GREASING THE WHEEL: HOW THE CRIMINAL JUSTICE SYSTEM HURTS GAY, LESBIAN, BISEXUAL AND TRANSGENDERED PEOPLE AND WHY HATE CRIME LAWS WON'T SAVE THEM

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INTRODUCTION

On a cold night in October 1998, Russell Henderson and Aaron McKinney allegedly beat Matthew Shepard, a young, gay, white college student.[1] Shepard subsequently died from his injuries.[2] When prosecutors announced that they would seek the death penalty against Henderson and McKinney, the gay, lesbian, bisexual and transgendered (GLBT) community divided. Numerous GLBT individuals and organizations supported executing Henderson and McKinney. They suggested that only by putting Henderson and McKinney to death would Shepard's life as a gay man be recognized as valued. Other GLBT individuals and organizations were more reserved, arguing that the death penalty is not a "gay issue," and thus deferring to the prosecutor's judgment. Still other GLBT individuals and organizations voiced a firm stance not only against the death penalty for Henderson and McKinney but against the death penalty more generally, including eleven prominent GLBT organizations that released a joint statement against the death penalty.[3] In a survey conducted by a gay community web site, those surveyed were evenly divided over whether the death penalty was

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1. *Death Penalty Sought in Wyo.*, BOSTON GLOBE, Dec. 29, 1998, at A6.

2. *Id.*

3. The organizations that released the joint statement are: Astraea National Lesbian Action Foundation; Gay Men of African Descent; International Gay & Lesbian Human Rights Commission; Lambda Legal Defense and Education Fund; Lesbian & Gay Community Services Center of New York; Lesbian & Gay Rights Project—ACLU; LLEGO—National Latina/o LGBT Organization; National Center for Lesbian Rights; National Gay and Lesbian Task Force; New York City Gay & Lesbian Anti-Violence Project; and OutFront Minnesota. *More Gay Groups Oppose Death Penalty*, SEATTLE GAY NEWS ONLINE, February 21, 1999, *available at* http://www.sgn.org/Archives/sgn.2.21.99/shepard.htm.In the end, both Henderson and McKinney eventually accepted pleas, avoiding possible death sentences. Ken Hamblin, *Justice Prevails in Wyoming*, DENVER POST, Nov. 7, 1999, at 2H.

ever an appropriate punishment for a crime.[4] Responses were similarly split regarding whether the death penalty was appropriate in the specific cases of McKinney and Henderson.[5]

While the murder of Mathew Shepard split the GLBT community over death penalty issues, it also fueled an existing movement in the community to expand existing hate crime laws and to adopt new hate crime measures inclusive of sexual orientation.[6] Progressive, centrist, and conservative GLBT organizations that had taken different stances over the death penalty in the Shepard case unanimously called for sexual orientation-inclusive hate crime legislation in Wyoming. In 2000, GLBT voters ranked hate crime legislation as the most important issue to them personally and third most important to the GLBT community as a whole.[7] The GLBT movement has prioritized hate crime as a "gay issue."

While both liberal/left and conservative/centrist gay organizations consistently view hate crime as a "gay issue," they disagree as to whether the death

4. In responding to the statement, "I am opposed to the death penalty as punishment for any and all crimes", 34.0% of respondents strongly agreed, 12.1% agreed, 6.8% were unsure, 20.2% disagreed, and 26.8% strongly disagreed (956 respondents total). *The Data Lounge Crime and Punishment Survey*, *available at* http://www.datalounge.com/datalounge/surveys/record.html?record=4137 [hereinafter *Data Lounge Survey*]. There are no known scientific studies examining the attitudes of GLBT people toward the death penalty. The Data Lounge survey cited above involves a self-selected response by visitors to the website, which captures only those people who have leisurely access to the internet. National polls on the death penalty, which identify respondents by race, age and gender, do not inquire as to respondents' sexual orientation and/or gender identity. The visibility of certain organizations and certain members of the GLBT community may paint an inaccurate picture of the GLBT community's attitudes toward the death penalty. Specifically, the visibility of the Human Rights Campaign (HRC), the largest national GLBT organization, which argues that the death penalty is not a "gay issue," as well as cultural depictions in society of mostly white, wealthy, gay men—who would be more associated with the centrist or conservative positions—may suggest that the GLBT community is more monolithic than it actually is. A recent Gallup Poll notes that support for the death penalty is greater among men versus women and whites versus people of color. *Poll Releases: Support for the Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%,* GALLUP NEWS SERVICE, Feb. 24, 2000. Many members of the GLBT community who oppose the death penalty are people of color, women, poor or have other identities that keep them marginalized within the GLBT community.

5. Of 959 respondents presented with the statement "Aaron McKinney deserves the death penalty," 27.5% strongly agreed, 18.9% agreed, 10.7% were unsure, 15.1% disagreed and 27.7% strongly disagreed. Of 956 respondents presented with the statement "Russell Henderson deserves the death penalty," 23.6% strongly agreed, 18.1% agreed, 13.6% were unsure, 16.9% disagreed and 27.7% strongly disagreed. *Data Lounge Crime and Punishment Survey*, *supra* note 4.

6. While hate crime measures can include protections for transgendered individuals, few hate crime laws to date include gender identity. As of March 2002, only four states—California, Minnesota, Missouri and Vermont—and the District of Columbia had enacted hate crimes laws which included gender identity. *See Does Your State's Hate Crimes Law Include Sexual Orientation?*, HUMAN RIGHTS CAMPAIGN, *available at* http://www.hrc.org/issues/hate_crimes/background/statelaws.asp (updated May 2001).

7. THE GILL FOUNDATION, OUT AND INTO THE VOTING BOOTH: LESBIAN, GAY, BISEXUAL & TRANSGENDER VOTERS IN 2000 46 (2000). The survey did not include any questions about the death penalty.

penalty can be similarly classified. This article argues that the death penalty is unequivocally a "gay issue" and that activism for hate crime legislation actually runs counter to the interests of the GLBT movement. American criminal jurisprudence is based on the categorization of people into two classes: those deemed worthy of the criminal law's protection and those deemed undeserving or even prosecutable.[8] American criminal justice has always served favored classes of people—those with greater social or economic power—more effectively than disfavored groups without power. Whether for the victim or the accused, selective prosecution, unequal sentencing and an assortment of laws, punishments and tactics have compounded injustice and unfairness in the criminal courts.

Society generally is premised on a hierarchy of social classes—based on race, sex, sexual orientation, gender identity, age, wealth, education level and so on. This social hierarchy transfers to the legal realm. Legal sociologists have observed that the social class of the criminal offender and victim bears on the defendant's fate: those accused of offending someone above them in social status are likely to be handled more severely than those offending someone below them.[9] By privileging certain favored classes of people over disfavored classes, the law merely reproduces the existing social order.[10] In the law, as in society, discrimination is "ubiquitous."[11]

Historically, GLBT individuals have fallen into the class of disfavored people, valueless in the eyes of the criminal justice system and subject to over-prosecution and under-protection.[12] Hate crime legislation, rather than critiquing the premise of selective protection, merely argues for an expansion of the class of valued people.[13] Rather than challenging the administration of justice by favored/disfavored classes that is the basis for the marginalization of GLBT

8. *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 761 (2001) (concluding from statistics that criminal justice system places higher value on lives of white people than on lives of black people).

9. DONALD BLACK, SOCIOLOGICAL JUSTICE 10 (1989). Black illustrates this finding with a grid, showing that low-status defendants accused of crimes against high-status complainants will receive the most attention by the legal system. Crimes by high-status defendants against high-status complainants receive the second greatest level of attention according to Black, followed by low-status defendant crimes against low-status complainants and, finally, high-status defendant crimes against low status complainants. *Id.* at 11.

10. *See* Alan Hunt, *Perspectives in the Sociology of Law*, *in* THE SOCIOLOGY OF LAW 33 (Pat Carlen ed., 1976) (arguing that law is a "mode of reproduction of the social order", but that "legal norms *do more* than passively reflect the existing reality of these relations as lived and practised in society").

11. Black, *supra* note 9, at 21.

12. *See generally* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970 (1983); MARTIN DUBERMAN, STONEWALL (1993).

13. Terry Maroney, *The Struggle Against Hate Crime: Movement at a* Crossroads, 73 N.Y.U. L. REV. 564 (1998); Jane Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (2000).

people in society generally, hate crime legislation in fact reinforces the hierarchy of societal valuing and privileging of certain groups over others.[14]

This article argues that hate crime legislation, beyond merely replicating the discrimination found in society, actually reinforces such discrimination by actively adopting legal structures premised on the concept of social hierarchy. As an alternative, this article argues for GLBT activism against the death penalty as a means of challenging not only the criminal justice system's bias against GLBT people—both victims and defendants—but more importantly as a means of dismantling the favored/disfavored categorization.[15] Part I of this article outlines the relationship between criminal law and the GLBT community, from historical precedent through to the present-day administration of the death penalty against GLBT defendants and against perpetrators of crimes against GLBT victims. Part II details the roots of hate crime activism and legislation and explicates the various critiques of hate crime laws both philosophically and in terms of their administration. Part III illustrates how the hierarchy embraced in hate crime legislation reinforces the bias in the criminal justice system, how such bias impacts society generally, and how anti-death penalty activism could more successfully and significantly challenge institutionalized bias. While the article utilizes identity and self-interest rationales to argue for changes of priori-ties in GLBT community activism, it should be noted that such arguments are only a tool to reach beyond the humanitarian rationales that are commonly used to justify criminal justice policy reforms. Self-interest is therefore only a starting place in the larger process of understanding various other forms of oppression as similarly rooted and interconnected.

I.
PAST AND PRESENT GLBT INTERACTIONS WITH THE CRIMINAL JUSTICE SYSTEM

The modern gay rights movement began with police brutality. In June of 1969, the Stonewall Inn, a gay bar in New York City, was raided by police. Police raids of gay bars were not uncommon, but on that occasion the patrons—among them drag queens, transsexuals and other more marginalized subsets of the GLBT community—fought back. The ensuing struggle and protests led to mobilized outcry and activism nationwide and inaugurated the present-day gay liberation/GLBT rights movement.[16]

Yet the GLBT community's interaction with the criminal justice system neither begins nor ends with the Stonewall Riots. Scholar Derrick Sherwin

14. While the critique of identity-based distinctions in the law contained herein may be applicable to other areas of jurisprudence, the focus of this article is solely on the criminal justice system.

15. Chamallas, *supra* note 8, at 760. Chamallas notes, and this article subsequently addresses, that the devaluation of certain defendants subject to execution is coupled with the related high valuation of victims belonging to favored classes.

16. *See generally* DUBERMAN, *supra* note 12 (recounting the Stonewall riots and the rise of the gay liberation movement).

Bailey traces connections between homosexuality and criminal justice as far back as the legal code of Roman Emperor Justinian in the sixth century, which provided:

> [S]ince certain men, seized by diabolical incitement, practise among themselves the most disgraceful lusts, and act contrary to nature: we enjoin them to take to heart the fear of God and the judgement to come, and to abstain from suchlike diabolical and unlawful lusts, so that they may not be visited by the just wrath of God on account of these impious acts, with the result that cities perish with all their inhabitants. For we are taught by the Holy Scriptures that because of like impious conduct cities have indeed perished, together with the men in them.[17]

Violators of the code were tortured, mutilated, paraded in public and executed.[18] The code was less a moral condemnation of homosexuality than a practical effort to avoid the collapse of the Roman Empire, in light of belief in the biblical prophecy that places where such conduct transpired would be destroyed in the manner of Sodom.[19]

John D'Emilio notes that the criminalization of queer sexuality in America has persisted throughout the nation's history:

> [C]ondemnations of homosexual behavior suffused American culture from its origin . . . . Colonial] law stipulated harsh punishments for homosexual acts. Colonial legal codes . . . proscribed death for sodomy, and in several instances the courts directed the execution of men found guilty for this act. [Though all states abolished the death penalty for sodomy,] all but two in 1950 still classified it as a felony. Only murder, kidnapping, and rape elicited heavier sentences.[20]

Even today, several states have solicitation statutes that criminalize consensual, non-commercial same-sex sexual activity, or intent to engage therein, based on the criminalization of sodomy.[21] D'Emilio notes the secondary effects that criminalization had on the GLBT community:

> [T]he statutes imposed the stigma of criminality upon same-sex eroticism. The severity with which the legislature and magistrates viewed homosexual behavior . . . buttressed the enforcement of a wide

17. JUSTINIAN, NOVELLA 77 (issued in A.D. 538), *quoted in* DERRICK SHERWIN BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION 73 (1975).

18. *See* Timothy W. Reinig, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 870 (1990), *citing* 6 PROCOPIOUS, WORKS 141 (1935).

19. *Id.* at 870–71.

20. D'EMILIO, *supra* note 12, at 13–14 (citations omitted).

21. *See Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1519, 1537 (1989) (citing statutes in Alabama, Arizona, Arkansas, Delaware, Georgia, Kansas, Maryland, Nevada, Rhode Island, Wisconsin and the District of Columbia) [hereinafter *Developments in the Law*].

> range of other penal code provisions against homosexuals and lesbians . . . . [J]udges commonly directed gratuitous, abusive language at defendants.[22]

The criminalization of GLBT sexuality spills over into the general context of dealings between the GLBT community and the bias-ridden system of criminal justice.[23] Throughout the mid- to late-twentieth century, conduct of the police vis-à-vis GLBT communities has ranged from failure to protect to outright persecution. On the one end, when men stalked lesbian bars in order to attack women who rejected their sexual advances, police were more likely to arrest the women than their male assailants.[24] Police themselves would also stalk gay bars and cruising spots, making vice-crime arrests in droves. Police entrapment of GLBT communities gained momentum in the 1950s.[25] More than one thousand GLBT people per year were arrested in Washington, D.C., in the early 1950s.[26] During the same period in Philadelphia, misdemeanor charges against GLBT people averaged one hundred per month.[27] After the kidnap and murder of a young boy in Sioux City, Iowa, the county attorney ordered the detention of local gay men.[28] Under the authority of the state's sexual psychopath law, which allowed for hospitalization without trial or conviction, the county attorney had 29 gay men committed to asylums.[29] The police crackdown was so comprehensive that in a survey of gay men conducted by the Institute for Sex Research, twenty percent reported such encounters with law enforcement officers.[30] It was the persistence of this conduct by police that led to the Stonewall riots and the modern GLBT rights movement.

Mari Matsuda observes that "the criminal justice system is a primary location of racist, sexist, homophobic, and class-based oppression in this

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22. D'EMILIO, *supra* note 12, at 14–15.

23. Notably, the criminalization was both fed by and contributed to other arenas of societal hostility toward GLBT people. Of particular interest is the fact that, during the McCarthy era, more people were fired for being gay than for being Communists. The branding of sexual minorities as sexual perverts in McCarthy-era inquiries spearheaded by Congress and other wings of the federal government helped to foster society's disdain for GLBT people. *See* D'EMILIO, *supra* note 12, at 40–49.

This disdain bound GLBT people not only to Communists but to other minorities of the period, including racial minorities. For instance, in 1958, a conservative state senator in Florida launched an investigation into "homosexual activity" at the Florida State University in Gainesville. The result was that sixteen staff and faculty members, alleged to be gay, were fired from the university. At the same time, the university was being racially integrated—with the first black student enrolling in the university's law school—and all those faculty and staff fired were active in the civil rights movement. *See id.* at 48.

24. *Id.* at 51.

25. *Id.* at 49.

26. *Id.*

27. *Id.* at 50.

28. *Id.* at 50–51.

29. *Id.*

30. *Id.* at 50, *citing* JOHN H. GAGNON & WILLIAM SIMON, SEXUAL CONDUCT 138–39 (1973).

country."[31] In the administration of the death penalty specifically, such bias determines whom the state kills (defendants) and on whose behalf the state kills (victims). The role of racism has been well-documented in these valuations. Studies on racial bias in the capital sentencing process have shown that the race of the victim is the single greatest determinate of whether a defendant will receive a death sentence.[32] Specifically, a defendant charged with killing a white victim is 4.3 times more likely to be sentenced to death than a defendant charged with killing a black victim.[33] Similarly, it has been contended that more than half of the women on death row are lesbians,[34] though far less than 50 percent of women are lesbians.[35] No rigorous statistical studies have been conducted on the extent to which the sexual orientation of a victim or defendant plays a role in capital proceedings.

Prosecutorial discretion or juror decisionmaking may allow bias to pervade the criminal justice system, but such privileging of certain classes of people over others is no different from the bias and discrimination prevalent in society at large. It is unremarkable that the systemic oppression that pervades society—oppression of people of color, poor people, GLBT people, women, disabled people, immigrants and so on—also infests the criminal justice system. As Matsuda notes, the same systemic oppression that keeps marginalized groups from receiving fair treatment in the workforce also operates to prevent fair treatment under the law.[36] In the case of capital punishment, an individual must be marginalized to the point where she is less human and thus can be acceptably executed, a process that often draws on prejudice to achieve such marginalization.[37] Arno Karlen argues, "Accusing a person of any major deviance has long been a good way to get him in trouble for other deviances."[38]

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31. Mari J. Matsuda, *Crime and Affirmative Action*, 1 GEO. J. OF GENDER, RACE & JUST. 309, 319 (1998).

32. *See* McCleskey v. Kemp, 481 U.S. 279, 287 (1987) (discussing the findings of the Baldus study on race and sentencing).

33. *Id.*

34. Victoria Brownworth, *Dykes on Death Row,* THE ADVOCATE, June 16, 1992, at 62.

35. *See* THE 1995 INFORMATION PLEASE WOMEN'S SOURCEBOOK 342 (Lisa DiMona & Constance Herndon eds., 1994) (citing a 1993 study where 2% of women surveyed identified as lesbians and 3% as identified as bisexual, while 17% reported having had sex with a woman).

36. *See generally* Matsuda, *supra* note 31.

37. *See* Francine Banner, *Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant*, 26 N.Y.U. Rev. L. & Soc. Change 569 (2000) (urging to capital defense attorneys to examine feminist counternarratives as models of narrative which combat marginalizing assumptions about power and agency); Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413 (1997) (observing that capital punishment where society defines the outer limits of unacceptable behavior); Richard Goldstein, *Queer on Death Row*, THE VILLAGE VOICE, Mar. 14, 2001, at 40 ("In capital cases, the prosecution aims to convince the jury that the defendant is inhuman.").

38. Arno Karlen, *Homosexuality in History*, *in* HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL 75, 89 (Judd Marmor ed., 1980) (citation omitted).

Numerous examples illustrate the use of sexual orientation-based stereotypes in capital trials. The trial of Wanda Jean Allen, a black lesbian who was executed on January 11, 2001 for the murder of her black, female lover, was riddled with errors and injustices. Her history of mental illness and borderline mental retardation was not brought to light at her trial, but the prosecution liberally invoked stereotypes regarding her lesbianism.[39] Professor Ruthann Robson estimates that "40 percent of women accused of murder must contend with 'some implication of lesbianism.'"[40] Victor Streib notes that in capital cases, the prosecution will often seek to dehumanize the defendant, which in the case of a female defendant means defeminizing the defendant first.[41] Thus, women defendants will often be portrayed as violating social norms of womanhood and femininity.[42] In Allen's trial, the prosecution suggested that Allen "wore the pants in the family" and introduced testimony by the victim's mother that Allen liked to spell her middle name G-E-N-E, in the masculine manner.[43] The jury did not consider, during either the guilt or sentencing phases of the trial, the history of abuse between Allen and her partner, despite the fact that Allen was arrested with scratches on her face, allegedly from abuse.[44] Such evidence was overshadowed by the testimony that the 'butch' Allen dominated her lover. Thus, Allen was convicted on the basis of a rash of stereotypes about lesbians which, combined with stereotypes about black people and poor people, played off juror biases to portray Allen as an aggressive offender so dangerous to society that the only recourse was execution. One observer proposed that had Allen been a middle class, white heterosexual woman who killed her boyfriend, the jury would probably have been more sympathetic and Allen's sentence would have been considerably lighter.[45]

Similarly, in the case of Aileen Wuornos, a white lesbian sentenced to death for a string of murders in Florida, the state virtually ignored her well-founded claims of self-defense. Rather, the prosecution suggested that Wuornos's les-

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39. News Release, Lambda Legal Defense and Education Fund, Lambda Urges Stay of Execution for African-American Lesbian (Jan. 10, 2000), *available at* www.lambdalegal.org/cgi-bin/iowa/documents/record?record=759.

40. Goldstein, *supra* note 37, at 40 (quoting Professor Ruthann Robson).

41. *Id. See also* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 547 (1995) (referring to the myth of demonic agency in capital punishment which dehumanizes defendants by substituting their crimes for their personhood); Banner, *supra* note 37, at 587–92 (discussing the defeminization of women in order to portray them as evil as an example of the dehumanization of capital defendants).

42. *See* Carroll, *supra* note 37, at 1416 (arguing that lack of femininity, aggression, poor mothering skills and sexual promiscuity are recurrent considerations in applying death penalty to women).

43. Goldstein, *supra* note 37, at 40.

44. *Id.*

45. Katherine Bell, *Op Ed: Sex and the Death Penalty*, (Jan. 11, 2001), *available at* http://www.planetout.com/news/article-print.html?2001/01/11/5. ACLU Lesbian and Gay Rights Project attorney Eric Ferrero notes that "If she [Allen] had been straight and killed her boyfriend, she probably wouldn't [have been] on death row." *Id.*

bianism led to the man-hating murders of seven men in the late 1980s and early 1990s.[46] Branded as the first woman serial killer in history, the FBI and prosecutors applied the serial killer paradigm—a male model—to Wuornos by suggesting her lesbianism led to gender confusion and, thus, to her identification with male violence.[47] With respect to the prosecution defeminizing Wuornos, Streib notes: "In a small town in Florida, if the defendant is a lesbian, you are halfway there. The covert message here is that Wuornos is not really a woman, she is more like a man."[48]

Conversely, prosecutors often portray gay male capital defendants as predators—regardless of the facts of the alleged crime—in order to exploit the fears of heterosexual male jurors and the fallacious association of gay men with child molesters.[49] In the capital trial of Fred Thomas Leath, the prosecution in its opening statement referred to Leath as "no better than a blood-sucking vampire."[50] Leath, a gay man, was charged with murdering a young man with whom he had a sexual relationship. The defendant, in post-conviction appeals, objected to this analogy as overly inflammatory. The Texas Criminal Court of Appeals held:

> The argument, when considered in the light of the definition of a vampire as "one who lives by preying on others," particularly the young and healthy, and when weighed in connection with all the facts and circumstances in evidence—the unnatural relationship of the parties and the background and setting in which the killing occurred as shown by the evidence—does not call for a reversal.[51]

Thus, despite the fact that there was no evidence that the relationship between the two men was non-consensual, the defendant was demonized as a predatory "vampire."

During sentencing, the prosecutor in the trial of Calvin Burdine, a white, gay man, described the defendant as a sexual predator and a danger to society, based on a 1971 conviction for consensual sodomy, a crime in the state of Texas.[52] The prosecutor urged the jury to sentence Burdine to death reasoning that, as a gay man, Burdine would enjoy a sentence of life in prison and therefore it would not be punishment.[53]

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46. Brownworth, *supra* note 34, at 62.

47. Press Release, Coalition to Free Aileen Wuornos, Letter to Civil Rights Attorneys (Aug. 7, 1993) (on file with author).

48. Heidi Evans, *Why U.S. Seldom Kills Women, Squeamishness Seen Behind Gender Bias,* N.Y. DAILY NEWS, July 29, 2001, *available at* 2001 WL 23587724.

49. *See generally* Jenny Carole, et al., *Are Children at Risk for Sexual Abuse by Homosexuals?,* 94 PEDIATRICS 41 (1994) (answering no).

50. Leath v. State, 346 S.W.2d 346, 348 (Tex. Crim. App. 1961).

51. *Id.* (citation omitted).

52. *See* Burdine v. Johnson, 262 F.3d 336, 373 n.17 (5th Cir. 2001).

53. *See* Goldstein, *supra* note 37, at 38. There is also evidence that Burdine's attorney derogatively referred to gay men during the trial as "queers" and "fairies", and that the attorney

The image of the predatory gay man has also been used in cases involving gay victims, where defendants have plead a "homosexual panic" defense, arguing that murder is a legitimate defense to a same-sex sexual advance.[54] Moreover, just as the "homosexual panic" defense defines violence as a justifiable heterosexual response, certain crimes are portrayed as homosexual in nature. Several cases refer to a "homosexual-type homicide"[55] or a "homosexual attack,"[56] as though the crime itself is unique to the GLBT community or has peculiar predatory aspects rooted in the defendant's sexual orientation.

Overall, the manipulation of these stereotypes resonates with juries which, like the attorneys and the system itself, are fraught with bias. According to a survey by the *National Law Journal*, twelve percent of jurors said they could not be fair to a gay defendant.[57] In one capital trial where the victim was gay, the prosecutor, in explaining her use of peremptory strikes, described one venireperson as "effeminate" and "very dainty" and stated that her observations of him—"the way he answered questions, what he said, the way he crossed his legs"—indicated he had "tendencies being homosexual."[58]

The factual presentation of capital cases involving gay defendants has been constructed solely to play off implicit or explicit juror prejudice. In *Cook v.*

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slept through much of the trial. Chris Bull, *A Matter of Life and Death*, THE ADVOCATE, Mar. 16, 1999, at 41.

54. *See, e.g., In re* Jackson v. State, 674 So. 2d 1365, 1368 (Ala. 1994); People v. Lang, 782 P.2d 627, 645 (Cal. 1989); Purtell v. Texas, 761 S.W.2d 360, 369 (Tex. Crim. App. 1988). Aaron McKinney and Russell Henderson both contended that they only kidnapped and beat Matthew Shepard because Shepard had made sexual advances upon them. Hamblin, *supra* note 3, at 2H.

55. People v. Kraft, 5 P.3d 68, 107 (Cal. 2000).

56. People v. Robertson, 767 P.2d 1109, 1141 (Cal. 1989); People v. Tapia, 30 Cal. Rptr. 2d 851, 859–60 (Ct. App. 1994).

57. *See* Goldstein, *supra* note 37, at 40.

58. Warner v. State, 594 So.2d 664, 667 (Ala. Crim. App. 1990). Such bias against GLBT jurors has often led to blatantly discriminatory outcomes. In 1979, Dan White was put on trial for the murder of openly gay San Francisco supervisor Harvey Milk. Defense counsel was not permitted to directly ask jurors about their sexual orientations yet nonetheless was able to glean jurors orientations and exclude them. The White voir dire resulted in a San Francisco jury with apparently no GLBT members in a case of deep concern to the GLBT community. Notably, the voter roles from which jurors are drawn in San Francisco were estimated shortly after the White trial to be twenty-five percent gay or lesbian. White was handed a manslaughter conviction, his culpability greatly reduced by his so-called "Twinkie Defense": White had claimed that he was unstable at the time of the crime due to having eaten too much junk food. *See* Randy Shilts, *Violence and Gays—A Turn of the Tide*, S.F. CHRON., Dec. 10, 1981, at 29, 32.

Similarly, in a 1985 case against four defendants charged with murdering John O'Connell, a gay man, the judge warned that jurors may be asked questions regarding their sexual orientation, in private if desired. The jury selection proceeded without such questions being directly posed, but the warning proved sufficient to result in a jury without any openly GLBT members. Paul R. Lynd, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 247 (1998). Conversely, in the case of serial killer Edgar Hendricks, tried for the murder of two San Francisco gay men in 1981, jurors were asked their sexual orientations in the privacy of the judge's chambers. The impaneled jury included a disproportionately high number of GLBT jurors—six—who, after finding Hendricks guilty, took only four hours to recommend the death penalty. *Id.* at 250.

Texas, the factual record on appeal suggested that the defendant was gay or bisexual, despite the fact that his sexual orientation had no bearing on the alleged criminal act: "after having homosexual relations and watching the movie 'The Sailor Who Fell From Grace With the Sea,' Cook broke into an apartment, hit the deceased in the head with a plaster object, and later killed her."[59] In the case of Albert Cunningham, the California Supreme Court rationalized that prosecution evidence tending to show that the defendant was gay was relevant for purposes of impeachment, despite finding that the defendant's sexual orientation was not directly relevant to the charges and that "the prosecutor appears to have dwelled on evidence of defendant's sexual preferences in a manner suggesting that this evidence was a negative reflection on defendant, without regard to its illumination of defendant's credibility."[60]

In the case of Stanley Lingar, a white gay man executed on February 7, 2001, the prosecutor raised Lingar's homosexuality during his opening statement in the penalty phase of the trial.[61] Over defense objections, the prosecutor argued that Lingar's sexual orientation was being offered as a motive for the crime, in which Lingar and his then-boyfriend allegedly picked up a young, white man, and forced him to disrobe and masturbate.[62] The prosecution contended that Lingar killed the young boy so that he would not reveal Lingar's sexual orientation. The prosecutor also contended that Lingar's sexual orientation was an aspect of his "character" which Missouri law allowed to be a factor in the sentencing decision.[63] On appeal, the Missouri State Supreme Court ruled that the fact that Stanley Lingar may have been in a consensual same-sex relationship was relevant to the circumstances of the murder because "it tends to explain appellant's desire to force a young man not only to remove his clothing but also to see him masturbate."[64] In ruling on Lingar's federal habeas petition, the district court held that while testimony about Lingar's sexual orientation was both irrelevant and prejudicial under Missouri law, Lingar's Eighth Amendment rights were not violated because the jury was not instructed to consider the evidence that Lingar was gay as an aggravating factor.[65] During trial, the judge permitted evidence of Lingar's sexual orientation even though the prosecution never elicited testimony to connect the claimed motive with the proffer of evidence.[66] It is apparent that the main reason for focusing on Lingar's sexual orientation was to evoke jury prejudice against him.[67]

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59. Cook v. Texas, No. 63,643, 1990 Tex. Crim. App. LEXIS 8, at *10 (January 17, 1990).

60. People v. Cunningham, 25 P.3d 519, 584 (Cal. 2001).

61. State v. Lingar, 726 S.W.2d 728, 739 (Mo. 1987).

62. ACLU Friend-of-the-Court Brief in Support of Appeal of Stanley D. Lingar at 4, Lingar v. Bowersox, 176 F.3d 453 (8th Cir. 1999) (No. 96–3609) [hereinafter *ACLU Brief*].

63. *Id.*

64. *Lingar*, 726 S.W.2d at 739.

65. *See ACLU Brief, supra* note 62, at 6.

66. *Id.* at 3–4.

67. Peter Freiberg, *Crime and Punishment: Does Homophobia Play a Part in Sending Gays*

Another case similar Lingar's is that of Jay Neill, convicted and sentenced to death for robbing an Oklahoma bank with his male lover. During closing arguments, the prosecutor told the jury:

> I want you to think briefly about the man you're setting [*sic*] in judgment on .... He is a homosexual. The person you're sitting in judgment on—disregard Jay Neill. You're deciding life and death on a person that's a vowed [*sic*] homosexual .... [T]hese are areas you consider whenever you determine ... the type of person you're sitting in judgment on .... The individual's homosexual. He's in love with Robert Grady Johnson. He'll do anything to keep his love, anything.[68]

The trial judge allowed the prosecutor's remarks over the defense counsel's objection, accepting the reasoning that Neill's relationship to his lover was relevant to his motivation for the charged crime.[69] The 10th Circuit initially argued that "[t]hese comments on Neill's homosexuality were accurate, in light of the evidence, and were relevant to both the State's case and Neill's defense theory."[70] Judge Lucero filed a strong dissent, arguing that that habeas relief should be granted "[b]ecause the prosecutor's blatant hatemongering has no place in the courtrooms of a civilized society, and [because] Neill's appellate counsel's failure to raise the issue on direct appeal constitutes clear and plain prejudicial neglect."[71] On a rehearing by the same three-judge panel, the two judges in the majority conceded that "[t]here does not appear to be any legitimate justification for these remarks. They are improper."[72] Nonetheless, the majority refused to grant habeas relief based on an ineffective assistance of counsel claim due to Neill's appellate counsel's failure to object to the remarks because "the improper remarks did not result in a fundamentally unfair trial."[73]

On the other hand, it is difficult to find cases where a GLBT defendant's sexual orientation is raised by the defense during the penalty phase. At the penalty or sentencing phase, defense attorneys may introduce any information that might lead jurors to lessen the punishment against the defendant. In cases involving non-GLBT defendants, defense attorneys strategically present evidence about the defendant's family and loved ones, community involvement or troubled childhood, in order to elicit juror sympathy.[74] Yet anti-GLBT bias

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to Death Row?, N.Y. BLADE NEWS, Feb. 2, 2001, at 1, 12.

68. Neill v. Gibson, 268 F.3d 1184, 1199 (10th Cir. 2001) (Lucero, J. dissenting), *quoted in* Arthur S. Leonard, *Dissenting Judge Cries Homophobia, But Federal Court Affirms Gay Convict's Death Sentence*, LESBIAN AND GAY NEW YORK NEWSPAPER ONLINE, *at* http://www.lgny.com/capitalcase166.html (last visited Apr. 7, 2002).

69. Leonard, *supra* note 68.

70. *Neill*, 263 F.3d at 1197. Note that the summary of the case by Leonard, *supra* note 68, is inaccurate on this point.

71. *Neill*, 263 F.3d at 1199 (Lucero, J., dissenting).

72. *Neill*, 278 F.3d at 1061.

73. *Id.* at 1062.

74. *See generally* Haney, *supra* note 41.

would dissuade a defense attorney from highlighting a defendant's same-sex lover or history of sexual abuse by someone of the same sex, fearing that any statement or implication that the defendant is gay, lesbian, bisexual or transgendered would be treated by the jury as aggravating, rather than mitigating evidence. Consequently, it will be more likely that evidence of a defendant's gay, lesbian, bisexual or transgendered orientation may be presented through the door of aggravating factors that the state may present in the penalty phase, as happened in the *Burdine* and *Lingar* cases.

Anti-GLBT bias may also impact cases involving GLBT victims where prosecutors, who would otherwise introduce victim impact statements to show the harm the defendant has caused to victims' families, might not introduce such statements where they reveal victims to be GLBT, thereby lessening juror sympathy with those victims and reducing the likelihood of a harsh sentence against the defendant. Thus, the lack of case law on GLBT-related evidence at the penalty phase may be subtle evidence of further injustice toward GLBT defendants and victims at the hands of the criminal justice system.

II.
THE PROMISE AND FAILURE OF HATE CRIME LEGISLATION

As the above account of the GLBT community's interaction with the criminal justice system reveals, GLBT people have experienced a history of violence at the hands of government. Though GLBT people have also experienced violence at the hands of individual actors, violence is often exacerbated by the reaction or inaction of government. In the late 1980s, the National Gay and Lesbian Task Force released research documenting violence against lesbians and gay men. The Task Force reported that one in five gay men and one in ten lesbians reported being physically assaulted because of their sexual orientation.[75] This data bolstered an already growing movement in the GLBT community against so-called "hate crimes." The formal anti-hate crime movement in the GLBT community grew out of the work of the National Gay and Lesbian Task Force, which built local anti-violence projects in cities across the country and eventually formed the National Coalition of Anti-Violence Projects.[76] In 1999, the twenty-five member organizations of the National Coalition of Anti-Violence Projects reported a total of 1960 incidents of violence against GLBT people.[77] A key role of the anti-violence movement has been to increase public consciousness about violence committed against GLBT people.[78] This education is of great necessity given the history of failure of the criminal

75. KEVIN BERRILL, ANTI-GAY VIOLENCE: CAUSES, CONSEQUENCES, RESPONSES 2, 3 (National Gay and Lesbian Task Force ed., 1986).

76. New York City Anti-Violence Project website, *at* http://www.avp.org.

77. NATIONAL COALITION OF ANTI-VIOLENCE PROJECTS, ANTI-LESBIAN, GAY, TRANSGENDER AND BISEXUAL VIOLENCE IN 1999 (1999).

78. Spade & Willse, *supra* note 13, at 39.

justice system to investigate and prosecute anti-GLBT violence.[79] The other goal of anti-violence movements generally has been to provide "specific legal protection to these subordinated groups, groups often in positions only on the 'bad side' of the law—as targets of formal criminal penalty, police brutality, or private violence unfettered by public intervention."[80] The latter goal does not necessarily implicate hate crime activism but might also be achieved through increased police sensitivity or cultural de-stigmatization of GLBT sexuality and subjectivity.

Arguments for hate crime legislation build on the "legal protection" goal with an added philosophical component: "Bias crimes are more socially invidious than crimes not motivated by group hatred because of their tendency to perpetuate prejudice and victimize an entire class of persons."[81] Hate crime statutes transport the civil rights/affirmative action paradigm into the criminal law. The prejudice and discrimination that are condemned are not those of the government or private employers but of criminals. Unlike civil rights legislation that makes otherwise lawful conduct (e.g., refusal to hire or promote) unlawful, hate crimes laws enhance punishment for conduct that is already criminal.[82]

The "added harm" rationale for hate crime laws fails for two reasons. First, hate crime laws are not constructed as remedies for historical discrimination but are instead facially neutral. Hate crime statutes "refer[] only . . . to 'race' and not to particular races" and thus can be "used to penalize bias-motivated crimes lacking historical pedigree."[83] Second, as applied within a flawed criminal justice system, hate crime laws have been used disproportionately to prosecute marginalized groups,[84] actually hurting those they were intended to help. Lisa Crooms writes that "hate crime statutes, passed for the ostensible protection of disempowered minorities, are administered by a society rooted in the ideology of white supremacy and within a criminal justice system committed to the continuing oppression of [racial] minorities. This leads the ironic, if unsurprising, conclusion that the very laws intended to combat oppression instead serve to punish those struggling against oppression."[85]

Notably, FBI statistics, drawn from local police reports, indicate that disproportionate attention is paid to hate crimes committed against whites.[86]

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79. *See Developments in the Law, supra* note 21, at 1541.

80. Spade & Willse, *supra* note 13, at 39.

81. *See Developments in the Law, supra* note 21, at 1541.

82. James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 39 (1997).

83. Maroney, *supra* note 13, at 606. Some scholars have argued instead for a true affirmative action approach to hate crime legislation where, for instance, anti-gay crime would be punished more severely than anti-heterosexual crime. *See* Note, *Combating Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270, 1272–74 (1988).

84. *See,* Maroney, *supra* note 13, at 608.

85. Lisa A. Crooms, *"Everywhere There's War": A Racial Realist's Reconsideration of Hate Crimes Statutes*, 1 GEO. J. GENDER & LAW 41, 44 (1999).

86. Maroney, *supra* note 13, at 608, *citing* Federal Bureau of Investigation, U.S. Dep't of

According to 1995 FBI statistics, twenty-seven percent of known hate crime offenders nationwide were black, whereas fifty-nine percent were white, a disproportionate representation given that blacks comprise twelve percent of the population and whites comprise eighty percent.[87] While crimes perpetrated by whites are the most frequent hate crimes reported, anti-white crimes are being reported and classified as hate crimes at a disproportionate rate, an inversion which ignores the history of hate crime as well as the intent of hate crime laws. Maroney writes: "Given both overt and unconscious racism or racial insensitivity on the part of police and prosecutors, it is reasonable to speculate that such persons are quicker to think of anti-white crimes as bias-motivated than so to judge anti-black crimes."[88] In voicing its opposition to hate crime laws, the Libertarian party cites federal hate crime prosecution tallies to suggest that blacks are "statistically twice as likely as whites to face prosecution for hate crimes."[89] In Los Angeles, for instance, more than half of the hate crime charges filed in 1999 were filed against minority defendants.[90] Defense attorney Christopher Plourd notes, "It is demonstrable that these laws hit the poor and minorities hardest. It wasn't meant that way, but that's the way it is."[91]

Given the bias that pervades the criminal justice system, bias in the administration of hate crime laws should come as no surprise. While seeming to challenge bias in the criminal justice system, hate crime laws actually reinforce systemic bias:

> [T]he anti-hate-crime movement has achieved significant reform within institutions of governance. The seeming 'success' of the anti-hate-crime movement, however, deserves greater scrutiny. The fact that anti-hate measures have been assimilated so easily into the very criminal justice system they seek to challenge indicates that they fit squarely within its dominant ideology.[92]

Maroney argues that the institutionalization of anti-hate-crime aims has led to the co-optation of the movement, where the political power of activists outside the sphere of politics is ceded to those who have control inside the sphere of politics.[93] The police, the larger criminal justice system and even those charged with hate offenses decide what constitutes a hate crime, bringing all their prejudice to bear in marking a victim as a member of a certain community and

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Justice, Criminal Justice Information Services Division, Hate Crime Statistics 1995, at 1 (1996).

87. *Id.*

88. *Id.*

89. Scott Canon, *Hate Crimes Laws Based on Specific Factors*, KAN. CITY STAR, Mar. 29, 2000, at A1.

90. Arianna Huffington, *Hate Crimes Legislation: The NAACP's Misguided Priority*, COMMON DREAMS NEWS CENTER, Oct. 30, 2000, *available at* http://www.commondreams.org/views/103100-105.htm.

91. *Id.*

92. Maroney, *supra* note 13, at 597.

93. *Id.* at 598.

judging what conduct that community finds hateful.[94] Certain schemas or cultural scripts—what Martha Chamallas calls "prototypes"—operate to form a normative understanding of what is and what is not a hate crime.[95] Matsuda writes: "Ideas about crime: what is a crime, who is a criminal, and how we choose to punish and prevent crime—none of our ideas in this regard are developed free from the intellectual poisons of racism, sexism, homophobia and class oppression."[96] Hate crime laws may also reinforce certain prejudices with-in the criminal justice system. AnnJanette Rosga argues that allowing identity categories to be codified into hate crime laws reinforces "hegemonic notions of mutually exclusive, internally undifferentiated bio-social groups."[97]

Moreover, the individualized focus of hate crime may distract from more systemic scrutiny and reform. Spade and Willse argue that "the focus on violent crimes committed against members of subordinated identity categories constructs hate crime as individual expressions of personal prejudice and therefore eclipses the understanding of the systemic nature of inequality."[98] Hate crime laws move beyond an individualized focus on the effect of the crime on the victim to scrutinize the systemic impact on the victim's community or communities. However, this logic does not run in reverse. Hate crime laws focus predominantly on the hate offender as an individual, ignoring the systems of oppression and bias underlying the offender's actions, thus explaining away the offender as an aberration.[99] Martha Chamallas argues that our socio-cultural treatment of crime emphasizes the character of the individual offender and "discounts or ignores those situational or social factors that may contribute to or even determine the outcome."[100] Neil Gotanda suggests that if the analysis of bias is focused on individual prejudice, remedies to bias will reflect such narrowness.[101] If the problem is individual actors, the solution is punishing those individuals. Challenges to the systemic bias that nurtured these actors are thus lost.

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94. *Id.* at 604.

95. Chamallas, *supra* note 8, at 795–99.

96. Matsuda, *supra* note 31, at 312.

97. AnnJanette Rosga, *Policing the State,* 1 GEO. J. GENDER & LAW 145, 153–54 (1999).

98. Spade & Willse, *supra* note 13, at 44–45.

99. This argument is reinforced more generally in an essay by Neil Gotanda, *A Critique of "Our Constitution is Colorblind",* in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257, 265 (Crenshaw et al. eds., 1995). Gotanda analyzes the jurisprudence with regard to race and racism as lodged in the principle of "formal race." Race is constructed as an "attribute of individuality unrelated to social relations." *Id.* Thus racists are "individuals who maintain irrational personal prejudices." *Id.* In this manner, racism is explained away as an individual phenomenon, obviating the need for systemic remedies.

100. Chamallas, *supra* note 8, at 747, 781.

101. Gotanda, *supra* note 99, at 266.

III.
TOWARD CONSTRUCTING A FAIR AND UNBIASED CRIMINAL JUSTICE SYSTEM

Hate crime legislation does not challenge systemic bias within the criminal justice system—nor society generally—but rather potentially reinforces it. For there to be hope of the criminal justice system operating fairly on behalf of GLBT people and marginalized people generally, the systemic inequality and subordination of the criminal justice system must be dismantled.[102] Gayle Rubin describes a hierarchy of privilege in sexual relations, where certain sexual practices—for example monogamy, sex within marriage, procreative sex, heterosexual sex and non-commercial sex—fall within the "charmed circle" or favored class while others—including prostitution, sadomasochism, group sex and same-sex sexual activity—are disfavored.[103] Similarly, within the criminal law, certain classes of people are valued more highly than others.[104] Chamallas points to data on race and the death penalty cited in *McCleskey v. Kemp*[105] that

> dramatically illustrated the operation of devaluation in the context of the criminal justice system. The pernicious pattern that emerged from the statistics was that a higher value was placed on the lives of white people than on the lives of black people.... It was as if the decisionmakers had created two separate categories of crime: the killing of whites and the killing of blacks.[106]

It may not be solely that defendant's lives are devalued but that they are valued dramatically less than the lives of certain favored victims—in this case, white victims.

Randall Kennedy explains this phenomenon as "racially selective empathy," which he describes as "the unconscious failure to extend to blacks the recognition of humanity, and hence the same sympathy and care, given as a matter of

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102. Spade & Willse, *supra* note 13, at 41–42.

103. Gayle Rubin, *Thinking Sex: Notes for a Racial Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 281 (Carol S. Vance ed., 1984), *cited in* Spade & Willse, *supra* note 13, at 42.

104. *See generally* Jennifer L. Hochschild & Monica Herk, *"Yes, But...": Principles and Caveats in* AMERICAN RACIAL ATTITUDES, MAJORITIES AND MINORITIES 308 (John W. Chapman & Allan Wertheimer eds., 1990) (noting the devaluation of people of color); Adeno Addis, *Recycling in Hell*, 67 TULANE L. REV. 2253 (1993) (tracing the devaluation of black people in criminal law and other contexts); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (tracking the devaluation of black mothers in the criminal law); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1467 (1992) (arguing that anti-sodomy laws legitimize homophobic violence and the devaluation of homosexuality).

105. McCleskey v. Kemp, 481 U.S. 279, 287 (1987) (analyzing the Baldus study which shows that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing black victims).

106. Chamallas, *supra* note 8, at 761.

course to whites."[107] Hate crime activism does not challenge this favored/disfavored paradigm; it reinforces it.

Drawing on Rubin's theories, Spade and Willse compare hate crime activism with the movement for same-sex marriage.[108] As it stands, the institution of marriage favors or honors certain relationships, such as the monogamous partnering of a man and a woman, and excludes or disfavors other relationships, such as partnerings between men and men or women and women, poly-amorous relationships and the like. Historically, the "charmed circle" inscribed by marriage has been altered—most notably by the legal acceptance of interracial marriage—yet the paradigm whereby the institution of marriage bestows privilege on certain types of relationships to the exclusion of others persists.[109] It has been argued that the privileging of heterosexual relationships can only exist if same-sex relationships are denounced; this is the reasoning by which conservative activists claim that acknowledgement of same-sex relationships devalues and degrades heterosexual relationships. Within this paradigm, Spade and Willse contend that the movement for same-sex marriage merely seeks to expand the charmed circle of marriage to encompass same-sex relationships. This approach reinforces the privileging of some relationships over others by simply changing the list of those relationships that are favored, rather than challenging the entire paradigm whereby society, through the institution of marriage, attempts to govern intimate relationships and personal morality. Expanding the charmed circle thus leaves certain relationships in the "uncharmed" or disfavored position. Even if the broad class of same-sex relationships is privileged, certain same-sex relationships that intersect with disfavored classes, such as intergenerational same-sex relationships, sadomasochistic relationships, polyamorous relationships and so on, will remain disfavored.

Calls for hate crime legislation similarly reinforce a paradigm of differential treatment between certain classes of victims or offenders, rather than calling for an end to favored/disfavored classifications. Arguments for hate crime legislation often parallel the reasoning of the favored/disfavored paradigm. For instance, during the trial of Russell Henderson for the killing of Matthew Shepard, the Log Cabin Republicans released a statement arguing that "[t]o offer a reduced punishment to the perpetrators of one of the most heinous murders in recent Wyoming history not only profanes the memory of Matthew Shepard, it sets a frightening precedent which devalues the life of every gay person in America."[110] Similarly, when Steven Eric Mullins and Charles Butler, Jr. were

107. Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988).

108. Spade & Willse, *supra* note 13, at 42.

109. *Id.*

110. Bull, *supra* note 53, at 38–39 (quoting Rich Tafel, Executive Director of the Log Cabin Republicans).

charged with capital murder for beating and burning gay man Billy Jack Gaither in Alabama, David White of the Gay and Lesbian Alliance of Alabama said that prosecutors were "sending the right message."[111] White, whose organization is the largest GLBT rights group in Alabama, said that the capital indictment meant that Gaither's life would not be "looked at as being lesser than another life."[112]

There are two primary reasons why expanding the favored side of the equation to include sexual orientation and gender identity-inclusive hate crime legislation will not help GLBT people, let alone other communities invested in social justice. First, not all GLBT people will be able to cross the border into the favored status of recognized rights and protection. Chamallas notes that devaluation is, "often *selective in its operation,* affecting subgroups and subtypes, rather than all members of a disfavored group. Not only do some members of the disfavored group escape the effects of devaluation; they actually may benefit from the process."[113] For example, Chamallas reasons that the devaluation of traditionally women-dominated jobs may work to the advantage of some women in "male" jobs, insofar as they derive a benefit from the overvaluation of male-dominated industries and positions.[114] In this example, the more privileged subset of women workers (those who hold "male jobs") benefit at the expense of marginalized or under-privileged women workers (those who hold "female" jobs). Despite women entering "male" fields (expanding the favored class) the problem remains—certain labor is valued higher than other labor for reasons due to bias and privilege, and women remain disproportionately impacted and subordinated.

In the context of hate crimes, Spade and Willse question the "emancipatory value of a gay rights agenda that seeks recognition by and entrance into subordinating systems of inequality."[115] Since such structures of authority have historically been used by those with privilege to oppress those without,[116] only those who most resemble the privileged class will be able to actually enter the "charmed circle" of privilege themselves.[117] Were same-sex relationships to shift from disfavored to favored status, certain types of same-sex relationships would still be disfavored, as they intersect with other "uncharmed" forms of relationships. Thus, within the disfavored class of same-sex relationships, there exists a hierarchy that mirrors that of society generally. For instance, mono-

111. Jay Reeves, *Two indicted on capital charges in murder of gay man in Alabama,* ASSOCIATED PRESS (Mar. 26, 1999).

112. *Id.*

113. Chamallas, *supra* note 8, at 774.

114. *Id.*

115. Spade & Willse, *supra* note 13, at 44.

116. *See* Lynne Henderson, *Authoritarianism and the Rule of Law,* 66. IND. L.J. 379, 390 (1991) (noting that those in power can use the law to punish and oppress powerless minorities); Reinig, *supra* note 18, at 871 ("In Western civilization, whenever the social structure has been faced with a major crisis, whether of a political, religious or cultural nature, the majority has consistently treated its minorities with suspicion and censure.").

117. *See* Rubin, *supra* note 103, at 281; Spade & Willse, *supra* note 13, at 44.

gamous same-sex relationships are privileged over polyamorous same-sex relationships. Evidence of the marginalization of certain subsets of individuals within the GLBT community can be seen in the exclusion of people of transgendered experience from the agendas of many mainstream GLBT organizations and their reluctant inclusion by others.[118]

The second and related reason why expanding the favored category will not help GLBT people is that if the favored/disfavored paradigm persists—and systemic racism, sexism, homophobia and classism also persist—there is the ever-present potential for GLBT people, individually and as a class, to cross back and forth between favored and disfavored status. Legal and cultural history suggests that, despite gains, the GLBT community has not become privileged or favored either in the eyes of justice or society generally.[119] Thus, 'deviant' sexual orientation or gender identity remains fundamentally deviant, and the majority highlights or obscures such deviance as is convenient.[120] The acceptable border between favored and disfavored is policed by the majority using authoritarian power that philosopher Hannah Arendt argues is inextricably connected to violence.[121] Violence, according to Arendt, is a tool used by the majority/powerful to silence difference and dissent.[122] Kendall Thomas describes homophobic violence in particular as a "mode of power" or "institution" that serves to construct GLBT identity as subordinate and devalued and heterosexuality as privileged and preferred.[123] Just as hate crimes have been historically used as a means of reinforcing dominant power relationships in society,[124] violence will continue to be used by favored groups to control

118. The best example of reluctance to include transgender issues comes from the Human Rights Campaign (HRC), the nation's largest GLBT political organization. HRC has faced criticism from transgender activists and other national GLBT organizations for excluding gender identity protection from its Employment Non-Discrimination Act pending before Congress, which aims to eliminate discrimination against GLB people in employment. *See, e.g.,* Press Release, National Gay and Lesbian Task Force, NGLTF Supports Trans Inclusion in ENDA (June 16, 1999), *available at* http://www.ngltf.org/news/release.cfm?releaseID=34. While most national GLBT organizations had incorporated transgender issues in their mission statements by the mid-to-late 1990s (for example, the National Gay and Lesbian Task Force did so in 1997), HRC did not do so until 2001, after much lobbying by transgender activists. A transgender activist website dedicated to monitoring HRC's involvement in trans-politics can be found at *The Subversion of the Transgender Movement*, *available at* http://www.gendernet.org/hrcwatch/subvert.htm (last visited Apr. 7, 2002).

119. *See generally* D'EMILIO, *supra* note 12; Reinig, *supra* note 18; *Developments in the Law*, *supra* note 21.

120. *See* Karlen, *supra* note 38, at 89 ("[A]ccusing a person of any major deviance has long been a good way to get him in trouble for other deviances . . . ."). *See generally* Rubin, *supra* note 103.

121. HANNAH ARENDT, ON VIOLENCE 46 (2d ed. 1970).

122. *Id.*

123. Thomas, *supra* note 104, at 1467.

124. James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 387–88 (1996).

disfavored groups.[125] Hate crime legislation merely creates additional opportunities for violence to be imposed by establishing new crimes or lengthier sentences under which already over-prosecuted disfavored groups—including GLBT people—can be further prosecuted.[126] Donald Black notes that such discrimination is endemic to the law.[127] No legal system has ever been observed to be free of discrimination.[128] "It is an aspect of the natural behavior of law, as natural as the flying of birds or the swimming of fish. Discrimination is so characteristic of legal life that . . . [i]t is not problematic. It is taken for granted."[129] It is doubtful that a system so ridden with biases can be cleansed when society still maintains its hierarchies.[130]

Conversely, hate crime legislation poses the potential of reinforcing the favored/disfavored paradigm under which the GLBT community has suffered, both within the legal system and without. Rather than expanding the boundaries of the favored class while maintaining a disfavored underclass,[131] the favored/disfavored paradigm for meting out justice and injustice should be abolished, since it will inevitably privilege certain classes of people over others, running completely counter to the equality-based values of social justice.

Instead of reinforcing the favored/disfavored paradigm through hate crime activism, GLBT activists should work to oppose the death penalty as a means of challenging the favored/disfavored paradigm. As death penalty litigator Bryan Stevenson argues, "anti-death penalty activism challenges the ultimate devaluation of disfavored classes. Giving voice to the humanity of marginalized and rejected people is the only effective response to the characterization of the disfavored as disposable through execution."[132] The existence of the death penalty affirms the existence of favored/disfavored social classifications in our society, as evidenced in patterns of racial bias that predict that disfavored class members (blacks) who kill favored class members (whites) are most likely to be executed. Thus, eliminating the death penalty can begin the process of chipping away at the favored/disfavored paradigm, or at least of undermining its power and consequence dramatically. As Craig Haney observes, "we can tolerate eliminating from the human social order only those who by their very nature stand outside its boundaries."[133]

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125. ARENDT, *supra* note 121, at 46.

126. *See, e.g.*, Crooms, *supra* note 85; Huffington, *supra* note 90.

127. BLACK, *supra* note 9, at 21–22.

128. *Id.* at 21.

129. *Id.* at 22.

130. *See* Margherita Rendel, *Law as an Instrument of Oppression or Reform*, *in* THE SOCIOLOGY OF LAW 143 (Pat Carlen ed., 1976).

131. *See* Spade & Willse, *supra* note 13, at 44 (arguing that such a strategy says, in effect, "give those of us who are most like you . . . a piece of the pie . . . .").

132. Interview with Bryan Stevenson, Executive Director, Equal Justice Initiative, in New York, N.Y. (Feb. 13, 2001).

133. Haney, *supra* note 41, at 549.

Challenging the death penalty therefore poses a broader and more fundamental challenge to the systems through which society sets and polices the boundaries of hierarchy and power. Anti-death penalty activism poses a challenge to the systematic homophobia, sexism, racism and classism of the criminal justice system by highlighting the disproportionate execution of and bias against disfavored defendants, including people of color[134] and GLBT people.[135] This challenge goes beyond the exclusively individualistic focus of hate crime activism to encapsulate broader patterns of systemic discrimination and bias, patterns in the criminal justice system with which the GLBT community is well acquainted.

CONCLUSION

The intersection between hate crime legislation and the death penalty illuminates the conflict between hate crime activism and opposition to the death penalty. In several states, hate crime laws are included in death penalty aggravation statutes, so that the commission of a murder classified as a hate crime will make a defendant death-eligible.[136] Here, too, these statutes are justified on a favored/disfavored valuation principle:

> The inclusion of hate crime in death aggravation schemes and the imposition of death against hate criminals are intended as symbolic gestures to show target communities that they are valued by society and that crimes against them are taken seriously. Indeed, using the death penalty as a method of symbolizing societal commitment to defined groups of people is increasingly common. Numerous capital murder schemes, reformulated after *Furman v. Georgia*[137] and validated by *Gregg v. Georgia*[138], allow the death penalty to be imposed if the victim was a law enforcement official, a child, elderly, disabled, or pregnant.[139]

The criminal law, through capital punishment statutes, draws lines between valued and devalued members of society, deeming the latter to be so undeserving of life as to justify execution at the hands of the government. Hate crime legislation perpetuates this paradigm and may even be used, in the manner of affirmative action,[140] to argue that valuations should be inverted, so that those who are traditionally disfavored become more valued in the eyes of the criminal justice system than those who are traditionally favored. A particularly telling example is the following account by journalist Arianna Huffington:

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134. McCleskey v. Kemp, 481 U.S. 279, 287 (1987).
135. Brownworth, *supra* note 34, at 62–64.
136. Maroney, *supra* note 13, at 612. Those states are California, Delaware and Nevada.
137. 408 U.S. 238 (1972).
138. 428 U.S. 153 (1976).
139. Maroney, *supra* note 13, at 612.
140. Jacobs & Potter, *supra* note 82, at 39.

I asked NAACP chairman Julian Bond why hate crime legislation had been moved to the front burner [of the organization's priorities], ahead of more urgent needs [such as incarceration rates and police brutality]. "I grant you that hate crimes legislation is a smaller matter," he replied, "but if there had been hate crimes legislation, all three of the [white] men who dragged James Byrd [a black man] to death would have been put to death in Texas." "But you don't even believe in the death penalty," I pointed out. "That's right, I don't," he answered.[141]

In this extreme example, Bond switches from an "acted-upon" relationship to law enforcement to an "acted-on-behalf-of" position, which beyond falsely assuming entry into the favored class also reinforces the authoritarian use of violence as a means of social control.[142] By calling for hate crime laws in Wyoming, where Matthew Shepard was murdered, GLBT organizations—including those that opposed the death penalty for Henderson—effectively signaled their agreement that anti-GLBT crimes must be punished as harshly as other attacks against marginalized groups. Even if these organizations are attempting to articulate a hate crime vision that denounces the death penalty, the message is often mixed and muddled. Progressive GLBT organizations that oppose the death penalty send a contradictory message by supporting legislation that trumps up criminal charges in a system that, even where capital sentencing is not at risk, is hampered by discrimination and injustice at every stage, as evidenced by the disparities in sentencing under hate crime laws. These organizations acquiesce to a flawed system of justice, hoping to be at the top of the hierarchy, but risking the ever-present danger of being at the bottom. Given the historical relationship between marginalized groups and the criminal justice system, as well as the current biased administration of that system on their behalf, a greater degree of distrust is warranted. Thus, GLBT people, like any disfavored group, should be afraid of any system that is driven by prejudice. Ray Hill, a gay activist who protested the execution of his lover's killer, argues that: "Coming from a class of people whose lives have been devalued, the death penalty is the ultimate devaluation of life .... If we are going to start placing different values on different people—playing 'us' against 'them'—there is always going to be someone to call us 'them.'"[143]

Journalist Alexander Cockburn notes that "[y]ears ago a great criminal court judge in Detroit—Justin Ravitz—explained the criminal justice system as America's 'only working railroad.' And now many gays are toiling to make sure that the railroad runs on time, even on overtime."[144] GLBT activists pushing for hate crime legislation may inadvertently grease the wheels of discrimination in

141. Huffington, *supra* note 90.

142. ARENDT, *supra* note 121, at 46.

143. Gip Plaster, *Taking a Stand on the Death Penalty,* HOUS. VOICE, Feb. 25, 2000, at 1.

144. Alexander Cockburn, *Why Are Gay Activists So Reactionary?,* WORKING FOR CHANGE, (Jun. 21, 2000), *at* http://www.workingforchange.com/article.cfm?ItemID=3974.

the criminal justice system. Such an approach is directly counter to the ideals of justice and fairness upon which hate crime laws are premised. We must strive instead to rid the criminal justice system of the ultimate opportunity to devalue disfavored individuals through systematically biased executions via the death penalty. This is an important step in strategically challenging the social hierarchy that oppresses not only GLBT people but all disfavored groups and is the only way that such communities will achieve real, not symbolic, equality.