that legally sponsored racial and sexual-orientation categorization have facilitated the accumulation of these property rights in whites and heterosexuals. Thus, the association of whiteness and heterosexuality with access to these three types of property converts both whiteness and heterosexuality into forms of property.

A. *Actual Property*

One of the elements of property in whiteness and heterosexuality is the traditional access to wealth and things. Both anti-miscegenation laws and laws regulating same-sex sexuality have contributed to the appropriation of actual property by whites and heterosexuals.

1. *Actual Property and Race*

In the South during and after slavery, race was an important determinant in the allocation of actual property—i.e., most wealth and land was concentrated in the hands of whites while most blacks did not have access to property. Slaves were, in many cases, unable to own property due both to their legal status and lack of a wage.[110] Anti-miscegenation laws, by maintaining the fiction of racial difference and hierarchy, justified a legal and economic system that reserved property ownership mainly for those who were considered white by the law.

After slavery, despite the expectation of many freed slaves that they would be allocated pieces of former slave owners' land, the government refused to redistribute the land, and white property interests were protected. Early in the post-war period, freed blacks heard reports that they

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109. *Id.*

110. Loren Schweninger, Black Property Owners in the South 1790-1915 30 (1990).

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would receive "forty acres and a mule."[111] These hopes were squelched when white plantation owners refused to abdicate their property rights and the state endorsed their property interests.[112] By re-affirming white property ownership and denying blacks access to the acquisition of land, the government incorporated the pre-Civil War relationship between race and property into the post-slavery economic system. The residue of this decision remains in American society today.

Private discrimination along with a variety of state policies have continued to alienate black Americans from economic advancement. While the federal government propagated policies supporting the growth of suburbs during the 1930s-1960s, federal loan programs refused to subsidize the development of communities of color in cities and surrounding areas.[113] Insurance redlining by banks continues today to keep investment out of black neighborhoods.[114] The Social Security Act excluded many black Americans from insurance programs by excluding agricultural and domestic workers, foreclosing this opportunity to save and amass wealth.[115] Despite the passage of Title VII of the Civil Rights Act of 1964[116] and the implementation of some affirmative action policies, employment discrimination continues to bar black Americans from attaining higher salaried jobs. Housing discrimination, which persists notwithstanding the passage of the Fair Housing Act[117] and other non-discrimination laws, keeps black Americans from purchasing real estate in predominantly white neighborhoods where property values are higher, while limiting the property values of predominantly black neighborhoods.[118] These are only a few examples of the ways in which the current economic system continues to consolidate wealth in the hands of whites despite the supposed end of legal segregation.

Statistics about current black and white wealth reveal the consequences of centuries of private and state-sponsored racism. The 1988 Results from the Survey of Income and Program Participation demonstrate that for every dollar earned by white households, black households earned sixty-two cents.[119] The same study announces that whites possessed nearly twelve times as much median net worth as blacks, or $43,800 versus

111. LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 399-401 (1979).

112. *Id.* at 402-03.

113. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 16-17 (1995).

114. *Id.* at 19. Oliver and Shapiro cite a 1991 Federal Reserve Study which demonstrates that commercial banks reject black applicants for mortgages twice as often as whites.

115. *Id.* at 38.

116. Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (1994)

117. Fair Housing Act of 1968, 42 U.S.C. § 3601-3619 (1976 & Supp. IV 1981).

118. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 687-90 (3d ed. 1992).

119. OLIVER & SHAPIRO, *supra* note 113, at 86.

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$3,700.[120] These gaps in wealth confirm that the legacy of slavery and institutionalized racism have succeeded in consolidating actual property in the hands of whites. The unequal distribution of wealth along racial lines has contributed to the creation of property in being white.

2. *Actual Property and Sexual Orientation*

While gay men and lesbians as a group have been denied access to actual property under different conditions than black Americans, the current ban on gay and lesbian marriage echoes the various forms of de jure segregation that kept (and continue to keep) black Americans from accruing wealth. The *Baehr* decision lists a number of the rights and benefits that, under Hawaii law, gay and lesbian couples are derivatively denied due to their exclusion from marriage: state income tax advantages (which could include the ability to file joint tax returns, the right to claim dependency deductions and statuses, and the right to claim estate and gift tax benefits[121]); control, division, acquisition and disposition of community property; inheritance rights; award of child custody and support payments following divorce proceedings; the right to spousal support; the right to enter pre-marital agreements; and the right to bring a wrongful death action.[122] Other economic privileges enjoyed by heterosexual married couples include access to spousal health insurance and housing for married couples.[123] By prohibiting gay and lesbian marriage, the state is effectively denying gay men and lesbians equal access to the property they could be accumulating had they received the same treatment as heterosexual married couples.[124] The significant ramifications of de jure racial discrimination should remind legislators of the long term inequality that results when the state facilitates the unequal distribution of wealth through the law.

B. *Legal Rights as Property*

Under classical property theory, property included not only external objects, but also all of the human rights, liberties, powers, and immunities that are important for human well-being, including freedom of expression, freedom of conscience, freedom from bodily harm, and free opportunity to use one's intelligence and talents.[125] James Madison described property as follows:

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120. *Id.*

121. *See* Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of our Hopes and Troubles in the Nineties*, 1 LAW AND SEXUALITY 63, 86 (1991).

122. *Baehr*, 852 P.2d at 59.

123. Dunlap, *supra* note 121, at 86.

124. Some would argue that heterosexual unmarried couples also do not have access to these legal privileges. However, the fact that heterosexual couples have the option to marry distinguishes them from same-sex couples.

125. Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128-29 (1990).

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> [Property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. . . . a man has property in his opinions and the free communication of them . . . . He has a property very dear to him in the safety and liberty of his person . . . . He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.[126]

As Cheryl Harris argues, whiteness looks like property if one adopts a broader view of property as encompassing legal rights.[127]

1. Legal Rights as Property and Race

Clearly, under slavery blacks were denied almost all of the rights and liberties listed above. Slaves were not permitted to travel without permits, own weapons, own property, or assemble publicly, and were denied access to education.[128] During slavery, whiteness, which determined free status, denoted access to the full range of legal rights and liberties.

Even after slavery was abolished, black Americans were subject to legal segregation and were denied many personal rights. Black Americans' ability to exercise their right to free speech, their right to vote, their right to travel, and other rights were drastically curtailed by the threat of white violence.[129] Legal segregation and the absence of protection against discrimination severely limited educational and employment opportunities. Further, anti-miscegenation laws denied black Americans their property right in choice of marriage partner. Anti-miscegenation laws also provided the racial categories by which legislators could provide or deny the property of other legal rights. Thus, anti-miscegenation laws fostered a property in whiteness by facilitating the allocation of legal rights and liberties only to whites.

2. Legal Rights as Property and Sexual Orientation

As with black Americans, the economic benefits provided to heterosexual married couples do not adequately cover the range of privilege afforded by the law to individuals who identify as heterosexual. To really understand the depth of heterosexual privilege, one must look beyond the conferral of tax benefits and inheritance rights to the panoply of legal rights and liberties denied to gay men and lesbians. Joseph Singer has described

126. James Madison, *Property*, *in* 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., 1906).
127. Harris, *supra* note 10, at 1725-26.
128. HIGGINBOTHAM, *supra* note 18, at 39-40.
129. BELL, *supra* note 118, at 40; LITWACK, *supra* note 111, at 276-77.

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"property rights" as both protection from interference by the state (a negative right) and, conversely, as the ability to call upon the state to enforce one's rights (a positive right).[130] Negative property rights can be described as "freedom from" rights. For example, a land owner may be free to choose to pursue a variety of uses of her land without the state dictating a certain use (as long as the use does not create a nuisance). Positive property rights are "freedom to" rights, e.g., the same land owner may also turn to the police or the courts to evict a trespasser invading her land. Both are property rights associated with owning the plot of land. The legal rights conferred by heterosexuality can also be analyzed as both negative and positive property rights.[131]

a) Negative Property Rights

In the realm of negative property rights, heterosexuals are afforded both privacy and autonomy by the law, which insulate them from state interference. The heterosexual right to privacy has been developed in Supreme Court jurisprudence. While this right to privacy is not enumerated in the Constitution, beginning with *Griswold v. Connecticut* in 1965, the Court recognized a right to privacy which emanates from various Constitutional amendments. The right to privacy has protected individual rights in the areas of child rearing,[132] marriage,[133] contraception,[134] and abortion.[135] This list demonstrates that privacy protection is limited to family and marriage decisions. Since the law almost always assumes that a family is heterosexual, it is not surprising that the right to privacy was specifically denied to gay men and lesbians in the *Hardwick* decision. While Justice Blackmun in his dissent from the *Hardwick* decision contended that

130. Singer, *supra* note 105, at 3.

131. I chose not to use negative/positive property rights analysis to explore anti-miscegenation laws since my investigation of black Americans' legal rights is presented as an analogy to the denial of legal rights to gay men and lesbians. However, this analysis could be applied to the range of property rights denied to blacks by anti-miscegenation laws functioning in concert with other segregationist laws.

132. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (affirming the right of parents to educate their children in parochial rather than public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that due process liberty includes the right to establish a home and raise children).

133. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that state could not deny marriage license to those who failed to comply with child support payments because restriction impermissibly burdened the right to marry).

134. *See* Griswold v. Connecticut 381 U.S. 479 (1965) (holding that statute which prohibits married couples from using contraception violates the right to privacy); Eisenstadt v. Baird 405 U.S. 438 (1972) (extending right to procreative decision-making to unmarried couples).

135. *See* Roe v. Wade 410 U.S. 113 (1973) (holding that a woman has a fundamental right to obtain an abortion in first trimester).

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the case should have been about "the right to be left alone" for all individuals, the Court did not choose to extend the right to privacy to all sexual contacts.[136]

Kenneth Karst analyzes Supreme Court jurisprudence on the constitutional right to privacy, which he terms the "freedom of intimate association."[137] Karst catalogues many of the potential values in intimate association such as companionship, caring and commitment, intimacy, and self-identification.[138] While gay men and lesbians forge intimate relationships despite the potential for state interference, Karst argues that the above values cannot be fully appreciated without the complete freedom of choice to enter and leave relationships.[139] This choice is assured through the "freedom of intimate association" (or right to privacy). In defining the right to privacy within exclusively heterosexual social institutions, the law attaches privacy to heterosexuality, and denies gay men and lesbians the opportunities to create intimate relationships without fear of state intrusion.

Heterosexuals are also granted a right to autonomy denied to gay men and lesbians. As with the right to privacy, heterosexual couples are free in many circumstances to order their personal lives without the fear of interference by the state. But in the same circumstances, gay and lesbian couples are subject to significant invasion by state officials. In the 1992 case *In re Guardianship of Sharon Kowalski*, the Minnesota Court of Appeals navigated a family dispute over the legal guardianship of a woman who had suffered severe brain injuries due to an auto accident.[140] At the time of the accident, Sharon had lived with her lesbian partner, Karen Thompson, for four years, and the couple had exchanged rings. After the accident, both Karen and Sharon's father petitioned for guardianship, and the court assigned guardianship to the father. Subsequently, Sharon's father received a court order which terminated Karen's visitation rights (they were later reinstated when doctors examined Sharon and determined that she wanted to see her partner). Three years later, the father informed the court that he had to relinquish guardianship. Karen filed a petition to be a successor guardian, but the trial court assigned guardianship instead to a friend of Sharon's family (who had not even filed for guardianship). While the Minnesota Court of Appeals reversed the trial court appointment and recognized the lesbian couple as a "family of affinity,"[141] the case demonstrates the extent to which gay and lesbian couples' attempts to create their own families are vulnerable to state intervention. Had the couple been

136. *Hardwick*, 478 U.S. at 199.
137. Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).
138. *Id.* at 629-37.
139. *Id.* at 637.
140. *In re* Guardianship of Sharon Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991).
141. *In re Guardianship of Kowalski*, 478 N.W.2d at 797.

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heterosexual and married, the court would have deferred to their relationship and would have presumed that the spouse would act as guardian. Instead, Karen Thompson had to undergo eight years of protracted litigation to get the court to allow her to care for her disabled partner. Gay men and lesbians are denied the negative property right to arrange their affairs without the intrusive intervention of the legal system; hence, this negative property right is reserved for those who engage in heterosexual relationships accepted by the state.

b) Positive Property Rights

Property rights can also be conceived as the ability to call upon the state to enforce legal rights. Some scholars define property as the continued expectation that the law will intervene on your behalf: "I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me."[142] Under this theory of property, there are various positive property rights reserved only for heterosexuals. One example is federal anti-discrimination employment law. While federal law includes civil rights and remedies for employment discrimination on the basis of race, religion, sex, age, hardship, and national origin, if gay men or lesbians are the victims of discrimination on the basis of their sexual orientation in the workplace, they do not have access to federal remedies.[143]

When marital relationships deteriorate, couples are often forced to invite the state to resolve their dispute. This is particularly problematic for gay men and lesbians when the law does not acknowledge their original relationship. The case of *Alison D. v. Virginia M.* poignantly manifests this difficulty.[144] Petitioner and respondent had been lovers for three years when they decided to have a child together. Virginia was artificially inseminated and gave birth to a boy. The couple brought the child up together for several years until their relationship deteriorated and Alison moved out. Alison had maintained visitation until Virginia terminated all contact between Alison and the child. Alison filed suit for visitation. The New York Court of Appeals refused Alison visitation rights because it did not consider her a parent. The court began its opinion, "At issue in this case is whether petitioner, *a biological stranger to a child who is properly in the custody of his biological mother*, has standing to seek visitation with the child."[145] The court denied that Alison could be deemed a "parent" under the current interpretation of New York Domestic Relations Law, and the

142. JEREMY BENTHAM, THE THEORY OF LEGISLATION 112 (C.K. Ogden ed., 1931).

143. *See* Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (1994). While the *Romer* decision has moved the law towards protecting gay men and lesbians from discrimination, the decision does not prohibit discrimination on the basis of sexual preference.

144. Alison D. v. Virginia M., 572 N.E.2d 27 (1991).

145. *Alison D.*, 572 N.E.2d at 28 (emphasis added).

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court declined to expand its notion of "parent" because it said that to award visitation to a "third party" would impair the rights of "parents."[146] Despite the fact that Alison and Virginia planned together for the conception and birth of the child and agreed to share in all the responsibilities of child raising, the court relied on static interpretations of New York law which elevate the rights of biological parents above those without biological ties to the child.[147] *Alison D.* warns gay and lesbian couples and parents that they cannot rely on the state to aid them in their intimate disputes because the law will not acknowledge and enforce gay and lesbian family rights.

The 1989 New York Court of Appeals case *Braschi v. Stahl Associates* provides an example of the movement among some courts towards recognizing gay and lesbian families and upholding their legal rights.[148] In *Braschi* the court intervened in a landlord-tenant dispute and protected a gay man's right to his deceased lover's rent-controlled apartment. The court defined family not in terms of "fictitious legal distinctions or genetic history" but rather on "the reality of family life."[149] It concluded that family includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."[150] While in *Braschi* a gay man was able to call upon the law to enforce his property rights, the case is unusual. Our awe of *Braschi* reminds us that most courts will not be as friendly to gay men's and lesbians' legal claims. Had either of the petitioners in *Alison D.* or *Braschi* been heterosexual, the law would not have questioned their familial status and would have unflinchingly supported their rights as a parent and a tenant. As the law denies both negative and positive property rights to gay men and lesbians, it creates a property value in being heterosexual.

C. *Personhood Property*

Margaret Radin's article *Property and Personhood* postulates that certain property is connected to one's personhood, and that property rights should be assessed according to their personal value.[151] I posit that Radin's

146. *Id.* at 29.

147. *Id.* The court relies on Ronald FF. v. Cindy GG, 511 N.E.2d 75 (N.Y. 1987), for the proposition that biological parents have the right to care and custody of the child even if other non-biological parents have exercised some control over the child with the biological parents' consent. Several gay and lesbian advocates have argued for a functional definition of parenthood which would analyze the "best interests of the child" standard in custody and visitation to include those adults outside of the biological parents with whom the child has developed a parental bond. *See* 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).

148. Braschi v. Stahl Associates Co., 543 N.E.2d 49 (N.Y. 1989).

149. *Braschi*, 543 N.E.2d at 53.

150. *Id.* at 54.

151. Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

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theory should be expanded to include personhood itself as property, perhaps the most valuable property held by an individual. Anti-miscegenation laws and laws regulating same-sex sexuality, in elevating whiteness and heterosexuality, allocate personhood property on the basis of race and sexual orientation, and thus contribute to the production of whiteness and heterosexuality as property.

Radin's premise is that "to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment."[152] She contends that external resources should be evaluated along a spectrum, with property more integral to our personhood (such as a wedding ring) as more valuable, and fungible property (such as money) as less valuable.[153] Radin argues that the personal quality of property should be used to distinguish among and weigh claims to property.[154]

Radin does not offer a full explanation of "personhood" in her article, instead relying on the reader's intuitive sense of the term. While there are certain elements of "personhood" which should be left to intuition, a non-exclusive list of the characteristics of "personhood" as referred to in this article may be helpful. "Personhood" is the sense of being an individual. It encompasses self-development, dignity, and humanity. Personhood is developed through introspection, relationships with others, and through one's interactions with the state. Within Radin's analysis, a wedding ring has personhood value because it symbolizes an intimate relationship between two people and reminds the wearer of how his/her life is enriched by the relationship. This article is focused particularly on how aspects of one's personhood can be stolen by institutionalized racial and sexual oppression.

Radin's analysis suggests, but falls short of proposing, that personhood itself is property. Rather than rooting personhood in the ownership of property (which certainly is an important part of the theory of whiteness/heterosexuality as property), Radin's thesis should be extended to assert that personhood can be decoupled from ownership of actual property. In order to fully recognize the privileges afforded whites and heterosexuals by the state, one must look beyond property that is personal and acknowledge personhood itself as a form of property.

Radin focuses almost all of her attention on tangible objects. However, in her application of personhood property theory to welfare rights she indicates that intangible property rights can be measured on her scale. Radin suggests that welfare theorists use her personhood schema to argue that certain intangible interests, such as free speech, employment, and health care should be valued more highly than other possible entitlements.[155] This

152. *Id.* at 957 (emphasis in original).
153. *Id.* at 986.
154. *Id.* at 1014-15.
155. *Id.* at 989.

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assertion effectively maintains that there are certain elements of personhood (such as self-expression through speech) that can be considered property. In addition, the extremes on Radin's continuum of property value are "personhood" and "fungibility," implying that personhood is the most valued form of property.

1. Personhood Property and Race

During slavery, each individual's status as a person (i.e., their personhood property) was allocated or denied on the basis of race. The conflation of white with free and black with slave can also be translated as white as "person" and black as "property." During slavery, black slaves were treated as property that could be transferred, assigned, inherited, or posted as collateral.[156] Conversely, only whites were accorded with the status of "person" under the law. For example, the Representation Clause of the Constitution counted slaves as three-fifths a person for the purposes of congressional apportionment and taxes, a clear statement that the law did not consider slaves full people.[157] Thus "blackness" connoted the absence of legal rights and liberties and the designation as "property," whereas "whiteness" connoted access to legal protections and the status of "person."

The collapsing of whiteness and the privilege of being a person gave rise to a new form of property—personhood property in whiteness. Under a system which propertized blacks, whiteness became a shield from commodification—protection from the denial of personhood.[158] To have the label "white" in colonial and Reconstruction society meant that one was guaranteed the legal status of "person" rather than "property." Harris writes:

> Because whites could not be enslaved or held as slaves, the racial line between white and Black was extremely critical; it became a line of protection and demarcation from potential threat of commodification, and it determined the allocation of benefits and burdens of this form of property . . . . Slavery as a system of property facilitated the merger of white identity and property . . . . Whiteness was the characteristic, the attribute, the property of free human beings.[159]

Anti-miscegenation laws were pivotal in creating the personhood property of whiteness. State allocation of personhood property on the basis of race is dependent on rigid definitions of black and white. The white shield from dehumanization was a "highly volatile and unstable form of

156. HIGGINBOTHAM, *supra* note 18, at 52.
157. U.S. CONST. art. I, § 2, cl. 3.
158. Harris, *supra* note 10, at 1720.
159. *Id.* at 1720-21.

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property"[160] because it was dependent on the determination via anti-miscegenation laws and racial categorization laws that an individual was "white." By solidifying racial lines, anti-miscegenation laws and fractional blood count laws provided the mechanism whereby the state could identify those it believed should be given the property of personhood.

The link between personhood property and whiteness has persisted since the abolition of slavery. After the Civil War, anti-miscegenation laws and other laws legalizing racial segregation maintained white supremacy and thus continued to reinforce the personhood property in whiteness. For example, laws which inhibited blacks' right to vote (i.e., literacy tests, property qualifications, and poll taxes) reserved full citizenship for whites even after suffrage was guaranteed by the Fifteenth Amendment in 1870.

Patricia Williams has applied personhood property theory to explain the dehumanization of blacks after the Civil War. She writes:

> Blacks went from being owned by others to having everything around them owned by others. In a civilization that values private property above all else, this means a devaluation of person, a removal of blacks not just from the market but from the pseudo-spiritual cycle of psychic and civil communion . . . this limbo of disownedness keeps blacks beyond the pale of those who are entitled to receive the survival gifts of commerce, the life, liberty, and happiness whose fruits our culture locates in the marketplace.[161]

Williams exposes the importance of ownership of actual property for the development of personhood in a capitalist society. While blacks were no longer treated as property after slavery, by denying access to actual property, the state continued to withhold the property of personhood. Thus whiteness remained associated with personhood property.

This identity-based property is still prevalent in today's racial structure. While the elimination of slavery legally assigned blacks the status of "person," black Americans and other people of color are still denied full personhood. One legacy of slavery and legal segregation is that American culture is organized around a white identity. The American psyche conceives of the "self" as white, and blacks (and other people of color) as "other." This construction effectively denies blacks their personhood property by reducing them to their racial marker. Frantz Fanon communicates this process of reduction through a white person's remarks:

> 'Oh, I want you to meet my black friend . . . Aime Cesaire, a black man and a university graduate . . . Marian Anderson, the finest of Negro singers . . . Dr. Cobb, who invented white blood, is a Negro . . . Here, say hello to my friend from Martinique (be careful, he's extremely sensitive) . . . .'

160. *Id.* at 1720.
161. WILLIAMS, *supra* note 12, at 71.

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> Shame. Shame and self-contempt. Nausea. When people like me, they tell me it is in spite of my colour. When they dislike me, they point out that it is not because of my colour. Either way, I am locked into the infernal cycle.[162]

Fanon's confession reveals the devastating effects of being denied personhood by a white society. He describes his consciousness of his body in the white world as a "negating activity. It is a third-person consciousness."[163] Fanon is alienated from his own body, and thus from his personhood, because he sees the obliteration of his self in a white man's eyes. In a culture where only whites are afforded the luxury of racial neutrality, whiteness confers the property right to be treated and to feel oneself as an individual rather than as a racial stereotype.

2. *Personhood Property and Sexual Orientation*

Just as personhood property in whiteness was perpetuated by anti-miscegenation laws, personhood property in heterosexuality is generated by the state's prohibition and criminalization of same-sex intimate relationships. Beyond the legal rights that are denied to gay men and lesbians by the law when they are excluded from the family construct, the state withholds an intangible property right to personal dignity from gay men and lesbians because of their sexual identity. In the context of race, anti-miscegenation laws functioned within the social, economic, and political exploitation of black Americans to perpetuate the fiction of white supremacy and to deny blacks personhood. While gay and lesbian identity developed under different social conditions, both people of color and gay men and lesbians have been outcast from mainstream American society because of their identities. State sponsored ostracism denies both people of color and gay men and lesbians a property right in personhood.

In the context of sexuality, the personhood property inherent in heterosexuality is derived from the dignitary value of being legitimate in the eyes of the state. The most significant marker of state legitimation of an intimate relationship is marriage. Marriage is a symbol of state approval of one's relationship.[164] Despite the fact that a gay couple can find companionship and can gather legal rights and obligations to approximate marriage, many gay and lesbian activists have continued to demand the right to marry for its symbolic value. Karst explains the importance of gay marriage:

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162. FRANTZ FANON, BLACK SKIN, WHITE MASKS 77-99 (1952), *reprinted in* ANATOMY OF RACISM at 108, 112 (David Theo Goldberg ed., 1990). While Fanon grew up in Martinique and writes of racism in Europe, I believe his writing reflects experiences of racism in the United States.

163. *Id.* at 109.

164. Harlon Dalton, *Reflections on the Gay and Lesbian Marriage Debate*, 1 LAW AND SEXUALITY 1,7 (1991).

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> What homosexuals lack is a formalized legal status that recognizes their union and commitment. Such a status would mean not only that they would have the same opportunity as heterosexual couples to make the public self-identifying statements implicit in marriage, but also that the state recognized their status as an acceptable one in society rather than one deserving of stigma.[165]

While some activists assert that gay men and lesbians do not need state approval and are better off without state involvement in their intimate affairs,[166] most would agree with Mary Dunlap that "the absence of the option of marriage is at the heart of how the legal system destabilizes lesbian and gay intimacy, keeping it sleazy(-looking) and keeping lesbian and gay people alienated and distrustful."[167] In light of the importance of intimate relationships in every individual's personal development and well-being, the withholding of the right to marry is indicative of the state's larger project to deny gay men and lesbians their "humanity."

One extraordinary Surrogate Court judge in New York County recognized the importance of state affirmation in *In re Adoption of Evan*.[168] The court granted a lesbian mother's application to adopt the child she had reared with her partner (who had been artificially inseminated and had

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165. Karst, *supra* note 137, at 684.

166. Several gay and lesbian activists have voiced their concerns about devoting resources to expanding marriage boundaries. One line of argument insists that marriage has historically served to oppress women and that the institution of marriage cannot be extricated from its "patriarchal essence." *See* Dunlap, *supra* note 121, at 63. *See also* Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, 6 OUT/LOOK, NATIONAL LESBIAN AND GAY QUARTERLY 9, 14 (1989). A second critique of gay and lesbian marriage proposes that marriage laws are inherently divisive, no matter who comes under the blessings of the state. Dunlap, *supra* note 121, at 78. Even if some gay men and lesbians are "allowed" to attain the privilege of marriage, those who choose not to, or who cannot get married, are once again stigmatized. This reasoning derives from a larger critique of "rights" arguments which suggest that as long as people have the access to privilege or state recognition, equality can be realized. Opponents of rights arguments point out that historically rights-based victories have been co-opted by the American political system, and while rights claims can amend hierarchies of power (by expanding the number of individuals who have access to these rights) they can never overturn them.

The critiques mentioned above indicate the complexity of the movement for gay and lesbian marriage. However, given the present political landscape, creating a marriage choice for gay men and lesbians is worth pursuing. First, "de-heterosexualizing" marriage could destabilize the patriarchal core of the construct of marriage. *See* Nan Hunter, *Marriage Law, and Gender: A Feminist Inquiry*, 1 LAW AND SEXUALITY 9, 12 (1992). Thus the implications of gay and lesbian marriage could reach beyond expanding the choices and status of gay men and lesbians, and could potentially undermine the gender inequality in heterosexual marriage as well. Second, given our historical context, while it may be more desirable, it is not politically viable to argue that the state should withdraw from regulating intimate relationships altogether. While I am aware that gay and lesbian marriage will not erase sexual hierarchy, it is still critical to force our government officials to acknowledge their responsibility in perpetuating social inequality and in denying many men and women wealth, legal protections, and personhood.

167. Dunlap, *supra* note 121, at 83.

168. *In re* Adoption of Evan, 583 N.Y.S.2d 997 (1992).

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given birth to the child). The court understood that by acknowledging the petitioner, Diane, as a legal "parent," the child, Evan, would be afforded various benefits under the law. The opinion listed several economic benefits that Evan will enjoy, including the security of his entitlement to Diane's support, his ability to inherit from Diane, his eligibility for social security benefits if she becomes disabled or dies, and his access to participation in the medical and educational benefits provided by her employment.[169] Citing *Alison D.*, the court verified that should Evan's parents separate, he will be better able to retain his relationship with both women.[170] Most significantly, Surrogate Judge Preminger stated:

> perhaps even more crucial than the financial [benefits] . . . the adoption brings Evan the additional security conferred by formal recognition in an organized society. As he matures, his connection with two involved, loving parents will not be a relationship seen as outside the law, but one sustained by the ongoing, legal recognition of an approved, court ordered adoption.[171]

Judge Preminger recognized that denial of a status similar to heterosexual couples is not only harmful to gay and lesbian couples, but also forces their children to construct their personhood in the face of state disapprobation.

As with *Braschi* and *In re Guardianship of Kowalski*, *In re Adoption of Evan* provides hope that courts are responding to the changes in family structure and are finally razing the walls between gay and lesbian identity and the family. But *In the Matter of the Adoption of Evan* also demonstrates what has been withheld from gay men and lesbians for so long—the recognition by the state that one's choice of partner and efforts to create a family (and hence one's identity) are socially acceptable. Courts must be made aware that by withholding their sanction of gay and lesbian family life and deferring to antiquated definitions as if they were insurmountable truths, the law conditions personhood property on being heterosexual.

CONCLUSION

> We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life . . . . And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households . . . . The Court recognized in *Roberts* that the 'ability

169. *In re* Adoption of Evan, 583 N.Y.S.2d at 999.
170. *Id.*
171. *Id.*

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independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others.'[172]

Justice Blackmun, writing in dissent in *Bowers v. Hardwick*, like the Court in *Loving*, understood that intimate relationships are central to one's sense of self, and that self-definition is so integral to individual happiness that it demands legal protection. Our concept of who we are as people in society is significantly determined by our relationships with others, and specifically our relationships with those whom we love and are intimate with. As Karst recognized in his description of the freedom of intimate association, "It is an individual's intimate associations that give him his best chance to be seen (and thus to see himself) as a whole person."[173] For many years gay men and lesbians, like multi-racial couples before them, have built and sustained intimate associations and have constructed armor to protect their self-confidence from the hostility presented by the state and by a largely homophobic (and racist) society. These relationships will continue to be forged and will flourish no matter what laws are passed in national and state legislatures. But society cannot be assured that all individuals are free to explore the breadth of intimacies necessary for self-development until marriage bans and sodomy laws are eliminated. Despite the persistence of racism and the continuing prejudice toward interracial couples, *Loving* was a crucial decision, not only because it legalized interracial marriage, but because it laid the groundwork for a truly free space where interracial relationships can develop to their full potential. Legal restrictions of same-sex relationships deny many gay men and lesbians the opportunity for a full realization of personhood, and reserve this possibility for heterosexuals. Activists must convince judges, legislators, and voters that it is not only money or even legal rights that are at stake, but individuals' potential for loving relationships and for a full and deep sense of self-worth that is in jeopardy.

172. *Hardwick*, 478 U.S. 204-205 (Blackmun, J., dissenting) (*citing* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)).
173. Karst, *supra* note 137, at 635-636.

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