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THE LIMITS OF LEGAL DISCOURSE:
LEARNING FROM THE CIVIL RIGHTS MOVEMENT IN
THE QUEST FOR GAY AND LESBIAN CIVIL RIGHTS

ODEANA R. NEAL *

The African-American struggle for civil rights has been a long one, one that began with the importation of the first black person into the country as a slave, and continues today.¹ Through radical political struggle coupled with legal precedent, *de jure* segregation became a part

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Although initial footnotes describing an author's use of terminology have become a cliché, I found, in circulating a draft of this article, that terminology I took for granted was not shared by all my readers. I use "lesbian" to describe women whose erotic attraction is self-described as being solely towards other women; "bisexual" to describe women and men whose erotic attractions are self-described as being towards members of both sexes; and "transgendered" to describe women and men whose self-described gender identity is other than their sexual identity at birth (regardless of whether those people have had hormonal treatment or surgery to reassign their sexual identity). The word "gay" is used to describe men whose erotic attraction is self-described as being solely towards other men, as well as to describe activities and culture often associated with gay men. I use the word "queer" to encompass all of the above, as well as those who consider themselves members of sexual minorities for other reasons, such as sado-masochists and fetishists. See Alessandra Stanley, *Militants Back "Queer," Showing "Gay" the Way of "Negro,"* N.Y. TIMES, Apr. 6, 1991, at 23 (discussing the use of "queer" not only as a militant term, but also as an expedient and inclusive term). Finally, I use the word "homosexual" to encompass gay men and lesbians.

1. For perspectives on race-based inequality in the United States throughout the country's history and efforts to eradicate that inequality, see generally CIVIL RIGHTS AND AFRICAN AMERICANS: A DOCUMENTARY HISTORY (Albert P. Blaustein & Robert L. Zangrando eds., 1968); NEGRO SOCIAL AND POLITICAL THOUGHT 1850-1920 (Howard Brotz ed., 1966); THE EYES ON THE PRIZE: CIVIL RIGHTS READER—DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE, 1954-1990 (Clayborne Carson et al. eds., 1991); WORDS THAT SET US FREE: A DOCUMENTARY HISTORY & CHRONOLOGY OF AMERICA'S STRUGGLE FOR EQUAL JUSTICE & CIVIL RIGHTS (THE WORLD ALMANAC, 1993).

of the past of the United States.² Meticulous legal strategizing by the NAACP Legal Defense Fund culminated with the Supreme Court's decision in *Brown v. Board of Education*, which declared unconstitutional the governmental practice of segregating on the basis of race. Careful legislative lobbying—as well as the threats posed by radical black political groups who made it clear that they would be willing to use violence to protect themselves and achieve political ends—resulted in the passage of the Civil Rights and Voting Rights Acts. The passage of the acts seemed to assure the creation of real political, educational, and employment gains for African-Americans.

Gay men and lesbians have fought a different fight for social, political, and economic equality in the United States. On June 27, 1969, New York City police officers raided a Greenwich Village gay bar called the Stonewall. During the raid, which lasted into the next day, the “drag queens,” “dykes,” “street people,” and “bar boys,” who were patrons of the bar, jeered police and threw coins, paving stones, and even parking meters at them.³ At the end of the weekend, the Stonewall bar had been burned out; but a new collective resistance—gay liberation—had been forged: For the first time, gay men and lesbians in New York actively

2. Two amendments to the United States Constitution significantly changed the status of people of African descent in America. First, with the ratification of the 13th Amendment in 1865, slavery was abolished in the United States. As a result, thousands of people were no longer considered property of whites in America. Soon, however, states replaced this fixed system of chattel slavery with a system of racial segregation by enacting Black Codes and Jim Crow laws. By design, these stringent raced-based laws kept newly liberated people of African descent separate from whites in all respects: former slaves were barred from using public accommodations and often from obtaining for themselves many of the necessities of life liberally enjoyed by many whites.

Second, the ratification of the 14th Amendment on July 27, 1868 profoundly impacted the lives of Africans in America. This amendment states in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

U.S. CONST. amend. XIV, § 1.

As applied to statutes which made distinctions between individuals or groups on the basis of race, the Supreme Court held, in the latter part of the nineteenth century, that equal protection did not require identical treatment of people of different races, merely equal treatment. *Plessy v. Ferguson*, 163 U.S. 537 (1896). As a result, the Court sanctioned the “separate but equal” doctrine. The *Plessy* decision was revisited in *Brown v. Board of Educ.*, 347 U.S. 483 (1954) more than a half century later. There, the Court held that separation of the races in public school education is inherently unequal. *Id.* at 495.

3. BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 81 (rev. ed. 1995).

fought police harassment.⁴ Many view this event—the “Stonewall Rebellion”—as the birth of the modern gay liberation movement.

This article will critique several political/legal strategies used by the African-American civil rights movement which have served as models for the gay and lesbian civil rights movement. I argue that the gay and lesbian civil rights movement must learn from the failures and limitations, as well as the successes, of the African-American civil rights movement. It must take care, as the African-American civil rights movement should have, in its use of rhetoric and imagery about people in the movement, and it must also take care not to exclude, either by acts of commission or omission, people at the fringes of the movement. Finally, I examine *Lesbians, Gay Men, and the Law*, a textbook on sexual orientation and the law, to show how it is an example of current gay and lesbian rights discourse.

The comparison between the quest for civil rights by gay men and lesbians and the quest for civil rights by African-Americans is not without controversy.⁵ Many African-Americans resent the comparison because they feel that homosexuality is behavioral and is therefore unlike race, over which one has no choice.⁶ Some feel that sexual orientation may be hidden, and *is* hidden, when it serves lesbians and gay men politically, economically, or socially to do so: They argue that since race cannot be hidden in the same way, the two forms of discrimination are in no way comparable.⁷ Others feel that most gay men and lesbians—and particularly white gay men—do not suffer from the type of economic, educational, and social disadvantages that many African-Americans do and therefore should not be entitled to the same type of legal protections.⁸ Yet another group feels that comparisons to the African-American struggle for civil rights is ahistorical:

4. *Id.* at 81-83.

5. See generally Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33 (1994).

6. See Henry Louis Gates, Jr., *Blacklash? All Prejudices Are Not Equal. But That Doesn't Mean There's No Comparison Between the Predicaments of Gays and Blacks.,* NEW YORKER, May 17, 1993, at 42.

7. See Lena Williams, *Blacks Reject Gay Rights Fight As Equal to Theirs,* N.Y. TIMES, June 28, 1993, at A1.

8. *Id.* at A12. “By every measure I have seen, race runs deeper and does more damage than any other bias. While some white Americans may have cause for complaints, they still have the built-in advantage of not being black.” *Id.* (quoting ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992)).

I consider it offensively disrespectful of the recorded and unchronicled sufferings of millions of my people who were kidnapped, chained, shipped and sold like livestock; brutalized, branded and castrated when caught seeking freedom, and then publically [sic] lynched for trying to enjoy the simple justice won on many a battlefield.

.....

I have [never] seen a newspaper advertisement of centuries past that announced "homosexual for sale."

.....

While certain restrictions against gay men have been inhumane, gay men were never declared "three-fifths" human by the U.S. Constitution.⁹

Of course, this unwillingness to compare the two movements occurs in part because of the homophobia within the African-American community¹⁰ and the racism that permeates the white gay and lesbian community.¹¹ There can be tensions between the groups for political power and economic resources.¹² Certainly, similarities between the two movements easily can be exaggerated. Nevertheless, each movement is attempting to secure for its members full and unfettered freedom of

9. Vernon Jarrett, *Gay Rights, Black Struggles Are Different*, CHI. SUN-TIMES, Apr. 25, 1993, at 41.

10. There is undoubtedly homophobia within African-American communities. Still, 53% of African-Americans support legislative change to effect equal rights for gay people while only 40% of white Americans support such a change. Williams, *supra* note 7, at A12.

11. See Kim I. Mills, *Gay Community: Public Diversity and Private Distinction*, ASSOCIATED PRESS, Apr. 3, 1993 (quoting a gay black man as saying that he senses "a kind of aloofness; unfriendly attitudes, and an unwillingness to communicate" in his dealings with gay white institutions); see also Williams, *supra* note 7 (noting the racism that exists in the gay, lesbian, and bisexual community).

12. Increasingly, organizations which serve gay, lesbian, and bisexual people (which are often predominantly white) and those which serve African-Americans generally, argue over the availability of scarce resources for their constituencies or whether one group should be willing to tolerate the other. For example, in Washington, D.C., disputes over funding to assist people with AIDS often centered around whether such funding should go to groups which catered primarily to gay and bisexual white men or to groups which catered to African-American and Hispanic gay and bisexual men. See Amy Goldstein, *Where AIDS And Money Cross Paths: Gays and Minorities Dispute How Funds Are Divided Up*, WASH. POST, July 11, 1993, at A1. Similar disputes have arisen in Newark, New Jersey, Houston, Texas, and New York City. *Id.* at A14. There have also been conflicts between the groups when people of color who are popular in their communities go on to hold public office, only to make homophobic remarks while there.

opportunity and expression. And, for African-Americans who are also homosexual, success for one movement without success for the other means receipt of only half a loaf.

I. THE LIMITATIONS OF THE AFRICAN-AMERICAN CIVIL RIGHTS MOVEMENT

The gay and lesbian movement's legal strategy, and appeals to Americans' ideals of right and wrong, come from a tradition created by African-Americans during their struggles for civil rights. This is not to say that the gay and lesbian rights movement did not exist prior to 1954, the year in which *Brown* was decided and the Montgomery bus boycott started.¹³ Still, gay and lesbian legal and political advocates' attempts to chip away at hurtful and debilitating legal precedent, appeals for recognition of the humanity of queers, and efforts toward lobbying and demonstrating, all sound chords among those familiar with the African-American civil rights movement. Because the African-American civil rights movement has been so metaphorized and removed from its historical context, the gains of that struggle tend to be exaggerated, especially by white people. Many whites believe that African-Americans have made far more significant gains in the years following the golden era of the civil rights movement than is actually the case.¹⁴ Few white people believe that African-Americans continue to suffer from racial discrimination.¹⁵ Moreover,

[B]ecause of the wide acceptance of the belief in the significant economic progress of blacks, many whites have become increasingly resistant [sic] to efforts toward racial equality in the areas of education, employment, housing[,] and economic security. . . . [I]ncreasing numbers of whites are charging "reverse discrimination" and are strongly resisting the use of their tax dollars for social programs on behalf of the poor and minorities.¹⁶

The African-American civil rights movement has produced some visible trappings of success (*i.e.*, there are more African-Americans who

13. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

14. Richard Lowy, *Yuppie Racism: Race Relations in the 1980s*, 21 J. BLACK STUD. 445, 454 (June 1991).

15. *Id.*

16. Robert Hill, *The Illusion of Black Progress*, 10 BLACK SCHOLAR 18, 18 (1978).

are visibly successful economically and politically),¹⁷ yet the quality of life for a sizable portion of the African-American community is abysmal. Public education systems, especially in Northern municipalities, are more racially segregated now than they were twenty years ago.¹⁸ Academic achievement test scores of black students continue to lag behind those of their white counterparts.¹⁹ Incarceration rates of African-American males are skyrocketing,²⁰ and rates of contact with the criminal justice system are even higher.²¹ The poverty level for African-Americans is higher now than it has been in twenty years.²² African-American unemployment rates are regularly double what they are for whites,²³ and increased national job shrinkage will inevitably mean further under- and unemployment for African-Americans. Many African-American youngsters suffer from economic, psychological, and physical violence,

17. For example, today, over 40% of black households have annual earnings of over \$25,000; in 1967, only 31% did. Ramon G. McLeod, *White Men's Eroding Economic Clout Contributes to Backlash*, S.F. CHRON., Mar. 20, 1995, at A7. The proportion of African-American households with incomes of \$35,000 or more increased from 20.9% in 1970 to 25.8% in 1992. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994, at 464 (Table No. 706) [hereinafter STATISTICAL ABSTRACT]. Nevertheless, the median income for African-Americans declined during the same period from \$18,810 to \$18,660. *Id.*

18. See A COMMON DESTINY, BLACKS AND AMERICAN SOCIETY 76-77 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

19. See Dennis Kelly, *Kids' scores for reading 'in trouble,'* USA TODAY, Apr. 28, 1995, at 1A (achievement test scores for reading show that 40% of white high school seniors were proficient in reading while only 12% of African-American seniors were); John Hildebrand, *Gender Gap Narrows on SAT Exam*, NEWSDAY (Nassau and Suffolk County), Aug. 25, 1994, at A7 (black students' average scores on the 1994 Scholastic Aptitude Test were 198 points lower than the average scores of white students).

20. For example, in 1978, 65,104 jail inmates in the United States were African-American; in 1992, 195,156 of them were. STATISTICAL ABSTRACT, *supra* note 17, at 215.

21. For example, a 1992 report found that 70% of African-American men in Washington, D.C. were arrested and jailed at least once before reaching the age of thirty-five. See Elizabeth Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 621 n.3 (1992) (citing JEROME G. MILLER, HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON D.C.'S CRIMINAL JUSTICE SYSTEM 1 (1992)).

22. The proportion of African-American families earning under \$10,000 per year increased from 20.8 percent in 1970 to 26.3 percent in 1992. STATISTICAL ABSTRACT, *supra* note 17, at 469.

23. In 1980, the white unemployment rate was 6.3%, while the rate for African-Americans was 14.3%. In 1993, the black unemployment rate had fallen to 12.9%, but the rate for whites had also fallen to 6.0%. *Id.* at 416.

as well as teenage parenting, all of which result in further limiting life choices, and increasing despair. Certainly these numbers do not add up to success.

Analyses of the causes of these civil rights failures abound. Some argue that integration created a system in which black people no longer depend on or assist one another in their struggles for employment and education.²⁴ Others claim that African-Americans had begun to believe that they deserved the American dream without having to struggle to achieve it.²⁵ A particularly insightful analysis concludes, however, that a significant reason for the failure of the civil rights movement is that it did not recognize its enemy, or at least its leadership did not: It functioned on the presumption and operated on the belief that the foe was segregation.²⁶ It did not understand that the real enemy was racism, the force that had helped create the peculiar institution of slavery and had shaped the Jim Crow laws which kept many African-Americans in slavery-like conditions. Robert Carter, a lawyer who argued *Brown* before the Supreme Court, believes that he and other NAACP Legal Defense Fund attorneys underestimated the power of racism when they sought to eradicate segregation through litigation:

From our vantage point racial segregation—enforced separation, with its degrading humiliations—seemed to be the great evil that had to be destroyed. Segregation made it possible for majority whites to shortchange blacks, to deny them equal benefits from the public purse.

24. For example, one commentator discusses how the black middle class is indifferent to the problems of the black underclass and documents the responses of the former to the suggestion that they should, as law-abiding citizens, be responsible for the criminal and underclass blacks. See ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 95-110 (1993). Ulric Haynes, Dean of Hofstra University's business school, states, "In every society there are underdogs and there is an underclass. And I am not going to take on the black underclass as a special burden of mine as a black man." *Id.* at 95.

25. See, e.g., THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* 123-24 (1990) (citing DANIEL C. THOMPSON, *PRIVATE BLACK COLLEGES AT THE CROSSROADS* 88 (1973)). Sowell, an African-American political conservative, contends that African-Americans categorically believe that they are entitled to certain preferences, based on their status as a minority group. *Id.* As a result, he argues, they expend minimal effort to achieve their goals. In support of his thesis, Sowell looks at students attending certain historically black colleges and universities and claims that those "planning post-graduate study[,] often showed no sense of urgency about needing to be prepared 'because they believe that certain rules would simply be set aside for them.'" *Id.* at 123-24.

26. Robert L. Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 21-23 (Derrick Bell ed., 1980).

.....
It was not until *Brown I* was decided that blacks were able to understand that the fundamental vice was not legally enforced *racial segregation* itself; that this was a mere by-product, a symptom of the greater and more pernicious disease—white supremacy. Needless to say, white supremacy is no mere regional contamination. It infects us nationwide and remains in the basic virus that has debilitated blacks' efforts to secure equality in this country.²⁷

Similarly, Derrick Bell, who engaged in school desegregation litigation for the NAACP Legal Defense Fund during the 1960s concluded that the permanence of racism necessarily meant that legal victories would not result in full integration of African-Americans into the American mainstream.²⁸

Even the social scientists used as witnesses in desegregation cases may have been so sure that segregation was the cause of the evils that plagued African-Americans that they came to erroneous conclusions on the basis of their studies. Kenneth and Mamie Clark, for example, were psychologists who conducted tests to examine the self-esteem of African-American schoolchildren.²⁹ In these tests, children were presented with dolls that were identical except for one feature: one doll had pink skin and the other had brown skin.³⁰ The children were asked a series of questions about the dolls.³¹ When asked which doll was prettiest or which was the good child, an alarming number of black children chose the white doll.³² In fact, a significant proportion of black children identified the white doll as the one that most looked like them.³³

Kenneth Clark, who testified about the tests in several school desegregation cases, concluded that these tests demonstrated that

27. *Id.*

28. See, e.g., Derrick Bell, *The Permanence of Racism*, 22 Sw. U. L. REV. 1103 (1993); Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79 (1991).

29. See Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169, 169-78 (1947) [hereinafter Clark, *Racial Identification*] (listing the results of the doll preference questioning of African-American children); see also KENNETH B. CLARK, PREJUDICE AND YOUR CHILD, at xxiii-xxiv (1963) [hereinafter CLARK, PREJUDICE] (discussing the doll preference tests).

30. See Clark, *Racial Identification*, *supra* note 29, at 169-70.

31. See *id.* at 169.

32. See *id.* at 170-76.

33. See *id.*

segregated education had a negative effect on children's self-worth.³⁴ Black children were aware that white children attended better funded and more attractive schools, that cast-off books and other materials from white schools were often sent to be used at theirs, and that white children were often entitled to transportation to school while they were not. The segregation of schools was an ever-present reminder that they were not good enough to associate with white people. As a result, the children viewed white dolls and white people as deserving of good things while black dolls and black people were not.

But was it really school segregation that caused these feelings in black children? Thirty years after *Brown*, the doll experiments were conducted again, this time with children who were in desegregated learning environments.³⁵ The results were the same: Black children were likely to see the black doll as being the bad doll, the white doll as being the good one.³⁶ And a number of black children identified the white doll as the one who was most like them. Even in multiracial environments, black children continue to view themselves as inferior. In one classroom in Montgomery County, Maryland, one of the most integrated school systems in the country, a black child, described as an "A" student by his teacher, reacted to the lead character in a film shown in his class in this way:

You knew something bad was going to happen when it started. As soon as you see a black boy you know he's gonna do something bad. . . . Everybody knows that black people are bad. That's the way we are.³⁷

34. See *id.* 171-79; CLARK, PREJUDICE, *supra* note 29, at 22-24.

35. See Darlene Powell-Hopson & Derek S. Hopson, *Implications of Doll Color Preferences Among Black Preschool Children and White Preschool Children*, J. BLACK PSYCHOL., Feb. 1988, at 57, 57-63 (recounting the results of the author's doll study based on Clark's study of 30 years earlier). Most of the February 1988 volume of the *Journal of Black Psychology* (Volume 14, No. 2) is dedicated to commentary on the doll preference tests. See also WILLIAM E. CROSS, JR., SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY 115-18 (1991) (discussing the doll preference test conducted 30 years after Clark's original test and how the results were the same).

Kenneth Clark remains a staunch integrationist even though the doll experiments, if repeated today, would probably yield the same results. Sam Roberts, *Conversations/Kenneth B. Clark, An Integrationist to This Day, Believing All Else Has Failed*, N.Y. TIMES, May 7, 1995, § 6 (Magazine), at 7.

36. See Powell-Hopson & Hopson, *supra* note 35. See also Jack E. White, *Growing Up In Black and White*, TIME, May 17, 1993, at 48.

37. Marc Elrich, *The Stereotype Within: Why My Students Don't Buy Black History Month*, WASH. POST, Feb. 13, 1994, at C1, C4.

The student's sixth-grade class reached consensus that the following statements were true:

Blacks are poor and stay poor because they're dumber than whites (and Asians).

Black people don't like to work hard.

[Black people are naturally bad:] "It's 'just how we are.'"

White people are smart and have money.

Asians are smart and make money.³⁸

And so on.

It may be that, had the attorneys for the Legal Defense Fund realized that the enemy of African-Americans was racism and not *de jure* segregation, they would have planned their legal strategies differently. Carter, for example, says that he might have considered using more educators in the pantheon of social science experts who testified about segregated school conditions and the effect on children:

If I had to prepare for *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, I would seek to recruit educators to formulate a concrete definition of the meaning of equality in education, and I would base my argument on that definition and seek to persuade the Court that equal education in its constitutional dimensions must, at the very least, conform to the contours of equal education as defined by the educators.

I am certain that a racially integrated America is best for all of us; but I also know that quality education is essential to the survival of hundreds of thousands of black children who now seem destined for the dunghill in our society.³⁹

Carter concludes that a focus on educational integration is a luxury of middle-class African-Americans and that litigation surrounding schools should instead focus on matters like school financing, educational

38. *Id.*

39. Carter, *supra* note 26, at 27-28.

offerings, and teaching methodology.⁴⁰ If the African-American civil rights movement had recognized and acknowledged that laws requiring segregation were not the enemy of African-American, but a by-product of the real enemy, racism, litigation might have been conducted differently. Carter states that he would have spent more energy trying to ascertain what equality of education meant. This might have resulted in more litigation focusing on the amount of money expended on children in black schools, the qualifications and salaries of teachers in those schools, and equality determinations based on, at least in part, learning outcomes. Given that drop-out rates and grade-retention rates for African-American children are lower for children in all-black schools than they are for children in racially mixed schools,⁴¹ such a plan is well worth consideration.

Indeed, the Afrocentric education movement has come about, at least in part, because of the recognition that black children are being educated in a nation that is hostile towards them: Afrocentric educators suggest that African-American children can best be taught and best learn in neighborhood schools which respect and validate black culture. Many parents agree. Derrick Bell has stated that even as the NAACP Legal Defense Fund engaged in desegregation litigation, many African-American parents were far more interested in their children receiving a better education in segregated schools than they were in having their children attend desegregated schools. Perhaps they recognized the enemy better than their lawyers did.

Similarly, the gay, lesbian, and bisexual movement must recognize that the enemies of its constituency are not sodomy laws, laws forbidding the enactment of anti-gay discrimination statutes, legal precedent which views homosexuals as unfit or lesser-fit parents, or bans on gay, lesbian, and bisexual participation in the armed services. The enemy is homophobia, that prejudicial impulse which, though often guised as morality, sets gay men, lesbians, and bisexuals on a less-than-human plane. This is not to say that laws which discriminate against gay men, lesbians, and bisexuals are not to be combatted, any more than it is to say that *de jure* segregation should not have been the subject of any litigation during the height of the African-American civil rights era. What it *does* suggest, however, is that there needs to be a vision of what kinds of ends can most likely be achieved given the reality of racism and homophobia,

40. *Id.* at 28; see also Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (stating that many potential plaintiffs in school desegregation cases wanted schools with equal resources, not necessarily integrated schools).

41. See Douglas S. Massey et al., *The Effect of Residential Segregation on Black Social and Economic Well-Being*, 66 SOC. FORCES 29 (1987).

how to include as much of the movement's constituency within that vision as possible, and by what means, if any, racism and homophobia can be eradicated.

The gay, lesbian, and bisexual civil rights movement's focus on the military ban against gay, lesbian, and bisexual participation in the armed services and the movement's overreliance on mainstream politics to end that ban is one example of the failure to recognize homophobia as the enemy instead of the manifestation of homophobia. Gay men, lesbians, and bisexuals played a significant role in the 1992 election of Bill Clinton as President of the United States.⁴² Early in his campaign, presidential candidate Clinton stretched out his arms to solicit help from the queer community, and he appeared to embrace sexual minorities as part of his new world order.⁴³ Large and politically powerful gay and lesbian rights organizations—among them the National Gay and Lesbian Task Force, the Human Rights Campaign Fund,⁴⁴ the Gay and Lesbian Victory Fund, and the Lambda Legal Defense and Education Fund—as well as unaffiliated gay, lesbian, and bisexual individuals, poured out support for him.⁴⁵ The political power of lesbians and gay men was heralded by much of the media. In recognition of their efforts, many gay and lesbian supporters of Bill Clinton expected that within days after taking office he would, by

42. Lesbians and gay men have also contributed a significant amount of money to other Democratic and Republican candidates running for congressional seats. Maralee Schwartz & Jay Mathews, *Gay-Lesbian Lobby Contributing To More Republican Candidates*, WASH. POST, Oct. 28, 1990, at A7.

43. For example, by November, 1991 Bill Clinton had denounced the ban on homosexual participation in the United States armed forces. See Joyce Price, *Gays predict they will get into military*, WASH. TIMES, Nov. 10, 1991, at A3. In January, 1992, the Washington Post reported that candidate Clinton had already been active in seeking support from gay men and lesbians in his campaign. See, e.g., Maralee Schwartz, *On the Potomac, Candidates Troll for Activists' Backing*, WASH. POST, Jan. 23, 1992, at A14.

Bill Clinton has not been the only presidential candidate to actively seek votes from the gay, lesbian and bisexual community, however. Paul Tsongas, a candidate in 1992, raised more issues affecting that constituency than did Clinton, and Jesse Jackson, a 1984 and 1988 presidential candidate, held a rally for queer supporters and listed gay men, lesbians, and bisexuals in his list of members of his Rainbow Coalition. See Todd S. Purdum, *Democrats' Efforts to Lure Gay Voters Are Persistent but Subtle*, N.Y. TIMES, Apr. 7, 1992, at A24.

44. The Human Rights Campaign Fund is a gay lobbying and political action organization which raised approximately \$4.5 million in 1992. Jeffery Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES, Oct. 11, 1992, (Magazine), at 18, 20.

45. See *id.* at 21 (noting that identifiable gay sources had contributed \$2 million to the Clinton campaign by October, 1992 and that gay, lesbian, and bisexual turnout expected to be as high as nine million voters).

executive order, remove the ban that has tried to exclude lesbians, gay men, and bisexuals⁴⁶ from military service.⁴⁷ Lifting the ban would, as they saw it, signal the beginning of the end of official governmental intolerance of and discrimination against homosexuals and would allow those homosexuals who wished to express their patriotism by joining the armed services to do so without reservation. Instead, President Clinton shifted his position from abolishing the ban, to needing to “study” the issues, to settling on a “don’t ask, don’t tell” policy,⁴⁸ which has been characterized as a compromise because everybody is unhappy with it⁴⁹

46. Although not generally reported, bisexuals are also excluded from service in the military. Federal regulations which prescribe gay men’s and lesbians’ separation from the military on the basis of their homosexuality similarly provide for the separation of bisexuals from the military on the basis of their status as bisexuals. See 32 C.F.R. pt. 41, app. A(H)(b)(2) (1994).

47. See Adam Nagourney, *Clinton Clicks on MTV Stint*, USA TODAY, June 17, 1992, at 3A (Clinton, before a television audience, says that he opposes the military ban); Fred Barnes, *Basic Instinct: Clinton and the interest groups*, NEW REPUBLIC, Apr. 27, 1992, at 12 (reporting that Clinton, describing himself as “an enthusiastic supporter” of gay rights, said that he will end the ban on gay, lesbian, and bisexual military service). As late as his inauguration, in fact, there were still great expectations that President Clinton would lift the ban shortly after taking office. See David S. Broder, *How Clinton Plans to End Ban on Gay GIs*, S.F. CHRON., Jan. 21, 1993, at A3 (reporting that a “senior Defense Department official” said that President Clinton would prepare an executive order lifting the ban shortly after his inauguration); Marilyn Milloy, *Inauguration Hopeful Sign for Gays*, NEWSDAY, (Nassau and Suffolk) Jan. 20, 1993, at 38 (Tom Mixner, a friend of Clinton and an informal liaison between the campaign and gay men and lesbians, says that he has “assurances” that rumors that Clinton was “backpedaling on his pledge” to lift the ban were “unfounded.”).

The ban has, of course, been unsuccessful. Thousands of homosexuals have served in this country’s armed forces since its inception. See GAYS AND THE MILITARY: JOSEPH STEFFAN VERSUS THE UNITED STATES 25, 143-44 (Marc Wolinsk & Kenneth Sherril eds., 1993).

48. Under the policy, gay men, lesbians, and bisexuals will not be asked about sexual orientation at the time of enlistment in the armed services. Engaging in “homosexual conduct,” however—*i.e.*, engaging in a sexual act with a member of the same sex, making a statement that demonstrates a propensity or intent to engage in homosexual acts, or marrying or attempting to marry someone of the same sex—may serve as the basis for discharge from the military, as may revealing that one is gay, lesbian, or bisexual. Paul Richter & John M. Broder, *A Step for Gay Soldiers but Not for Gay Rights*, L.A. TIMES, July 20, 1993, at A1.

49. See Bettina Boxall, *Some Hoots, A Few Hurrahs Greet Clinton Policy on Gays in Military*, L.A. TIMES, July 20, 1993, at A14 (stating that on either side of the issue, very few people seemed pleased with President Clinton’s compromise policy). Indeed, even the President himself stated that no one, including him, was likely to be pleased by the policy. Melissa Healy, *Clinton Eases Ban on Gays in Military but Restricts Conduct*,

and which has made life more difficult for many gay men, lesbians, and bisexuals in the military.⁵⁰ Thus, in spite of increased visibility and an outpouring of money and votes, the rights of sexual minorities were, ultimately, sacrificed to achieve other political goals.

Since the implementation of the "don't ask, don't tell" policy, there has been a flurry of litigation challenging it.⁵¹ One court has deemed the policy violative of bisexual, lesbian, and gay service members' First Amendment rights.⁵² The ban is certainly an important manifestation of homophobia. What does this ban mean for the vast majority of lesbians, gay men, and bisexuals? Probably not much. A relatively small proportion of the population of the United States will engage in military service at some time or another. Even assuming that gay men and lesbians constitute ten percent of the American population, it means that this war is being engaged for a narrow slice of the gay and lesbian population. With the current downsizing of the military, this figure will be even smaller in the future. And, it certainly is the case that in time of war, homosexuality is not seen as being so great an issue that it warrants separation from the armed services.

My quarrel, again, is not with the fact of litigation. Although I believe that the fight against the military ban is symbolic—and I believe and understand that symbols are important—I also believe that resources, financial as well as psychic, must be expended with the understanding that the real-world effect of the eradication of the military ban is not particularly significant for the vast majority of the gay, lesbian, and bisexual community. And what are the problems of that community? Acts of violence against bisexuals, gay men, and lesbians is toward the top of the list, if not at the top. Although some legislation has been passed by

L.A. TIMES, July 20, 1993, at A1.

50. Some in the military say the new policy has changed little with regard to the harassment of gay men and lesbians in the armed services. See, e.g., Art Pine, *Few Benefit From New Military Policy on Gays*, L.A. TIMES, Feb. 6, 1995, at A1; Jonathan S. Landay, *New Policy on Gays In Military Draws Fire One Year Later*, CHRISTIAN SCI. MONITOR, Mar. 17, 1995, at 3. In addition, Congressional rumblings continue about returning to the previous policy. See Katharine Seelye, *Gingrich Seems to Back Off on Step Against Gay Policy*, N.Y. TIMES, Apr. 5, 1995, at A23.

51. This is not to say that there was no litigation challenging the previous policy. See, e.g., Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992); Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D.Wash. 1994).

52. Able v. United States, 880 F. Supp. 968 (E.D.N.Y.), remanded 44 F.3d 128 (1995). But see Thomasson v. Perry, No. 95-2185, 1996 U.S. App. LEXIS 6591 (4th Cir. Apr. 5, 1996) (holding "don't ask, don't tell" policy does not violate the First Amendment).

states and municipalities enhancing penalties for violence committed upon gay men, lesbians and bisexuals because of their sexual orientation, few prosecutions are brought pursuant to these sections. Where are the gay, lesbian, and bisexual prosecutors to prosecute these crimes?⁵³ Suicide among gay, lesbian, and bisexual teenagers is three times that of heterosexual teenagers.⁵⁴ Therefore, there needs to be assurance—perhaps achieved through litigation—that those who counsel teenage children, both within and outside schools, receive proper training in dealing with the special issues that these children face and be denied certification if they do not have such training. Gay men and lesbians, contrary to popular belief, tend to earn less money and be more vulnerable to dismissal from employment than their heterosexual counterparts.⁵⁵ It is important, therefore, to strengthen and create statutes which forbid discrimination on the basis of sexual orientation in the workplace and to represent those who are subject to that discrimination. This kind of legislative work is much more likely to be successful than is constitutional litigation.

At the core of all this, of course, is the role education plays or does not play in eradicating homophobia as well as racism. One of the beliefs of attorneys in the African-American civil rights movement was that white people's interaction with black people and knowledge about their lives would result in a reduction of hostility towards African-Americans. There was some hope that this would be particularly true of white children who would grow up in desegregated environments with black children. The

53. Gay, lesbian, and bisexual prosecutors can play a significant role in the prosecution of those who commit violence against gay men, lesbians, and bisexuals. Two such prosecutors, Hallee Weinstein and Angela West, prosecutors in Baltimore and Los Angeles, respectively, played a significant role in ensuring prosecution for lesbian abusers. Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249 (1992).

54. See Kurt Chandler, *Growing Up Gay—A Crisis in Hiding*, STAR TRIB., Dec. 6, 1992, at 1S (citing a 1986 U.S. Department of Health and Human Services report which found that young gay and lesbians were two to three times more likely to attempt suicide than other young people); see also Joyce Murdoch, *Gay Youths' Deadly Despair; High Rate of Suicide Attempts Tracked*, WASH. POST, Oct. 24, 1998, at A1.

55. Expert Opinion of Prof. Kenneth S. Sherrill, Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, No. C-1-93-0773 (S.D. Oh.), available in <http://maxweber.hunter.cuny.edu/polsc/ksherrill/>; M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726 (1995); L.A. COUNTY BAR ASS'N, COMMITTEE ON SEXUAL ORIENTATION BIAS, REPORT 20 (June 2, 1994).

experiment has had mixed results. While most white Americans now agree that overt and blatant discrimination, either formal or informal, is immoral and should be illegal, there is still some low-level belief that African-Americans are inferior to white people, although the individual African-Americans with whom they interact may not be, on the whole. The public reaction to *The Bell Curve*, a book which posits that African-American intelligence is lower than that for whites, is an example of this thesis.⁵⁶ The authors argue that although the intelligence of an individual African-American cannot be assumed to be lower than that of any individual white American, the average intelligence level of black people as a whole is lower than the average intelligence level of white people.⁵⁷ For many, the enormous amount of publicity surrounding the publication of this dense and highly technical text, as well as the acceptance of its thesis by those who had not read the book, signalled that it was confirming what many white Americans already "knew;" that is, African-Americans were simply not as smart as white people, though that might not be true of at least some of the black people they knew.⁵⁸ African-Americans who work in or are educated in integrated settings are regularly subjected to comments indicating that their white colleagues believe that they are somehow not like other black people, that is, that they are better than the rest. A majority of white Americans indicate that they would have no problem living next door to an African-American family, but tipping-point studies show that too many African-Americans living in a neighborhood causes white families to flee.⁵⁹ Even though education and

56. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 298-315 (1994). *The Bell Curve* tries to support the assertion that intelligence as measured by IQ testing is "substantially inheritable," and that the lower average IQ scores of blacks as compared to whites and Asians suggest that blacks, on average, are biologically inferior in intelligence to other racial groups. *Id.* Herrnstein and Murray also believe that public education and other forms of government intervention are not going to help raise the performance and life prospects of those racial groups that do not perform well on intelligence tests. *Id.* at 436-45.

57. *Id.* at 298-315.

58. See Glenn C. Loury, *A Well-Funded Entry in the Black Inferiority Sweepstakes*, L.A. TIMES, Sept. 24, 1995, at M5.

59. See, e.g., Douglas S. Massey & Andrew B. Gross, *Explaining Trends in Racial Segregation, 1970-1980*, 27 URB. AFF. Q. 13, 15-16 (1991) (survey shows that while 24% of white residents in Detroit area would feel uncomfortable in a neighborhood in which one in 15 families was black and 27% said they would be unwilling to enter it, if a neighborhood were 50% black, virtually no white would be willing to enter it and 64% would try to move); *There Goes The Neighbourhood*, ECONOMIST, Dec. 7, 1985, at 22 (noting that one developer says that he will not allow the number of minorities in development to rise above 35% or the white residents will leave).

exposure to African-American people can result in a lowering of some hostility towards them, many, many generations will pass before a culture premised on white supremacy and a culture based in heterosexism changes.

Just as African-Americans must figure out what equality means and how it can be achieved in a society which finds us inferior, so must the gay, lesbian, and bisexual community figure out what equality means in a society which is heterosexist. What this may mean is that gay men, lesbians, and bisexuals have to accept that legal victories may not allow them the privilege of straight white men. Continually pushing on a door which may open only slightly, if at all, may be the most that can be hoped for. Gay men, lesbians, and bisexuals:

must find inspiration not in the sacrosanct, but utterly defunct, glory of ideals that for centuries have proven both unattainable and poisonous. Rather, they must find it in the lives of " . . . oppressed people who defied social death . . . insisting on their humanity despite a social consensus that they were 'a brutish sort of people.'"⁶⁰

II. THE USE OF PITY IMAGERY AND RHETORIC IN THE AFRICAN-AMERICAN AND GAY, LESBIAN, AND BISEXUAL CIVIL RIGHTS MOVEMENTS

One device used by African-Americans in the search for political and legal equity, either wittingly or unwittingly, was the use of images and rhetoric that displayed their long suffering. Indeed, it may be that without television the civil rights movement would not have achieved the political successes it did. Nightly viewing of young men and women having dogs set upon them, the almost tangible hostility that was aroused by nine black students' entering Little Rock Central High School, as well as images of dismal living conditions in Southern rural areas, helped promote the idea that black people were helpless without the beneficence of whites. At the very least, the images indicated that black people were to be pitied, and that as a result, they should have special legal protection.

Nevertheless, there was a price to pay for presenting such images. African-Americans have learned that the pity from the majority can quickly turn to anger when the image portrayed reflects black success stories and even black anger. The terms of discourse in the current debate on the future of race-based affirmative action programs confirm this. There is a belief that African-Americans are no longer entitled to "special

60. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 197 (1992) (quoting Nathan Huggins, *BLACK ODYSSEY* (1990)).

protection" because they no longer suffer in the way that the previous images of black life indicated. Instead of images of tar-paper shacks, the images of black people are either those of wildly wealthy African-Americans, usually sports figures or entertainers, or those whose suffering is deemed attributable to their own behavior, such as teenagers who are handcuffed and being led away by police or who are high on crack or who are screaming at one another on afternoon television talk shows. Only the "truly disadvantaged" are entitled to a boost from the government. It no longer seems possible that the effects of racism constitute a disadvantage unless the disadvantage has been expressed as abject poverty.

A similar kind of strategy is used in the gay, lesbian, and bisexual civil rights movement which also uses a kind of we-can't-help-it rhetoric. Some legal strategists, for example, base their claim that gay men, lesbians, and bisexuals constitute a suspect class under equal protection jurisprudence on scientific theories that declare that homosexuality is an immutable characteristic.⁶¹ If it were an immutable characteristic, sexual orientation would fit much more neatly into the equal protection paradigm for suspectness. There is also the use of language that seeks to counter those who claim that being gay, lesbian, or bisexual is simply a lifestyle choice: This cannot be a choice because no one would claim to be this way, the countercharge goes.⁶² The use of this kind of rhetoric is understandable because those who believe that homosexuality cannot be helped are more likely to be supportive of gay, lesbian, and bisexual equal rights. Use of pity rhetoric is dangerous, however, because it leaves the movement's gains open to attack should scientific research about the immutability of sexual orientation, which is still in its infancy, conclude that sexual orientation is not genetically determined.⁶³ Similarly, should

61. See, e.g., Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937 (1991); Elvia R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1427 (2nd ed. 1988). But see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (arguing that gay men, lesbians, and bisexuals constitute a suspect class even if sexual orientation is not an immutable characteristic).

62. See, e.g., Sylvia Rubin, *The New Lesbian Chic*, S.F. CHRON., June 22, 1993, at B3 (quoting lesbian playwright Claire Chaffee as saying, "No one would choose to be lesbian").

63. See Ruth Hubbard, *The Search for Sexual Identity; False Genetic Markers*, N.Y. TIMES, Aug. 2, 1993, at A15 (arguing that sexual orientation is a complex concept and that a genetic marker for why some people's sexual orientation is towards people of the same gender is no more likely to be found than a genetic marker for why some people's orientation is towards people of a certain hair or eye color).

it appear that gay men, lesbians, and bisexuals are indeed happy with their sexual orientation, and perhaps happier than they would be if they were heterosexual, any gains made by playing a sympathy card will be lost.

This is not to say that there are not truly dire consequences that can derive from being gay, lesbian, or bisexual, and declaring it. Certainly, no one would choose the victimization, discrimination, and societal disdain, that many gay men, lesbians, and bisexuals encounter daily; and no one would choose to endure the inner turmoil that can be created by the process of becoming aware that one is homosexual or bisexual. But there certainly is joy—and ecstasy—in being homosexual or bisexual, that is, in being able to love whom one wants as one wants. To acknowledge that joy, however, might make those tending towards non-sympathy see homosexuality as simply hedonistic. Choosing to take pleasure in one's body and in the bodies of others—and acknowledging it—is not the American way. Americans, including many members of sexual minorities, are both fascinated and repelled by sex and sexuality. Choosing the “wrong” way to live and choosing not to hide or feel ashamed of it is often punished either legally or culturally. But, to not be willing to express that joy in the course of seeking legal protection can have harmful repercussions should the image of joylessness be accepted and later rejected. Instead, the gay and lesbian civil rights movement should rely on true images, namely, images of choice and happiness, as well as images of despair, in the quest for tolerance and constitutional and legislative protection.

III. THE EXCLUSION OF THE PEOPLE ON THE FRINGES OF THE MOVEMENT

Some of the failures of the African-American civil rights movement derive from the movement's attempt to derace African-Americans in the struggle to gain rights. By attempting to mainstream and normalize who black people were and what being black meant, African-Americans both lost strength in their ability to coalesce with one another on the basis of shared racial identity and failed to allow themselves to be different within that shared identity.⁶⁴ The mainstream civil rights movement was ultimately fought for those who could most look and behave like a mythical best-of-America in blackface: middle-class, male (or appended to one), and heterosexual. Martin Luther King, Jr. was the leader of that

64. Cf. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 74-91 (1983) (discussing the tension in the gay rights movement of the 1950s among those who sought to have a separate homosexual culture recognized and protected and those who believed that sexual orientation did not a distinct minority make).

movement for reasons far beyond his message of non-violence: He presented the picture of a respectable white man who happened to be black. It is not accidental that the children chosen to integrate Central High School in Little Rock, Arkansas, as well as the men and women who integrated state universities throughout the south appeared stoic, non-complaining, and very American. Many of the initial integrators were *chosen* to integrate for that very reason. Those members of the African-American community who were not, or who did not want to be, situated within the paradigm of American normalcy were not to be considered part of the struggle. Leaving them behind has come to haunt us.⁶⁵

The failure to include those people who constituted a less privileged class, if not an underclass, in the heady business of constructing civil rights strategies is understandable, given the movement leaders' view of those people. The effect of *de jure* segregation, they believed, was to create a pathology among a significant proportion of the black population. In the words of W.E.B. Du Bois:

[There is] a mass of untrained and uncultured colored folk[,] and even of trained but ill-mannered people[,] and groups of impoverished workers of whom [the] upper class of colored Americans are ashamed. They are ashamed both directly and indirectly, just as any richer or better sustained group in a nation is ashamed of those less fortunate and withdraws its skirts from touching them. But more than that, because the upper colored group is desperately afraid of being represented before American whites by this lower group, or being mistaken for them, or being treated as though they were part of it, they are pushed to the extreme of effort to avoid contact with the poorest classes of Negroes. This exaggerates, at once, the secret shame of being identified with such people and the anomaly of insisting that the physical characteristics of these folk which the upper class shares, are not the stigmata of degradation.⁶⁶

65. The women's rights movement continues to struggle with the same issue: should women behave like men—should we attempt to situate ourselves within a male definition of normal—in order to achieve political ends? Or should we demystify and deconstruct myths of maleness and femaleness in order to show how there is no such thing as normal? The failure to embrace those women who are not white, straight, and middle class has significantly weakened the promised power of the women's rights movement.

66. W.E.B. DU BOIS, *On Being Ashamed of Oneself: An Essay on Race Pride*, from *The Crisis*, Sept. 1933, reprinted in W.E.B. DU BOIS: A READER 1, 77-78 (David Levering Lewis ed., 1995).

Benjamin Chavis⁶⁷ recognized this error during his reign as the executive director of the NAACP. He sought to make the organization an umbrella group of African-Americans, even though there might be factions within the group who disagreed with one another. Chavis came under particular attack for his inclusion of Minister Louis Farrakhan,⁶⁸ who has been accused of making a number of anti-Semitic speeches and remarks. As he continues to engage in civil rights work within his newly formed leadership council, Chavis has again emphasized the importance of accepting differences among African-American communities as those communities continue their political struggle. I agree with Dr. Chavis because it is important to embrace those members of the community with whom we disagree and not distance ourselves from them. Distancing ourselves would weaken the power of whatever accomplishments the movement would achieve.

The "gay rights agenda," which has been heralded by the political right as one of the most nefarious schemes ever to be present on the American political scene,⁶⁹ is probably instead several agendas, some of which may be conflicting. Desire to hide fissure within any political movement from those outside the movement is understandable. Division can hurt movements, and as William Rubenstein writes in his introduction to *Lesbians, Gay Men, and the Law*, in spite of increased visibility and apparent political strength, "lesbians and gay men face stiffer opposition than ever before. A well-organized and well-funded religious right has pledged that "'gay rights' will be the 'abortion' issue of the 1990s."⁷⁰

67. In 1994, Chavis was dismissed for using the organization's money, without the Board's knowledge, to pay an out-of-court settlement to avoid a sexual harassment and sexual discrimination suit. See Steven A. Holmes, *N.A.A.C.P. Tries to Build Political Power for 1996*, N.Y. TIMES, Oct. 2, 1995, at A8.

68. Farrakhan, the leader of the Nation of Islam, has uttered anti-semitic remarks on numerous occasions, referring to Jews as "bloodsuckers," among other things. *Farrakhan Remark Stirs Anger*, N.Y. TIMES, Oct. 14, 1995, § 1, at 24.

69. For example, Colorado for Family Values, a group of anti-gay rights activists which promoted Colorado's Amendment 2, a "state constitutional amendment that prohibits granting homosexuals protected class status under civil rights laws," sells books and videotapes on "The Gay Agenda." Valerie Richardson, *Amendment 2, Act II: Gay-rights Foe Builds on Colorado Victory*, WASH. TIMES, June 2, 1993, at A1; see also *infra* note 79.

70. LESBIANS, GAY MEN, AND THE LAW, i, xv (William B. Rubenstein ed., 1993). Similarly, Marvin Liebman, a political writer who is also a gay conservative Republican, believes that "homophobia replac[es] the anti-communism which used to hold the conservative movement together." Michael D'Antonio, *Bedeviling the GOP: With "Stealth" Candidates, Tight Discipline and Cash, the Religious Right Dominated the Republican Agenda. Now, the Battle's On for the Party's Soul—and Its Future*, L.A. TIMES, Nov. 29, 1992 § 6 (Magazine), at 28.

Indeed, some who were quite active in the anti-abortion rights movement during the 1980s have stated unambiguously that their attention is shifting to the prevention of the mainstreaming of homosexuality and bisexuality in the United States.⁷¹ Gay, lesbian, and bisexual bashing is on the rise.⁷² Organizations whose goal is to promote "traditional family values," which apparently does not include love and acceptance of gay, lesbian, and bisexual family members, are increasing in number and have a growing political cachet.⁷³ But it is not only the political right with which the gay, lesbian, and bisexual movement has to concern itself. It must also concern itself with itself and with its allies. It must decide what it wants being gay, lesbian, and bisexual to mean. It must determine which privileges sexual minorities should be willing to relinquish and which privileges it should struggle to maintain. The gay, lesbian, and bisexual rights movement is in a critical juncture in its development; and the development of legal strategies now will significantly shape the rights, privileges, and identity of sexual minorities for decades.

Undoubtedly, there has been a certain amount of mainstreaming of homosexual consciousness in American life, and that mainstreaming is attributable to the unflagging commitment and indomitable spirit of many gay men and lesbians. Former symbols of homosexuality and bisexuality have become mainstream trends. For example, voguing—a form of dance/modeling which was created by gay African-American and Latino men at "balls" in New York City, popularized by Madonna, and depicted in the film "Paris is Burning"⁷⁴—took the nation by storm and added

71. For instance, Randall Terry, leader of Operation Rescue, an anti-abortion activist organization, led a group to protest President Clinton's planned lifting of the ban on homosexuals and bisexuals in the military. *Operation Rescue Turns Anti-Gay*, SACRAMENTO BEE, Jan. 9, 1993, at A4.

72. Mr. Rubenstein notes that "antigay violence rose 31% between 1990 and 1991 in five major cities," LESBIANS, GAY MEN AND THE LAW, *supra* note 70, at xv, although it is not clear whether this rise is attributable to increased violence or increased reportage.

73. For example, during the 1992 presidential campaign, a group called the Christian Action Network raised money for television advertisements which discouraged the inclusion of bisexuals, lesbians, or gay men in any "vision for a better America." Schmalz, *supra* note 44, at 20. See also *supra* note 69, for another anti-queer "family-oriented" organization. In addition, after the 1994 Congressional elections, Speaker Newt Gingrich promised Rev. Lou Sheldon, an anti-gay religious figure, that Congress would hold hearings on barring federal funds for school districts which teach tolerance of gay men and lesbians and provide counseling for gay and lesbian youth. Louis Freedberg, *New Congress, Old Morals*, S.F. CHRON., Nov. 27, 1994, at S4.

74. See Patrick Pacheco, *At the Drag Queens' Ball: Jennie Livingston's Documentary, "Paris is Burning," Delves into Sexual and Ethnic Self-Image—and Elicits Charges of Exploitation*, L.A. TIMES, Aug. 4, 1991, (Calendar), at 19.

elements to any contemporary dancer's repertoire. Male earring wearing, once an apparent signal of homosexuality, is quite ordinary⁷⁵ and seems to be almost required accessorizing among male rock and rap musicians. Indeed, even the man of Barbie's dreams, Ken, now sports one along with frosted hair and a gay-identified neck chain.⁷⁶ Drag queens who are gay have been a regular presence on some television talk shows.⁷⁷ Images of lesbians have appeared on the covers of *Newsweek*, *New York Magazine*, and *Vanity Fair*, as well as on the cover of a television news magazine that featured Northhampton, Massachusetts and named it "Lesbianville." In addition, a number of movies have included lesbian characters. In light of such magazine and movie coverage, some writers have commented that being a lesbian is now "chic."⁷⁸ Today, fewer than half of all states have laws forbidding sexual behavior between members of the same sex, while in 1961 every state did.⁷⁹ Openly gay, lesbian,

75. See *Year of the Ear*, NEWSWEEK, May 19, 1975, at 93 (noting that straight men as well as gay men were increasingly wearing earrings).

76. See Nicole Brodeur, *Oh, Barbie, has Ken come out of the closet*, PHILA. INQUIRER, Oct. 24, 1993, at G1; Arlene Vigoda, *Lend Me an Ear*, USA TODAY, Feb. 9, 1993, at 1D.

77. See Paula Span, *Kingdom of the Drag Queens: They're All Dressed Up and Now They're Going Someplace*, WASH. POST, Mar. 11, 1993, at C1.

78. See Kara Swisher, *We Love Lesbians! Or Do We? "Hot" Subculture—or Just New Hurtful Stereotypes?*, WASH. POST, July 18, 1993, at C1; Rubin, *supra* note 62; Matthew Gilbert, *Newsweek discovers lesbians; VF obsesses over Conan*, BOSTON GLOBE, June 16, 1993, at 49.

79. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at xvi. Nevertheless, a number of local and state governments have enacted legislation which explicitly prohibits the promulgation of legislation which prohibits discrimination on the basis of sexual orientation. See, e.g., COLO. CONST. art. II, § 30b (1980), a voter-initiated amendment to the Colorado Constitution, referred to as Amendment 2, which would have prohibited cities and other municipalities from legislating that "homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." *Id.* While a majority of Colorado voters supported Amendment 2, thereby adding it to the state constitution, the Supreme Court of Colorado has enjoined its enforcement. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995). The Colorado Supreme Court held that no stated state's interest was compelling enough to justify burdening the political rights of the suspect class of gay men, lesbians, and bisexuals, either individually or in the aggregate. *Id.*

Similarly, voters in Oregon had the opportunity to support or oppose Measure 9, an anti-gay law similar to Colorado's Amendment 2, which would have amended the state's constitution to officially declare homosexuality "abnormal, wrong, unnatural, and perverse." See Allison Carper, *Gays Win Some, Lose Some*, NEWSDAY, Nov. 5, 1992, at 29. However, the measure was defeated 57% to 43%, *id.*, and was again defeated by

and bisexual people are running for public office and are winning elections.⁸⁰

Given the possibility of successful achievement of some degree of legal and political comity in the midst of hostile forces, it is not hard to figure out why some gay men, lesbians, and bisexuals might want to present an all-American image of homosexuality to the heterosexual population of the United States. Mainstream gay and lesbian rights organizations strive to situate homosexuals within a paradigm of normalcy—that is, to portray gay men and lesbians as being just like heterosexuals except for who they sleep with behind closed doors at night.⁸¹ And to some degree, of course, that is true. Certainly within the

a narrower margin in 1994: 52% to 48%. Bettina Boxall, *California Elections Key Victories Hearten Gay Activist*, L.A. TIMES, Nov. 10, 1994, at A37. Notwithstanding defeat of Measure 9, certain Oregon cities and towns have adopted anti-gay provisions similar to it. For a tally of towns and their respective anti-gay provisions, see Timothy Egan, *Voters in Oregon Back Local Anti-Gay Rules*, N.Y. TIMES, July 1, 1993, at A10; *Note, Constitutional Limits on Gay Rights Initiatives*, 106 HARV. L. REV. 1905 (1993).

80. *E.g.*, Barney Franks and Gerry Studds, two openly gay members of Congress, are regularly re-elected by their constituents; Steve Gunderson, a conservative Republican who recently disclosed that he has a same-gender partner may well become the third member of the class if he is reelected. Sheila James Kuehl became the first openly gay member of the California state legislature in 1994. *See* Boxall, *supra* note 79, at A37.

81. Of course, what constitutes normalcy changes from time to time and place to place. Gayle S. Rubin states that there is currently a “charmed circle” of sexuality and “the outer limits.” The more one can situate one’s self into the charmed circle, the more one will be accepted as being normal:

The charmed circle:

Good, Normal, Natural,
Blessed Sexuality

Heterosexual
Married
Monogamous
Procreative
Non-commercial
In pairs
In a relationship
Same generation
In private
No pornography
Bodies alone
Vanilla

The outer limits:

Bad, Abnormal, Unnatural,
Damned Sexuality

Homosexual
Unmarried
Promiscuous
Non-procreative
Commercial
Alone or in groups
Casual
Cross-generational
In public
Pornography
With manufactured objects
Sadomasochistic

realm of heterosexuality there is a broad spectrum of sexual behaviors—everything from sadomasochism to transgenderism to monogamy to sodomy. And those same practices are present in the realms of homosexuality and bisexuality. But instead of exposing the heterosexual community for what it is and is not, mainstream gay rights organizations have attempted to situate communities of sexual minorities and their issues within a myth of normalcy. For example, during the 1993 March on Washington, a demonstration which attracted a million people to Washington, D.C.,⁸² themes including family values, motherhood, and monogamy seemed as important as they did to the Republicans at the previous year's political convention. Although the official title of the march was the "March on Washington for Lesbian, Gay and Bi Equal Rights and Liberation," only gay men and lesbians were displayed proudly and predominantly during the weekend.⁸³ Issues of bisexuality and transgenderism seemed too complicated—too weird, too not normal—for the march organizers to highlight.⁸⁴ The picture that was being painted

Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance, ed.), in LESBIAN AND GAY STUD. READER (Abelove et al. eds., 1993) at 13.

There are also those who seek to normalize queer people by significantly expanding the definition of the word. See, e.g., Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 32. In this piece, Rich expands the concept of lesbianism beyond mere "genital sexual experience":

If we expand it to embrace many more forms of primary intensity between and among women, including the sharing of a rich inner life, the bonding against male tyranny, the giving and receiving of practical and political support . . . we begin to grasp breadths of female history and psychology that have lain out of reach as a consequence of limited, mostly clinical, definitions of "lesbianism."

Id. at 33.

82. The attendance estimates are in dispute. March organizers and the District of Columbia Office of Emergency Preparedness estimated the number of attendees at one million; the National Park Service stated that 300,000 people attended the march. April Lynch et al., *Gays March on Washington: Huge Turnout at Rally for Civil Rights, Acceptance*, S.F. CHRON., Apr. 26, 1993, at A1. I can say as a native of the District of Columbia who has attended and viewed a number of demonstrations, that I have never seen as many people at a march in the city as I saw on that day.

83. See *Some groups feel left out of gay rally*, ASSOCIATED PRESS, Apr. 25, 1993, available in WESTLAW, 1993 WL 11063933, ALLNEWSPLUS Database (noting that "bi" barely made it to the name of the march and that some transgendered people were disgruntled by their exclusion from the march's official name).

84. Indeed, there was a bit of a brouhaha in the bisexual community concerning the microphone time of Lani Kaahumanu, the only self-identified bisexual to speak at the march. Because a number of unscheduled speakers had been allowed to speak throughout the day, Kaahumanu, whose speech was scheduled to be the last, did not begin her

was one of the Cleaver family, albeit with June coupled with Wanda instead of Ward. Media were discouraged from portraying men in drag, those who advocated polyamorous relationships and women who went topless during the march;⁸⁵ and these groups were not, at least publicly, embraced by the mainstream and most powerful gay and lesbian political organizations.

This is not to say that *all* mainstream lesbian and gay organizations have excluded those "abnormal" sexual minorities from their agendas, although some certainly have. But the strategy that seems to have been employed is one of saying, "Let us get into the door, and once we're in, we'll pull you in behind us." They argue that liberation for them will mean liberation for all sexual minorities, that they, more than heterosexuals, are sympathetic to the needs and causes of non-mainstream sexual minorities, and that, after all, such sexual minorities have nowhere else to go. I've heard these arguments before—in addition to being bisexual, I am a black woman who is regularly being told that I should tag along, politically and legally, with other groups that are almost but not quite like me.⁸⁶ And I know that the demand that I tag along ultimately means being asked that I sacrifice my self-interest for the liberation of others. It means being shut out of processes and decision making; and it means that liberation is not readily forthcoming for me.

Lesbians and gay men who do, or at least wish to, live together in long-term committed relationships are at the center of the gay and lesbian rights movement and do constitute a significant constituency of the gay, lesbian, and bisexual community.⁸⁷ But the concerns of lesbians and gay men do not constitute entirely the concerns of the entire queer community.

speech until 6:45 p.m. instead of the originally scheduled 5:30 p.m. Kaahumanu and other final speakers were asked to limit their comments to two minutes. Kaahumanu edited her remarks, though to longer than two minutes, and condemned the march organizers for their inattention to bisexual people. Lani Kaahumanu, *How I Spent My Two Week Vacation Being a Revolting Token Bisexual*, 6 ANYTHING THAT MOVES 10 (1993).

85. See Howard Kurtz, *Don't Read All About It! What We Didn't Say About the Gay March!—And Why*, WASH. POST, May 9, 1993, at C1 (arguing that although most people who participated in the March on Washington were mainstream queers, radical and militant voices and images were squelched in an attempt to portray the queer rights movement as "benign").

86. See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991) (discussing discrimination on the basis of black womanhood).

87. There are some who question whether this is true. Some bisexuals, for example, insist that the vast majority of people are bisexual, meaning that they have attraction for members of both sexes, albeit to varying degrees, but that their bisexuality is channeled societally or environmentally into self-described monosexuality.

For example, many gay men and lesbians resent, or are at least uncomfortable with, others' self-identification as bisexual.⁸⁸ It is difficult to determine the degree to which liberation only for some lesbians and gay men will translate into liberation for other members of the gay, lesbian, and bisexual community.

Bisexuality complicates the gay and lesbian rights movement. First is the definitional difficulty. Bisexuals cannot agree on what it means to be bisexual, or perhaps we agree that being bisexual can mean many things. For some, being bisexual means that one engages in sexual behavior with members of both sexes. Others believe that even if one engages in sexual behavior with members of only one sex—whether that be one's own sex or the other sex—yet feels erotic attraction for members of both sexes, one is bisexual.⁸⁹ Some bisexuals are primarily attracted to members of their own sex, others to members of the opposite sex. Few have evenly divided attractions.⁹⁰ Some bisexuals feel sexual attraction to members of both sexes, yet feel emotional connectedness to only one gender. Many bisexuals believe that sexual orientation, at least for them, is a *chosen* orientation.⁹¹

88. See, e.g., Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. OF MIAMI L. REV. 511, 536 (1992) ("Many lesbians and gay men view self-professed bisexuals as untrustworthy because they can always present themselves as non-gay, avoiding the stigma and risks of open gay life."); Lisa Orlando, *Loving whom we choose*, in BI ANY OTHER NAME: BiSEXUAL PEOPLE SPEAKOUT 224 (Loraine Hutchins & Lani Kaahumanu eds., 1991) [hereinafter BI ANY OTHER NAME] ("[T]he lesbian and gay community abounds with negative images of bisexuals as fence-sitters, traitors, cop-outs, closet cases, people whose primary goal in life is to retain 'heterosexual privilege,' power-hungry seducers who use and discard their same-sex lovers like so many Kleenex.").

89. See WEINBERG ET AL., DUAL ATTRACTION (1994), which, in a study of San Francisco area bisexuals, looks at three dimensions of sexuality: sexual feelings, sexual behavior, and romantic feelings, i.e., the extent to which people fall in love with other people of each sex.

90. See *id.* at 47 (finding that two percent of bisexual men and 17% of bisexual women describe themselves as having similar sexual feelings, sexual behavior, and romantic feelings for members of both sexes; that 45% of bisexual men and 20% of bisexual women describe themselves as being "heterosexual-leaning" in all three dimensions; and that 15% of bisexual men and women describe themselves as being "homosexual-leaning" in all three dimensions). See also Sharon F. Sumpter, *Myths/realities of bisexuality*, in BI ANY OTHER NAME, *supra* note 88, at 12 ("MYTH: Bisexuals are equally attracted to both sexes. TRUTH: Bisexuals tend to favor either the same or the opposite sex, while recognizing their attraction to both genders.").

91. Some lesbians also feel that their sexual orientation is chosen. See Janet Lever, *Lesbian Sex Survey*, THE ADVOCATE, Aug. 22, 1995, at 22, 28.

Throwing issues of bisexuality into the creation of gay and lesbian legal theory complicates it. One example is *Rowland v. Mad River Local School District*,⁹² a case in which a school district failed to renew a woman's contract as a high school guidance counselor after she discussed her bisexuality with several of her colleagues. Justice Brennan's dissent from the denial of certiorari provides "the first explication by a Supreme Court Justice of why classifications based on sexual orientation are suspect and should be carefully scrutinized by the court."⁹³ The rationale used by Justice Brennan is similar to subsequent constitutional arguments made by gay and lesbian rights lawyers. First, Justice Brennan wrote that firing the counselor on the basis of a mere declaration of bisexuality violated her First Amendment rights. This is the same argument used by many gay and lesbian rights activists following the adoption of the "don't ask, don't tell" policy on homosexuals in the military.⁹⁴ Certainly, this argument is forceful—in the absence of some compelling reason, the United States Constitution is supposed to protect the right of all people to speak. One court has agreed with Justice Brennan's rationale to the extent that it states that a simple declaration of one's sexual orientation will not allow the government to take away benefits or punish.⁹⁵

Justice Brennan also argued that as a bisexual woman, the counselor is part of a "significant and insular minority" that the Equal Protection and Due Process Clauses protect; and he further argued that discrimination on the basis of that preference may have violated her privacy rights. The privacy argument is the one made in *Bowers v. Hardwick*, and it was not successful. The equal protection challenge is now the one that is often put forward in challenging anti-gay legislative classification in courts and serves as the basis for most challenges to the military ban. Far more often than not, however, these challenges are not successful, though a few

92. 470 U.S. 1009, 1110 (1985).

93. LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 305.

94. The argument, in fact, was made by Mr. Rubenstein in the *New York Times*. He stated:

The policy violates the First Amendment in that it permits speech about sexual orientation that reveals a heterosexual orientation but not a homosexual orientation. This is content-based censorship, like permitting Christian soldiers to identify their religion publicly but not permitting Jewish soldiers to do so.

William B. Rubenstein, *'Don't Ask, Don't Tell'. Don't Believe It.*, N.Y. TIMES, July 20, 1993, at A19.

95. *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y.), *remanded*, 44 F.3d 128 (1995). *But see* *Thomasson v. Perry*, No. 95-2185, 1996 U.S. App. LEXIS 6591 (4th Cir. Apr. 5, 1996) (holding "don't ask, don't tell" policy does not violate the First Amendment).

courts have been willing to find equal protection violations where legislative classifications were based on sexual orientation.⁹⁶

Finally, Justice Brennan posits that even if "homosexual conduct" were to be the basis of the counselor's dismissal, there would at least have to be a showing that such conduct was relevant to the decision to fire her. There is no indication in any of the lower court opinions or in the Supreme Court dissent from denial of certiorari that the counselor had ever engaged in sexual behavior with another woman. Indeed, that fact was irrelevant to both the district court opinion, the Court of Appeals decision, and Justice Brennan's opinion. Nevertheless, some courts have been willing to overturn legislative decisions based on sexual orientation as being simply irrational.⁹⁷

Let us assume for a moment, however, that Justice Brennan's dissent had eventually won the day, if the Court had agreed to hear the case.

96. For cases finding a violation of equal protection, see, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3122 (Aug. 10, 1995) (No. 95-239); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995); *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994). For cases finding no equal protection violation, see, e.g., *Steffan v. Perry*, 41 F.3d 677, 689 (D.C. Cir. 1994) (holding that homosexuals do not constitute a suspect class and that legislation barring homosexuals from military service is rational because "[a]lthough there may well be individuals who could, in some sense, be described as homosexuals based strictly on an inchoate orientation, certainly in the great majority of cases those terms are coterminous"); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987); *Gay Inmates of Shelby County Jail v. Barksdale*, 819 F.2d 289 (6th Cir. 1987); *Opinion of the Justices*, 525 A.2d 1095 (N.H. 1987).

97. See *Equality Found.*, 860 F. Supp. 417 (striking down a statute which forbade the city from granting class of gay men, lesbians, or bisexuals any type of preferential treatment or protected status deemed unconstitutional pursuant to heightened scrutiny *and* rational basis analysis); *Doe v. Sparks*, 733 F. Supp. 227 (W.D. Pa. 1990) (refusal of prison warden to allow visits by same-gender partner of lesbian inmate where heterosexual inmates were allowed visits by their unmarried partners was irrational, arbitrary, and unconstitutional); *Swift v. United States*, 649 F. Supp. 596, 602 (D. D.C. 1986) (ruling, on motion to dismiss, that "[t]he government has not offered any explanation as to how plaintiff's dismissal is rationally related to a legitimate governmental purpose. . . . The government may not discriminate against homosexuals for the sake of discrimination or for no reason at all"); *Gay Alliance of Genesee Valley v. City Assessor*, 599 N.Y.S.2d 370 (1993), *as modified*, 607 N.Y.S.2d 789 (4th Dept. 1994) (holding that City of Rochester's rejection of non-profit membership organization seeking understanding of legal rights for homosexuals, was based solely on the character of the membership and so was violative of group's equal protection rights); *State v. Perrin*, 589 N.E.2d 497 (Ohio Mun. Ct. 1991) (holding a statute irrational and therefore unconstitutional that made it illegal to solicit a person of the same gender, but not a person of the opposite gender).

Would not any protections afforded to Ms. Rowland as a bisexual woman be afforded to her if she were a lesbian? Not necessarily. Certainly First Amendment protection would allow her to declare her bisexuality just as it would allow her to declare her homosexuality. And it is certainly true that if Ms. Rowland were married to a man and were to maintain a monogamous relationship with him, she would be more fully protected than a sexually active lesbian: Her sex life would have state sanction, but in many states, a lesbian's sex life would not. Neither a lesbian nor a bisexual woman's sexual conduct with another woman would necessarily be protected by her First Amendment rights.

But what about the state's sanctioning of an individual's full expression of her sexuality? Equal protection theories involving sexual orientation revolve around the idea that gay men and lesbians, as part of a discrete and insular minority—and as members of a minority to which they were born—have a right not to have legislation discriminate against them absent some compelling state interest. A lesbian's constitutional rights, under this theory, might require the state to sanction her relationship with another woman, or at least would require the state not to interfere in it. If the bisexual woman's full expression of her sexuality requires simultaneous relationships with both a man *and* a woman, however, will the state be required to sanction *both* relationships, or to treat the trio as a family? Or, conversely, shall she be required to choose which of the two relationships she wants sanctioned, which is required presently of married heterosexuals who do or wish to engage in sexual relationships with other people? On what bases shall these questions be answered? Can they be answered within the paradigms set by the present discourse on what rights should be expected by the queer community? If the freedoms of the fringe of the movement cannot be protected, or do not purport to be protected by the center of the movement, then the center of the movement may find itself without political allies or gains in the future.

IV. LESBIANS, GAY MEN, AND THE LAW⁹⁸

The revolution sparked by the 1969 Stonewall uprising has been slow in coming to the academy but has finally arrived. Just as sexual minorities are more visible, and issues surrounding sexual issues and sexual orientation are publicly discussed and dissected more now than at

98. Discussing a book that a friend has produced can be a tricky business. William Rubenstein, the editor of *Lesbians, Gay Men, and the Law*, and I began attending Harvard Law School in the fall of 1983. We have remained friends since. Undoubtedly, our friendship and my knowledge of him outside the covers of this book will have an effect on my view of it.

any previous time in this country's history,⁹⁹ these changes are occurring within the academy.¹⁰⁰ Faculty hiring committees have moved from being monolithic in denying employment or tenure to identifiable lesbians and gay men¹⁰¹ to being entities which seek openly gay or lesbian faculty members in order to diversify the professorate.¹⁰² Lesbian and gay student organizations, once vehicles to support students socially, spiritually, or psychologically, if they had existed on campus at all, now seek and often achieve political gains for their constituents. Although perhaps more conservative in perspective than their liberal arts counterparts, law schools are now places where homosexuality and bisexuality are visible and make a difference. Courses focusing on sexuality and the law have been creeping into law school curricula at schools like Harvard, University of California at Los Angeles, and the

99. A number of popular comedic television shows, for example, have focused on issues of masturbation: *Roseanne* and *Seinfeld*. *Seinfeld* won an Emmy award for its masturbation episode. Della M. Rios, *Firing of Jocelyn Elders Liberated the "M" Word*, CLEV. PLAIN DEALER, Dec. 22, 1994, at 8E.

100. For example, San Francisco State University is the first four-year university to offer a formal interdisciplinary minor in gay, lesbian, and bisexual studies. Larry Gordon, *Opening the Door to Gay Studies*, L.A. TIMES, June 11, 1993, at A1. In addition, institutions such as Massachusetts Institute of Technology, Harvard, Brown, Swarthmore, and Wellesley offer courses in gay, lesbian, and bisexual culture and gay and lesbian study departments have been created at City College of San Francisco and the City University of New York. Mark Muro, *Gay Studies Goes Mainstream*, BOSTON GLOBE, Jan. 30, 1991, at 35 (calling gay, lesbian and bisexual studies "the hottest new movement in academia these days"). See also Queer Resources Directory (<http://www.grd.org/grd/-campusglb.studies.list>) (citing over 50 colleges and universities with gay, lesbian and bisexual courses or programs). See generally JOHN D'EMILIO, MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY (1992).

101. It is not clear whether discrimination against gay men and lesbians in education is predicated on their *being* queer or on their *disclosure* of their sexual orientation. See Fajer, *supra* note 88, at n.441 (citing JAMES T. SEARS, GROWING UP GAY IN THE SOUTH 399-400 (1991)) (stating that fewer than 10% of high school and junior high school principals would fire teachers for being homosexual, while more than half would fire teachers if they disclosed their orientation to their students).

102. Muro, *supra* note 100, at 39 (quoting Edmund White, a gay writer hired at Brown University, as saying, "Being gay didn't hurt."). See also Section Newsletter (Section on Gay and Lesbian Legal Issues, Association of American Law Schools), Oct., 1993, at 2 (Washburn University solicits resumes from "all qualified applicants and particularly from openly gay men who teach in the areas of business law and commercial law for visiting positions.").

University of Iowa.¹⁰³ The teachers of these courses, often adjunct or visiting professors, have had to assemble their own course materials. William Rubenstein, has been engaged in such an endeavor himself, having taught a course on sexuality and the law for several years as a visitor at Harvard and Yale law schools. His book *Lesbians, Gay Men, and the Law* alleviates the case-gathering chore, and will undoubtedly encourage more schools to add sexual orientation and the law courses to their curricula and more professors to teach them. And, undoubtedly, Mr. Rubenstein's book will become the definitive text in this area.

The book is divided into six sections, five of which focus on issues of substantive law and homosexuality: regulation of sexual behavior between members of the same sex, regulation of gay and lesbian identity, employment discrimination, formal recognition of same-sex relationships, and parenting issues.¹⁰⁴ In many ways, the text and each of its sections are structured like a typical casebook. There are cases, follow-up questions to be pondered by the reader (or asked by the teacher of her class), and suggested law review articles for the industrious who wish to know more or research further. Thus, readers will be exposed to standard cases involving homosexuality (if such cases can be called standard) including, for example, *Bowers v. Hardwick*,¹⁰⁵ in which the United States Supreme Court decided that enforcement of sodomy laws does not violate individuals' privacy rights, and in *Opinion of the Justices*,¹⁰⁶ in which the Supreme Court of New Hampshire, including now United States Supreme Court Justice David Souter, determined that the equal protection rights of gay men and lesbians do not permit New Hampshire to deny summarily their being licensed child care providers, but that the state may deny them the opportunity to be foster and adoptive parents.

But *Lesbians, Gay Men, and the Law* is not a standard casebook. Mr. Rubenstein sets out to provide a text which is rigorous enough to support a law school course, yet accessible enough to the lay public to provide an understanding of the history and current state of the law in this area. I am not aware of any other book—and certainly no other casebook—which attempts to achieve both these goals simultaneously; and I doubt that any

103. As of 1990, approximately 35 accredited law schools offered courses which focused entirely or primarily on gay and lesbian legal issues. Gene P. Schultz, *The Inclusion of Sexual Orientation in Nondiscriminatory Policies: A Survey of American Law Schools*, 2 LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES 131 (1992).

104. Mr. Rubenstein sees these five sections as being subparts of three major areas: sodomy law reform, discrimination, and family law. LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at xvi.

105. 478 U.S. 186 (1986).

106. 530 A.2d 21 (N.H. 1987).

would be as successful as *Lesbians, Gay Men, and the Law*. The text provides excerpts from fiction and non-fiction to assist readers in understanding an assortment of homosexual milieus. Included are non-gay, lesbian, and bisexual authors who write for a non-gay, lesbian, or bisexual audience; gay, lesbian, and bisexual authors who write for a gay, lesbian, and bisexual audience; and gay, lesbian, and bisexual authors who write for a non-gay, lesbian, and bisexual audience.¹⁰⁷ His inclusion of the voices of people of color and of women demonstrates that there is not a gay lifestyle nor a single way to be homosexual or bisexual.¹⁰⁸

The book begins with "Basic Documents"—descriptions and discussions of bodies of thought on homosexuality. This section is important and adds tremendously to the discussion of the legal concepts addressed later in the text. It reminds readers that the underlying discussion of the legal issues raised is homophobia. Included are excerpts from Alfred Kinsey's reports on sexual behavior in males and females;¹⁰⁹ an excerpt from the *New Catholic Encyclopedia* expressing the Church's position (and rationale for its position) on homosexuality;¹¹⁰

107. In Mr. Rubenstein's words:

I have tried to contextualize the legal cases discussed here with works of fiction, psychology, sociology, oral history, and journalism. This stems from my belief that the law is in no way a domain separate and apart from society itself but, rather, is always already part of and a constituent force in the construction of society.

LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at xxi.

108. Sadly, however, the writings of people of color in this book are, with the exception of interviews with James Baldwin and Perry Watkins, works of fiction. Mr. Rubenstein is not entirely to blame for this situation, however, as non-fiction writing by and about people of color focussing on sexual orientation, as opposed to the role of sexual orientation in the transmission of HIV and AIDS, is sparse at best. Nevertheless, in future editions of the text, Mr. Rubenstein may wish to consider the work of Angela D. Gilmore, *It is Better to Speak*, 6 BERKELEY WOMEN'S L.J. 74 (1990-91) (discussing being a Lesbian African-American law professor); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805 (1993) (deconstructing the majority opinion in *Bowers*), and other gay and lesbian non-fiction writers of color, particularly sociologists and cultural anthropologists, to enhance the portrait of queer life that he seeks to paint.

109. Alfred Kinsey et al., *Homosexual Outlet*, in SEXUAL BEHAVIOR IN THE HUMAN MALE 610 (1948); Alfred Kinsey et al., *Homosexual Responses and Contacts*, in SEXUAL BEHAVIOR IN THE HUMAN FEMALE 446 (1953), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 1, 12.

110. J.F. Harvey, *Homosexuality*, in VII THE NEW CATHOLIC ENCYCLOPEDIA 116 (1967), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 53.

and commentary from Adrienne Rich,¹¹¹ James Baldwin,¹¹² and *Queers Read This*, a “newspaper distributed at the New York City gay pride parade, June 1990.”¹¹³ Mr. Rubenstein wisely integrates non-legal prose throughout the text to help illustrate the real-world effects of the law being discussed.¹¹⁴ Thus, not only is *Bowers v. Hardwick* included in the text, but also included is an interview with Michael Hardwick in which he discusses his life before and after his arrest for sodomy and his subsequent involvement in litigation.¹¹⁵ Case law on state regulation of gay and lesbian meeting places is supplemented with a memoir of Judy Grahn’s introduction to gay bars in the 1950s.¹¹⁶ The inclusion of testimony and observations from lesbians and gay men—as well as from their allies and detractors—gives the book a richness and a grounding in reality rarely found in legal texts.

Still, there is sometimes a disconnection between the recognition of homophobia as the biggest enemy of gay, lesbian, and bisexual legal rights and the legal issues discussed in *Lesbians, Gay Men, and the Law*. Mr. Rubenstein does not attempt to engage in pro and con analyses of whether homophobia is legitimate: All analyses seek to figure out the best legal routes to gay liberation. As a result, there is no sense of how a homophobic impulse should impact legal strategy. For example, instead of presenting arguments against gay marriage on the basis that it is immoral or should remain illegal, the text contains a debate between Thomas Stoddard and Paula Ettelbrick, two lesbian and gay rights legal/political advocates, concerning whether seeking same-sex marriage rights should be a goal of the lesbian and gay rights movement. Stoddard argues that legalizing gay, lesbian, and bisexual marriage would not only

111. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 32.

112. Richard Goldstein, “Go The Way Your Blood Beats”: An Interview With James Baldwin, in JAMES BALDWIN: THE LEGACY 173 (Quincy Troupe ed., 1989), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 40.

113. QUEERS READ THIS (June 1990), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 45.

114. In his introduction, Mr. Rubenstein thanks Martha Minow for teaching him that “law school course materials could include nonlegal documents and, in fact, could be made much more meaningful by their inclusion.” LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at xi.

115. Peter Irons, *What Are you Doing in My Bedroom?*, in THE COURAGE OF THEIR CONVICTIONS 392 (1988), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 125.

116. Judy Grahn, *An Underground Bar*, in ANOTHER MOTHER TONGUE 28-33 (1984), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 193.

serve the purpose of legitimating lesbian and gay relationships, but would also strengthen the institution of marriage itself by “abolishing the traditional gender requirements of marriage,”¹¹⁷ thereby making it less sexist. Ettelbrick responds that marriage creates privilege—in terms of health care benefits, distribution of public funds, etc.—which gay men and lesbians should seek to abolish, not become a part of.¹¹⁸ There is no inclusion of the position of Louis P. Sheldon, founder of the Traditional Values Coalition,¹¹⁹ that domestic partnership benefits “will cost taxpayers and redefine the institution of marriage,”¹²⁰ presumably for the worse. Other, more conservative, political arguments condemning the legalization of sexual acts between people of the same sex or the provision of social benefits for gay and lesbian families are absent. Patrick Buchanan’s¹²¹ and Phyllis Schlafly’s¹²² moral, political, and legal views are

117. Thomas Stoddard, *Why Gay People Should Seek The Right To Marry*, OUT/LOOK, Fall 1989, at 9, reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 398.

118. Paula Ettelbrick, *Since When Is Marriage a Path To Liberation?*, OUT/LOOK, Fall 1989, at 9, reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 401.

119. The Traditional Values Coalition is a group consisting of approximately “31,000 mostly evangelical Christian congregations.” See *Congressional Freeloading Takes a Hit in Measure Passed by House*, CHI. TRIB., Sept. 30, 1994, at 6.

120. Louis P. Sheldon, *Law Devalues Marriage*, USA TODAY, Aug. 31, 1994, at 10A. Mr. Sheldon, however, does not seem to believe that redefining marriage would be beneficial in the way that Mr. Stoddard does.

Many of the feared repercussions of extending marriage-like benefits to unmarried people have not been realized, however. For example, the City of New York began extending health benefits to domestic partners of city employees on January 1, 1994. Not nearly as much money (about \$4 million) has been spent on insurance for domestic partners as was anticipated (between \$40 and \$75 million), and most of those people receiving benefits are unmarried heterosexual couples. Jennifer Steinhauer, *Increasingly, Employers Offer Benefits to All Partners*, N.Y. TIMES, Aug. 20, 1994, at 25.

121. Buchanan, a rightwing Republican candidate for the 1996 Presidential Election, has said that “Homosexuals have declared war on nature” and that “Homosexuality, like other vices, is an assault upon the nature of the individual as God made him.” Marc Fisher, *Buchanan’s Brash Rhetoric Ruffles Convention Series: Campaign ’96*, WASH. POST, Feb. 22, 1996, at A1.

122. Schlafly, the founder of the conservative Eagle Forum, is an outspoken critic of same-sex marriages and the homosexual lifestyle in general. During the Republican national Convention in 1992, Pat Robertson, the televangelist, introduced Schlafly by saying, “If it were not for this lady, we would have had homosexual rights written into the Constitution. She defeated ERA [the Equal Rights Amendment].” Laura Blumenfeld, *Schlafly’s Son, Out of the Closet; Homosexual Backs Mother’s Views, Attacks ‘Screechy Gay Activists’*, WASH. POST, Sept. 19, 1992, at D1.

not represented. What the arguments against such forms of homophobia are or how legal arguments will overcome them is not made clear.

In this and other ways, the book fits squarely into a gay and lesbian legal rights paradigm, which is not surprising. Mr. Rubenstein, a gay man and the former director of the American Civil Liberties Union Gay and Lesbian Rights Project, has a stake in the outcome of the issues he presents in his book. He is not objective nor should he pretend to be. He dedicates the book to "those who have been my central source of support and community for the past six years—my colleagues in the fight for equal rights for lesbians and gay men."¹²³ He is to be commended for unflinchingly positioning himself within the gay, lesbian, and bisexual rights movement in the course of editing a survey text. Mr. Rubenstein, in this book, in his career, and in his life, promotes a—if not *the*—"gay rights agenda," and uses some strategies also used by the gay and lesbian, and African-American, civil rights communities.

Lesbians, Gay Men, and the Law does use pity rhetoric, which promotes an image of joylessness in being queer. Particularly from the works of fiction included in *Lesbians, Gay Men, and the Law*, one could get the idea that being gay or lesbian is linked inextricably with sorrow or tragedy. In *Cat*, for example, a young lesbian is betrayed and denied by her lover.¹²⁴ In *Winesburg, Ohio*, Sherwood Anderson presents a portrait of a school teacher who appears to have sexual feelings for his male students and whose career is ruined by a fantasizing student who has fallen in love with him.¹²⁵ The two fictional works in *Lesbians, Gay Men, and the Law* that I most enjoyed, Paul Butler's *At Least Me and Rafael Tried*¹²⁶ and Audre Lorde's *Tar Beach*,¹²⁷ both present bitter-sweet love stories of brief romances between people of color that, though warm, loving, and life-altering, nonetheless end on a note of desolation. These stories resonate of the truth because the mere act of making love makes two women who are passionately in love stand at risk of being

123. LESBIANS, GAY MEN AND THE LAW, *supra* note 70, at xii.

124. Julie Carter, *Cat*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 159 (Barbara Smith ed. 1983), *reprinted in* LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 159.

125. Sherwood Anderson, WINESBURG, OHIO (1919), *excerpted in* LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 292.

126. Paul Butler, *At Least Me and Rafael Tried*, in AURORA: A FEMINIST JOURNAL, Spring 1982, at 17, *reprinted in* LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 386.

127. Audre Lorde, *Tar Beach*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY: 145 (Barbara Smith ed. 1983), *reprinted in* LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 378.

prosecuted for sodomy¹²⁸ and losing custody of their children.¹²⁹ But where are the stories of happiness, of people whose romances end happily or who are able to stare homophobia in the eye, recognize it, and overcome it? Without those stories of triumph included in the text—although some might argue that they are included in the legal victories won—the images of gay and lesbian life are less than complete. Since for so many people, and particularly for so many law students, *Lesbians, Gay Men, and the Law* will be the definitive work on sexual orientation and the law, the fiction should include more images of happiness in queerness, not only for the gay men and lesbians who will sit in the classrooms in which this text is discussed, but, perhaps more importantly, for their heterosexual classmates.

Furthermore, as does the mainstream of the gay rights movement generally, *Lesbians, Gay Men, and the Law* seems willing to embrace many elements of homosexuality and bisexuality, but ultimately situates one slice of the gay and lesbian community at the center of its concerns and leaves out others altogether. Lesbians and gay men who do or desire to live together in long-term committed relationships are at the center of *Lesbians, Gay Men, and the Law* and do constitute a significant portion of the gay, lesbian, and bisexual community.¹³⁰ Still it is difficult to learn about the fringes of the queer civil rights movement from this text and how the people on the fringes should be situated. For example, most of the cases in the family law section of the text focus on child custody disputes. The lawyers of the parties in these cases have necessarily presented portraits of their clients that will best serve their interests and

128. See Ruthann Robson, *Crimes of Lesbian Sex*, in *LESBIAN (OUT)LAW* 47 (1992), reprinted in *LESBIANS, GAY MEN, AND THE LAW*, *supra* note 70, at 80. In this chapter, Robson uses erotic portions of Judith McDaniel's, *Just Say Yes* (1990) to analyze the relevance of criminal sodomy statutes to sex between women.

129. In fact, a number of cases in the section of the text dealing with gay and lesbian parenting demonstrate that courts are willing and able to remove children from the custody of a parent on the basis of that parent's sexual orientation. See, e.g., *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992); *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. App. 1987). But cf. *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (holding that trial court's reliance on "any real or imagined social stigma attaching to Mother's status as a lesbian" was impermissible factor in determining custody of child).

130. There are some who question whether this is true. Some bisexuals, for example, insist that the vast majority of people are bisexual, meaning that they have attraction for members of both sexes, albeit to varying degrees, but that their bisexuality is channeled societally or environmentally into self-described monosexuality. Cf. Alfred Kinsey et al., *Homosexual Outlet*, in *THE HUMAN MALE* 610 (1948), reprinted in *LESBIANS, GAY MEN, AND THE LAW*, *supra* note 70, at 1. The authors state that "perhaps the major portion of the male population, has at least some homosexual experience between adolescence and old age." *Id.*

those portraits are included in the reported texts of the cases. But would granting custody to an otherwise fit mother or father who openly and regularly engages in sado-masochistic practice be in the best interests of the child? Should a father be permitted to have his child accompany him to a drag show; or should a court properly disallow these kinds of visits? What should the effect of custody and visitation be when a parent decides to change gender? And what about gay children? Are those who carry the banner for intergenerational sex part of the movement or not—and does it matter whether it is the adults or the children who do the carrying?¹³¹ The only mention of bisexuality in the book is in the text of *Rowland v. Mad River School District* (in which it is treated by Justice Brennan as being the same as homosexuality) and a brief mention in the Kinsey Report. Should the gay and lesbian civil rights movement encompass bisexuals in the quest for equality; or should bisexuals, because they can claim some kind of heterosexual privilege, be left on the side?

131. Mr. Rubenstein notes that “[v]arious forms of sexual relationships have been proscribed throughout history and many remain illegal today. These include . . . rape and molestation (sex without consent or with a person, such as a minor, who is said to lack the capacity to consent)” LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 77.

The National Man/Boy Love Association (NAMBLA), which was denied permission to march in the 1993 March on Washington argues that it is being left out of the gay rights agenda and that persecution of its members mirrors the persecution of same-sex adults who love one another.

The issue of age of consent laws has recently taken on an international flavor. In 1993, the United Nations officially recognized the International Lesbian and Gay Association (ILGA), an umbrella group of lesbian and gay organizations, which includes as members NAMBLA, Gay Male S&M Activists and VerenigingMartijn (a Dutch pedophile group). *US Officials lash out at UN ties to pedophilia group*, AGENCE FRANCE PRESSE, Jan. 27, 1994 available in WESTLAW, 1994 WL 9616946, ALLNEWSPLUS Database; Joyce Price, *Pedophiles resisting expulsion from gay umbrella organization*, WASH. TIMES, Nov. 27, 1993, at A4. ILGA supports, *inter alia*, the abolition of age of consent laws so long as countries provide “adequate protection for youth from being sexually abused without the age of consent laws.” *Id.* In January, 1994, the United States Senate voted to withhold almost \$119 million dollars from the United States’ contribution to the United Nations until the president of the U.N. certified that it did not recognize any group with ties to pedophilia. Joyce Price, *Senators hold up U.N. funding over ties to pedophiles*, WASH. TIMES, Jan. 27, 1994, at A3. Before a vote on the expulsion of NAMBLA and other pedophilic groups was taken by the United Nations general membership in the summer of 1994, a United States lesbian and gay political organization, the Human Rights Campaign Fund, issued a statement supporting the expulsion of NAMBLA, saying that it “is not a gay organization.” *Id.* Although ILGA expelled pedophilic groups from its membership, it was suspended from the United Nations when the group could not affirm that none of its members condoned pedophilic behavior. *U.N. Suspends Group in Dispute Over Pedophilia*, N.Y. TIMES Sept. 18, 1994, at B16.

I do not purport to answer these questions. I know only that these issues exist. And Mr. Rubenstein does include some dissenting voices in the text. He includes a statement from the National Center for Lesbian Rights in which the organization worries about the effect of lesbians and gay men suing one another.¹³² Larry Kramer's caustic commentary on the Constitution, organized religion, and a host of other evils that promote and support heterosexism makes it clear that he is anything but a mainstream political activist.¹³³ Nevertheless, the larger question of whom it is that the gay and lesbian rights movement is for is not explored.

At the heart of any discussion about the gay, lesbian, and bisexual civil rights movement is the question: What does it mean to have a good society, that is, a moral society? Pat Robertson¹³⁴ and Jerry Falwell¹³⁵ contend that a good society cannot and must not have legally sanctioned same-sex relationships. Their vision of the good society, which is based on their vision of a Christian-based society, posits that same-sex sexual conduct is by definition necessarily harmful to the larger society. But even for those who do not believe that same-sex sexual conduct is necessarily harmful, one must ask what the parameters of consensual conduct for adults shall be. How does one determine whether there has

132. National Center for Lesbian Rights, *Our Day in Court—Against Each Other: Intra-community Disputes Threaten All Of Our Rights*, NCLR NEWSLETTER 1, (Winter 1991-1992), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 561.

133. Mr. Kramer's comments on the Constitution:

I never knew what it felt like to be a nigger or a spic. Now I know. I'm a fag. Fags and niggers and spics aren't protected by the Constitution. Nor are junkies, whores, and broads.

Larry Kramer, *Whose Constitution Is It, Anyway?*, in REPORTS FROM THE HOLOCAUST: THE MAKING OF AN AIDS ACTIVIST 177 (1987), reprinted in LESBIANS, GAY MEN, AND THE LAW, *supra* note 70, at 563. Mr. Kramer, an author and activist, founded the Gay Men's Health Crisis, an AIDS service organization, and later dissociated himself from the organization to become one of the founders of ACT-UP (AIDS Coalition to Unleash Power), a radical AIDS awareness organization. Later, Mr. Kramer called the Gay Men's Health Crisis the "biggest sissies of them all" and compared people who run AIDS programs to Adolf Eichmann, an architect of the Nazi program to murder Jewish people throughout Europe. Catherine Woodard, *AIDS Activist Rips Programs, Pols*, N.Y. NEWSDAY, Nov. 15, 1993, at 27.

134. Robertson, Chairman and Chief Executive of the Christian Broadcasting Network and founder of the Christian Coalition, often states that the Old Testament considers homosexuality an abomination. David W. Dunlap, *Gay Writer Fast's in Jail, Seeking Talk with Pat Robertson*, N.Y. TIMES, Mar. 5, 1995, at A24.

135. Falwell, head of the Moral Majority organization and a televangelist, has stated that "God hates homosexuality." David W. Dunlap, *Gay Advertising Campaign on TV Draws Wrath of Conservatives*, N.Y. TIMES, Nov. 12, 1995, at A34.

been any spill-over from the bedroom to the political arena?¹³⁶ And how does one determine whether that spillover has been harmful or helpful to the larger society? How is that harm, if there is any, to be measured against the negative effects of prohibiting individual freedom and pleasure? And how can an identity-based movement go about answering that question when it includes so many different factions?

The African-American civil rights movement has similar questions to answer. Can an identity-based movement which represents so many different groups do so effectively? How will it be possible to serve all? Who will get left out, and how will that be decided? Certainly these questions are difficult, but working towards the answers can only help. It might even teach all of us not only to tolerate deviance, but also to embrace it.

136. See Audre Lorde, *Sadomasochism: Not About Condemnation*, in A BURST OF LIGHT 11-27 (1988) (In an interview Lorde discusses the role of private sadomasochistic practice in public political practice.).