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## WHY DISCRIMINATION AGAINST LESBIANS AND GAY MEN IS SEX DISCRIMINATION

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*Most efforts to secure constitutional protection for lesbians and gay men against discrimination have unsuccessfully employed privacy and suspect classification arguments. In this Article, Professor Koppelman approaches the issue from a novel*

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This Article is dedicated to my sister, Kitty.

Koppelman  
PP 220-257

## II

## A SOCIOLOGICAL ARGUMENT

A. *Racism and the Miscegenation Taboo*

The Supreme Court does not require that a challenge to a sex-based classification show that the challenged classification is caused by or reinforces sexism. Rather, once a sex-based classification is shown, the law is presumed to be unconstitutional, and the burden shifts to the state to rebut that presumption by showing that the classification is substantially related to the achievement of important government objectives.<sup>83</sup> Unless that can be shown—and in the case of laws that discriminate against gays, it cannot—the law is invalid. There is thus, so to speak, a firewall between the argument thus far and the more controversial sociological and psychological claims that follow. All the parts of the argument I am making fit together into a single structure, but the logic of those parts of the argument that have been presented up to this point is doctrinally complete, and thus is insulated from the destructive force of any skepticism you may feel toward the rest of the argument. This is because the argument thus far rests on pronouncements of the United States Supreme Court that lower courts are not at liberty to reject or disregard. Existing doctrine requires the judicial invalidation of laws that discriminate against gays, even if these lower courts do not accept a word of what I am about to say.

Theorists and state supreme courts interpreting their own constitutions, if not lower courts, should go beyond this firewall because received doctrine is unpersuasive.<sup>84</sup> It is now a commonplace view among constitutional scholars that the levels-of-scrutiny approach takes the court unnecessarily far afield from the systems of illegitimate hierarchy that were the target of the Reconstruction Amendments, and sometimes even perversely reinforces those systems.<sup>85</sup> Even if existing equal protection doctrine would require the invalidation of miscegenation laws or laws disadvantaging gays, judges may well wonder whether either result is in accord with the purposes of the fourteenth amendment. If they believe it isn't, they are perhaps justified in torturing the doctrine (as, in the past, they have) in order to

<sup>83</sup> See text accompanying notes 65-66 *supra*.

<sup>84</sup> The U.S. Supreme Court evidently has little interest in reexamining existing doctrine, even when that doctrine reveals itself to be completely incoherent. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (purporting to apply minimal scrutiny yet invalidating application of statute).

<sup>85</sup> The most thorough indictment of the doctrine is Owen M. Fiss, *Groups and the Equal Protection Clause*, in *Equality and Preferential Treatment* 84, 84-154 (Marshall Cohen et al. eds., 1977); see also C. MacKinnon, *supra* note 80, at 32-45.

reach a result more consistent with those purposes. As William Eskridge observes:

A gap in the analogy [between the homosexuality and miscegenation taboos] is that the connection between the discriminatory classification (sex) and the harm (reinforcing gender stereotypes) is abstract and hard to connect with legislative motivations. Judges may find it difficult to understand how denying two gay men the right to marry is driven by an ideology that oppresses straight women.<sup>86</sup>

An analogous objection may be made to the claim that the laws against miscegenation violate the constitutional prohibition of racial discrimination. The question left unanswered by *McLaughlin v. Florida*<sup>87</sup>—which, as it happens, is the first case in which the Court expressly applied strict scrutiny in its modern sense (scrutiny that is “strict” in theory and fatal in fact)<sup>88</sup>—is whether prohibitions of miscegenation were part of the system of racial oppression that the fourteenth amendment seeks to eliminate and, if so, in what way. It was, perhaps, the *McLaughlin* Court’s desire to avoid this difficult sociological inquiry that led it to adopt the mechanistic, levels-of-scrutiny approach, which thereafter came to dominate equal protection doctrine.<sup>89</sup>

I will now explore the connection between racism and the miscegenation taboo in some detail. I will do this for two reasons. First, this exploration will show how one group’s oppression can be rooted in another’s. Once it is made clear how discrimination against members of interracial couples is part of a larger pattern of domination of blacks by whites, the idea that discrimination against gays is part of a larger pattern of domination of women by men may seem less conceptually novel. Second, this exploration will show that sociological argu-

<sup>86</sup> Eskridge, *supra* note 58, at 1509-10; see also Jeffrey Rosen, *Sodom and Demurrer*, *New Republic*, Nov. 29, 1993, at 16, 18 (observing that sex discrimination argument for gay rights “requires a degree of sociological abstraction that is open to question”). But see William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 *Yale L.J.* 333, 356-57 (1992) (arguing that same-sex marriages could erode traditional, gendered work roles in the home, and thereby ease women’s now disproportionate burden of domestic labor).

<sup>87</sup> 379 U.S. 184 (1964) (invalidating statute prohibiting unmarried interracial couple from habitually living in and occupying same room at night).

<sup>88</sup> *Gerald Gunther*, *The Supreme Court*, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 *Harv. L. Rev.* 1, 8 (1972).

<sup>89</sup> For a statement of the very different, and less settled, equal protection doctrine that prevailed on the eve of *McLaughlin*, see Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 *Geo. L.J.* 49 (1964) (arguing that unless Court modified existing doctrine by shifting burden of justification onto the state, the state would probably prevail).

ment of the kind that I am proposing is neither unprecedented nor avoidable in constitutional law. The well-established doctrine that miscegenation laws are unconstitutional necessarily depends upon precisely the same kind of argument.

One way of establishing the connection between racism and the miscegenation taboo is to look at the common-sense meaning of the challenged taboo. Most people recognized that (at least among whites) the miscegenation taboo tended to be held most strongly by racists, that it tended to reinforce racism, and that it played an important role in the system of white supremacy.<sup>90</sup> They could not, however, be confident of the precise way in which it played this role, since the mechanisms in question took place within people's psyches. Nonetheless, those mechanisms were not altogether inaccessible. As Charles R. Lawrence III argues, "the 'cultural meaning' of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly."<sup>91</sup> This is because, if an action has cultural meaning, "this meaning must have been transmitted to an individual who is a member of that culture. If he professes to be unaware of the cultural meaning or attitude, it will almost surely be operating at an unconscious level."<sup>92</sup> The miscegenation taboo notoriously had invidious racial connotations. Here, then, is a second firewall: One can recognize what everyone knows, that the miscegenation taboo is *somehow* linked to white supremacy, that that link is part of its implicit meaning, without wading into the murky psychological waters in which the linkage dwells. This recognition appears to be the basis of the Court's most important miscegenation decision, *Loving v. Virginia*.<sup>93</sup>

When the Supreme Court next visited the miscegenation question after *McLaughlin*, in *Loving*, it focused directly on the purpose of the statute's racial classifications. *Loving* involved a challenge to a law prohibiting interracial marriage. Chief Justice Warren, writing for the Court, observed that the Supreme Court of Appeals of Virginia had held "that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of the blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy."<sup>94</sup> On this evidence, he concluded that "the racial classifications must stand on

<sup>90</sup> See Robert J. Sikkels, *Race, Marriage, and the Law* 32-63 (1972).

<sup>91</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 324 (1987).

<sup>92</sup> *Id.* at 357.

<sup>93</sup> 388 U.S. 1 (1967).

<sup>94</sup> *Id.* at 7 (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

their own justification, as measures designed to maintain White Supremacy,<sup>95</sup> and that the purpose of the statute thus "violates the central meaning of the Equal Protection Clause."<sup>96</sup> *Loving* thus indicates that the "central meaning" of equal protection is the prohibition, not of racial classification (as *McLaughlin* had implied), but of officially sanctioned racism, and *Loving* went beyond formal analysis to discern the racism that underlay the miscegenation prohibition.<sup>97</sup>

The *Loving* opinion did not fully explain how the prohibition of interracial marriage was linked to white supremacy, but the existence of the linkage should have been clear to most Americans. Before abolition, the connection was clear: as one Virginia jury foreman put it in 1833, "the law was made to preserve the distinction which should exist between our two kinds of population, and to protect the whites in the possession of their superiority."<sup>98</sup> Kingsley Davis observes that laws against interracial marriage are important for the continued functioning of a caste-based society.

Such laws indicate one thing: that the racial integrity of the upper caste is to be strictly maintained, to the degree that all persons of mixed racial qualities shall be placed unequivocally in the lower of the two castes. To permit intermarriage would be to give the hybrid offspring the legal status of its father, and would soon undermine the very basis of the caste order. Hence either intermarriage must be strictly forbidden or racial caste abandoned.<sup>99</sup>

Even when the legislators self-consciously strove to maintain the caste system, their concern was not limited to the danger to the superiority of the white race brought about by the production of mulatto children. "When they addressed black male/white female sexual relations, the relations themselves, as well as their likely result, disturbed the white male legislators."<sup>100</sup> By the time the miscegenation prohibition came before the Supreme Court in the mid-twentieth century, it had become autonomous from its historical origins, a deeply felt taboo in itself, and was, in fact, a principal basis for the defense of racial segre-

<sup>95</sup> *Id.* at 11.

<sup>96</sup> *Id.* at 12.

<sup>97</sup> *Loving* was not the first Supreme Court decision to do this. One earlier opinion recognized the significance of the miscegenation prohibition as a "stigma, of the deepest degradation . . . fixed upon the whole [black] race." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 409 (1857).

<sup>98</sup> Quoted in A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *Geo. L.J.* 1967, 2019 (1989).

<sup>99</sup> Kingsley Davis, *Intermarriage in Caste Societies*, 43 *Am. Anthropologist* 376, 389 (1941).

<sup>100</sup> Higginbotham & Kopytoff, *supra* note 98, at 1995 n.131.

gation in general.<sup>101</sup> Why did so much passion attach to the miscegenation taboo?

The miscegenation taboo presumed, in the first place, that the sex act had hierarchical significance, with penetration expressing the dominance of the man over the woman. The idea that sexual penetration implies the subordination of the person penetrated should hardly be unfamiliar to modern Americans. One of the commonest of obscenities, the verb "fuck," refers in a vulgar way to sexual intercourse, but as Robert Baker has observed, it also is ordinarily used to indicate harm, and the fact that this metaphor makes sense to us suggests that "we conceive of the female role in intercourse as that of a person being harmed (or being taken advantage of)."<sup>102</sup> The word implies "that intercourse is both the normal use of a woman, her human potentiality affirmed by it, and a violative abuse, her privacy irredeemably compromised, her selfhood changed in a way that is irrevocable, unrecoverable."<sup>103</sup>

Sexual penetration of a member of one race by a member of the other was understood symbolically either to represent or to invert the whole order of racial hierarchy. Thus white men took access to black women for granted, before and after emancipation, while the barest hint (or even the projected fantasy) of a black man's desire for a white woman often sufficed to bring out the lynch mob.<sup>104</sup> A white woman

<sup>101</sup> According to Myrdal:

The ban on intermarriage has the highest place in the white man's rank order of social segregation and discrimination. Sexual segregation is the most pervasive form of segregation, and the concern about "race purity" is, in a sense, basic. No other way of crossing the color line is so attended by the emotion commonly associated with violating a social taboo as intermarriage and extra-marital relations between a Negro man and a white woman. No excuse for other forms of social segregation and discrimination is so potent as the one that sociable relations on an equal basis between members of the two races may possibly lead to intermarriage. *Å*  
Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 606 (1944). See generally Charles H. Stember, *Sexual Racism: The Emotional Barrier to an Integrated Society* (1976); R. Sicksels, *supra* note 90.

<sup>102</sup> Robert Baker, "Pricks and Chicks": A Plea for "Persons," in *Philosophy and Sex* 249, 263 (Robert Baker & Frederick Elliston eds., 2d ed. 1984); see also C. Stember, *supra* note 101, at 144-65; Laurie Shrage, *Should Feminists Oppose Prostitution?*, 99 *Ethics* 347, 355-58 (1989).

<sup>103</sup> Andrea Dworkin, *Intercourse* 122 (1987). One can recognize the pervasiveness of this view in our culture without leaping to the conclusion that "intercourse itself is immune to reform," *id.* at 137, or that "intercourse itself determines women's lower status," *id.* at 138.

<sup>104</sup> See John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 100-08, 215-21 (1988); see also John Dollard, *Caste and Class in a Southern Town* 134-72 (3d ed. 1957); Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* 413-31 (1974). See generally Martha Hodes, *The Sexualization of Reconstruction Politics: White Women and Black Men in the South After the Civil War*, 3 *J. Hist. Sexuality* 402 (1993). The courts shared this hypersensitivity to black male sexuality. See, e.g.,

who consented to miscegenation was seen as degrading herself, and one of the earliest miscegenation laws, a 1664 Maryland statute, provided that any "freeborne [white] woman who thereafter married a slave would be required to serve the master of such slave during her husband's life, and that any children born of this union would be slaves."<sup>105</sup> Implicit in the taboo were the premises that sexual penetration is a nasty, degrading violation of the self, and that there are some people (black women) to whom, because of their inferior social status, it is acceptable to do it, and others (white women) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them. The taboo connoted a narrative in which black men represented a dangerous, predatory, uncontrollable sexuality, and white women represented a fragile, asexual purity, the protection of which was the special duty of white men.<sup>106</sup> This narrative was commonplace—not accepted by everyone,

McQuirter v. State, 63 So. 2d 388 (Ala. Ct. App. 1953) (sustaining conviction, for attempted assault with intent to rape, of black man who stared at white woman and followed her down street).

<sup>105</sup> Derrick A. Bell, Jr., *Race, Racism, and American Law* 66 (3d ed. 1992) (quoting Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland, Jan. 1637-Sept. 1664, at 533-34 (William H. Brown ed., 1883)). On the early history of miscegenation laws, see also A. Leon Higginbotham, Jr., *In the Matter of Color, Race and the American Legal Process: The Colonial Period* 40-47 (1978). David Fowler has linked racism here to sexism:

The caste rule against intermarriage is enforced against both sexes strictly, but a violation by a higher caste woman and a lower caste man is likely to be punished more harshly than one between their opposite numbers. The difference in treatment reflects the subordination of women to men in most societies. Male domination, derived from the patriarchal system, includes the arrangement of marriages of females, and this sort of misalliance by a higher caste woman constitutes flagrant disrespect for the authority and prestige of the males of her caste.

David H. Fowler, *Northern Attitudes Towards Interracial Marriage* 16-17 (1987). This specter of sexual pollution continues to police the behavior of higher caste females. "Infrequent though black-on-white rape was [in 20th-century America], the image of the black rapist could serve not only to control the behavior of black men in the North, but also to instill fear into white women who moved too freely in the public world." J. D'Emilio & E. Freedman, *supra* note 104, at 297-98.

<sup>106</sup> This narrative has been noted by many commentators. See, e.g., C. Stember, *supra* note 101, at 121-43. The taboo is also reasonably open to other constructions less flattering to the objects of its protection:

Sex was the whip that white supremacists used to reinforce white solidarity, probably the only whip that would cut deeply enough to keep poor whites in line. Political slogans that spoke straightforwardly of property or wealth (which not all whites held) had failed to rally whites en masse. However, nearly all white men could claim to hold a certain sort of property, in wives, sisters, and daughters. When women were reduced to things, they became property that all white men could own. The sexually charged rhetoric of "social equality" invited all white men to protect their property in women and share in the maintenance of all sorts of power (including the economic and political, which disproportionately benefited the better-off) in the name of protecting the sexuality of white womanhood.

but understood by everyone—in white American culture. This information was available to Chief Justice Warren because it was available to everybody.

It's often been argued that citation of social science evidence in *Brown v. Board of Education*,<sup>107</sup> which became the object of considerable controversy,<sup>108</sup> was unnecessary because everyone knew that segregation harmed and stigmatized blacks and was specifically intended to do so. Common-sense reasoning, it has been argued, should have been sufficient to dispose of the case.<sup>109</sup> In *Loving*, Chief Justice Warren may have taken this criticism of his earlier opinion seriously. Thus, the second firewall: The Court's decision in *Loving* did not depend on, or even cite, questionable social science evidence. For anyone who honestly didn't know that the miscegenation taboo was linked to racism, however—say, a recent immigrant—social science evidence might have helped to make the decision more persuasive. Even for those who recognize the invidious social meaning of the taboo, moreover, the question remains whether Warren's causal claim, that miscegenation laws are "measures designed to maintain White Supremacy,"<sup>110</sup> is accurate. Underlying the doctrinal question is a moral one: Is it wrong to stigmatize miscegenation? If so, why? If the claim is that the taboo is motivated by racism, what evidence have we that this is so? If the miscegenation taboo reinforces white supremacy, how does it do this? The judicial question of the prohibition's constitutionality has been resolved, and sits safely behind the two firewalls, but we must now push past them. No answer to the doctrinal question that ignores this moral question can be fully satis-

Nell I. Painter, "Social Equality," Miscegenation, Labor, and Power, in *The Evolution of Southern Culture* 47, 49 (Numan V. Bartley ed., 1988). It has also been noted that propriety of a more tangible sort was at issue in most of the legal cases: ↗

Until the mid-twentieth century, only a few of these [miscegenation] cases were brought either by interracial couples seeking the right to marry or by law enforcement officials trying to prevent them from doing so. Most of the cases were ex post facto attempts to invalidate interracial marriages that had already lasted for a long time. Such cases were brought by relatives or by the state after the death of one spouse, most often a white man. The lawsuits were designed with a specific purpose in mind: to take property or inheritances away from a surviving spouse, most often a woman of color.

Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 12 *Frontiers* 5, 7 (1991).

<sup>107</sup> 347 U.S. 483, 494 n.11 (1954).

<sup>108</sup> On this controversy, see Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 705-07, 712-13 (1976).

<sup>109</sup> The classic statement of this argument is Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421 (1960).

<sup>110</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

factory, because any doctrinal answer implies a conclusion about the moral question.

Let us now at last consider what, precisely, the equal protection clause of the fourteenth amendment should be understood to forbid. There are several theories that have attempted to specify what it means to "deny . . . the equal protection of the laws."<sup>111</sup> The process defect theory, most prominently developed by John Hart Ely, holds that minorities must not be denied "equal concern and respect in the design and administration of the political institutions that govern them."<sup>112</sup> The fourteenth amendment, according to Ely, requires that all citizens "be represented in the sense that their interests are not to be left out of account or valued negatively in the lawmaking process."<sup>113</sup> On this account, a law that is generated by a process tainted by prejudice, in which the legislators were biased against some of their constituents, is unconstitutional.

A second theory, the stigma theory, most prominently associated with Kenneth Karst, argues that the substantive core of the equal protection clause is "a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."<sup>114</sup> This principle "presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant. Accordingly, the principle guards against degradation or the imposition of stigma."<sup>115</sup> According to this theory, any law that stigmatizes or insults some citizens violates the Constitution.

A third theory, the group-disadvantage theory, holds that the amendment is primarily concerned with the material subordination of groups, such as blacks, that have been in a perpetually disadvantaged condition.<sup>116</sup> According to this theory, the equal protection clause presumptively forbids any state law or practice which "aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group."<sup>117</sup> (This theory will be of less interest to us here than the other two, because if the other two theories can be satisfied, this one can, too: Any law that is biased against and stigmatizes a group will also work to its material detriment, at least in the long run.)

<sup>111</sup> U.S. Const. amend. XIV, § 1.

<sup>112</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 82 (1980) (quoting R. Dworkin, *Taking Rights Seriously*, supra note 42, at 180).

<sup>113</sup> J. Ely, supra note 112, at 223 n.33.

<sup>114</sup> Kenneth L. Karst, *The Supreme Court, 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1, 4 (1977).

<sup>115</sup> *Id.* at 6.

<sup>116</sup> See generally, e.g., Fiss, supra note 85.

<sup>117</sup> *Id.* at 134.

In our search for evidence of a link between the miscegenation taboo and white supremacy, we've thus far focused on the understood social meaning of the taboo, which is what stigma-based theories of equal protection emphasize. From the standpoint of stigma theory, *Loving* was a remarkably easy case. It's also easy from the standpoint of the group-disadvantage theory: blacks' material disadvantages were the direct result of the racism that laws of this kind encouraged, and which biased both public and private decisionmaking. The principal proponent of the process defect theory, however, argues that stigma is relevant, not as a prohibited kind of harm, but only "[i]nsofar as it signals the attitudes that 'normals' are likely to entertain respecting the stigmatized individual," since prejudiced attitudes are then more likely to have infected the decisionmaking process.<sup>118</sup> Rather than attempt to adjudicate this dispute, I will here take the process theory as a given and see whether the result is different. Is there evidence that the miscegenation prohibition is the product of a lawmaking process that is tainted by racism?

One indicator, the one seized on by *McLaughlin*, is the bald fact of racial classification itself. If a legislature classifies on the basis of race, it's plain that the legislature thought that race mattered, and given the sorry history of race-consciousness in the United States, there is thus reason to suspect that racial antagonism is at work. That's why such laws are presumptively unconstitutional. "Racial classifications that disadvantage minorities are 'suspect,'" writes Ely, "because we suspect they are the product of racially prejudiced thinking of a sort we understand the Fourteenth Amendment to have been centrally concerned with eradicating."<sup>119</sup> But here we've resolved to push beyond this test, to see whether the suspicion is justified in *this* case. What other evidence have we that it is?

A second indicator is the cultural meaning of the prohibition. As noted above, the cultural output of a prohibition is a promising indicator of the cultural input that produced it. This is the basis of Lawrence's cultural meaning test, which looks to the generally understood meaning of a law as a proxy for the unconscious motivations that produced it.<sup>120</sup> It is impossible to believe that the generally understood racist connotations of the miscegenation taboo were not in the minds of the legislators. Such laws would not have been enacted had whites and blacks been regarded with equal concern and respect. (For that matter, the implicit connotations of sexual penetration as both de-

<sup>118</sup> See J. Ely, *supra* note 112, at 160 n.\*.

<sup>119</sup> *Id.* at 243 n.11.

<sup>120</sup> See Lawrence, *supra* note 91, at 324.

grading and appropriate only for (certain) women make it clear that such laws would not have been enacted by legislators who regarded men and women with equal concern and respect.)<sup>121</sup>

Finally, we can turn to the findings of social science. Social scientists have studied the links between various prejudiced attitudes, trying to discern which attitudes are reliable predictors of other attitudes and (more difficult to prove) which attitudes *cause* other attitudes. Such investigations have been undertaken into the connection between whites' attitudes toward blacks and their attitudes toward miscegenation. The results have been revealing.

The most promising explanation of the miscegenation taboo begins with the premise that "people hold and express particular attitudes because they derive psychological benefit from doing so, and that the type of benefit varies among individuals."<sup>122</sup> Racism, for example, may have any of a number of motivational causes. Racial bias "might: 1. reflect exposure to a limited and inaccurate range of information about Negroes, 2. reflect conformity to prevailing social pressures, or 3. represent the use of Negroes as social media for such ego-defensive purposes as the projection of unconscious and unacceptable impulses."<sup>123</sup> Opposition to miscegenation functions similarly. Some of those who were opposed to miscegenation honestly believed pseudo-scientific claims that intermarriage led to sickly offspring.<sup>124</sup> Some simply internalized the norms that already existed in their society. As Peter Berger and Thomas Luckmann observe, any society's universe of symbolic meanings "is self-maintaining, that is, self-legitimizing by the sheer facticity of its objective existence in the society in question."<sup>125</sup> Many individuals learned the custom of stigmatizing miscegenation along with all the other customs in their culture, and held to it because they had learned that that was the way things ought to be.

For some whites, however, this custom came to have a particular emotional resonance. These individuals' sense of identity became bound up with the miscegenation taboo, and so with the entire system of social hierarchy with which it was connected. It was for these individuals that the taboo was most important. And the participation of such individuals in political decisionmaking greatly increased the like-

<sup>121</sup> See C. Stember, *supra* note 101, at 202-03.

<sup>122</sup> Gregory M. Herek, *The Instrumentality of Attitudes: Toward a Neofunctional Theory*, 42 *J. Soc. Issues*, Summer 1986, at 99, 102.

<sup>123</sup> Daniel Katz et al., *Ego-Defense and Attitude Change*, 9 *Hum. Rel.* 27, 28 (1956).

<sup>124</sup> See Applebaum, *supra* note 89, at 71-72 (discussing studies).

<sup>125</sup> Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* 105 (1966).

lihood that the taboo would persist as a part of the social and legal code.

The identity of southern whites was defined at a fundamental level by their status as white, which was defined by contrast with the purported laziness, stupidity, uncleanness, criminal propensity, and hypersexuality of blacks. Their self-esteem was largely derived from the contrast between themselves and the despised racial Other.<sup>126</sup> The miscegenation taboo appears to be close to the psychological core of the system of white supremacy that prevailed in the South after Reconstruction.<sup>127</sup> Its prototypical mode of enforcement was the lynch mob. As Joel Kovel observes,

the archetypal lynching in the old South was for the archetypal crime of having a black man rape (= touch, approach, look at, be imagined to have looked at, talk back to, etc.) a white lady. Moreover, the archetypal lynching often included a castration of the black malefactor; and even when it didn't, the idea of castration was immanent in the entire procedure. Before there were lynchings in the South, there were laws to do what mobs took upon themselves to perform after the Civil War, and these same laws often punished Negro infractions of all kinds with castration.<sup>128</sup>

White supremacy was thus understood, and often expressly justified, as a means of protecting white women from black men.<sup>129</sup> The psychological basis of this understanding (which needed explaining; one writer observed that the actual danger that a southern white woman would be raped by a black man was much less than her danger of being struck by lightning<sup>130</sup>) has been explored by many writers, who have arrived at widely divergent conclusions.<sup>131</sup> Some claim that the concern about interracial sex was really a concern about racial pu-

<sup>126</sup> See generally Joel Kovel, *White Racism: A Psychohistory* (2d ed. 1984).

<sup>127</sup> "Fear of miscegenation permeates virtually all of the racist literature of post-Civil War America." 7 *Anti-Black Thought, 1863-1925, Racial Determinism and the Fear of Miscegenation*, pre-1900, at xxvi (John David Smith ed., 1993). It has remained prominent in racist hate literature. See C. Stember, *supra* note 101, at 15-32.

<sup>128</sup> J. Kovel, *supra* note 126, at 67. This mythology was an important part of the ideology supporting lynching, even though most of the lynchings that actually took place were not motivated by allegations of rape. See Painter, *supra* note 106, at 53; Joel Williamson, *The Crucible of Race: Black-White Relations in the American South Since Emancipation* 183-89 (1984).

<sup>129</sup> This did not, however, prevent white mobs from inflicting terrible punishments, sometimes including genital mutilation, on white women thought to have cohabited with black men. See Hodes, *supra* note 104, at 410-12.

<sup>130</sup> W. J. Cash, *The Mind of the South* 115 (1941).

<sup>131</sup> The following is not an exhaustive catalogue. See R. Sickels, *supra* note 90, at 10-31; C. Stember, *supra* note 101, at 37-89.

erty,<sup>132</sup> but as we have seen, this concern rarely extended to the fathering of mulatto children by white men. Some have argued that the miscegenation prohibition was based on whites' desire for economic superiority, rather than any actual abhorrence of interracial sex.<sup>133</sup> This, however, fails to explain why the taboo is held by even whites who support the economic advancement of blacks.<sup>134</sup> More interesting is the hypothesis that some kind of projected guilt was at work. John Dollard thought that "the white men are defending their women not only from the sexual thoughts and attentions of Negroes, but also from their own, and what they deny to themselves in fantasy they will hardly permit Negroes in fact."<sup>135</sup> Calvin Hernton argues that there were two sources of such guilt for the southern white man: his frequent cohabitation with black women, and his sense of the immorality of slavery, and later, of the Jim Crow system.<sup>136</sup> White womanhood was perceived as precious but endangered, and this danger justified all the repressive measures that were brought to bear on the black population. "In the mind of the Southerner the word 'rape' not only applied to sexual assaults on white women by Negroes, but to any attempt at changing what the Southerner called 'our way of life.'"<sup>137</sup> This account complements the Freudian hypothesis of Kovel, who contends that in the miscegenation taboo, the black man became the surrogate for the white man's own oedipal fears. The black man was made to

represent *both* father and son in their destructive aspects. There is evidence for this in the structure of his social role: he is the bad father who possesses the black mammy (who is herself impure), and he has the genital power which forever excites the child's envy; he is also the bad child who lusts after the pure and utterly forbidden white mother (made sexless, in reality). By making the rape fantasy the cornerstone of his culture, the white male only repeats in adulthood the central incest taboo of his childhood. And here southern

<sup>132</sup> This concern was the ostensible basis for the Virginia statute, entitled "An Act to Preserve Racial Integrity," which was invalidated in *Loving*. See Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. Davis L. Rev. 421, 423 (1988).

<sup>133</sup> See, e.g., Oliver C. Cox, *Caste, Class, and Race* 386-87, 526-27 (1948).

<sup>134</sup> See C. Stember, *supra* note 101, at 5-9, 32-34; see also Howard Schuman et al., *Racial Attitudes in America: Trends and Interpretations* 195 (1985) ("[B]y 1983 approval of integrated marriage had reached only the same level [40%] that approval of integrated transportation had reached in the early 1940s.").

<sup>135</sup> J. Dollard, *supra* note 104, at 137.

<sup>136</sup> Calvin C. Hernton, *Sex and Racism in America* 24 (1966) ("Sacred white womanhood emerged in the South as an immaculate mythology to glorify an otherwise indecent society.").

<sup>137</sup> *Id.*; see also W. Cash, *supra* note 130, at 114-17.

culture makes its unique contribution to an ageless human problem: the southern white male simultaneously resolves both sides of the conflict by keeping the black man submissive, and by castrating him when submission fails. In both these situations — in the one symbolically, in the other directly — he is castrating the father, as he once wished to do, and also identifying with the father by castrating the son, as he once feared for himself. All that he has to do to maintain this delectable situation is to structure his society so that he directly dominates black men.<sup>138</sup>

Charles Stember, noting that sexual penetration is understood to confer achievement, mastery, and defilement, infers that male sexual pleasure is heightened by the conquest of a woman of superior social status, and that because white women are so much higher in social status than black men, the pleasure of black men in interracial sex is far greater than that available under any circumstances to white men. White men's rage, he concludes, is the consequence of relative sexual deprivation.<sup>139</sup>

None of these ideas are more than hypotheses. As Stember concedes, any explanation of the taboo must rest on "speculation and deduction."<sup>140</sup> It is, however, significant that they all posit a close link between the miscegenation taboo and whites' conviction of black inferiority. All converge on the idea that if whites did not hold that blacks were less worthy of concern and respect than themselves, they would not hold the taboo. The fact that every investigator to venture into this mysterious territory has agreed on at least this proposition suggests that it can be held with confidence.

The miscegenation taboo served a defensive psychological function for a large subset of its supporters, and certainly for those who supported it most vociferously. It was an effect of its adherents' racism—they were affronted by the idea of a black man penetrating a white woman—but as part of a publicly shared moral code, it also caused racism. It did so in large part at an unconscious level. The taboo wasn't a rational belief; it was deeply rooted in culturally shared aversions that even strong antiracists usually could not escape internalizing. Harry Truman, who nearly lost the presidency because of his dedication to the ideal of racial equality, said in 1963 that "I don't believe in it. What's that word about ten feet long? Miscegenation? Would you want your daughter to marry a Negro?"<sup>141</sup> Moreover, the

<sup>138</sup> J. Kovel, *supra* note 126, at 71-72. For other psychological accounts of the taboo, all of which link it tightly to racism, see D. Bell, *supra* note 105, at 74-81.

<sup>139</sup> C. Stember, *supra* note 101, at 144-65.

<sup>140</sup> *Id.* at 206.

<sup>141</sup> Quoted in R. Sickels, *supra* note 90, at 32.

way it played out in practice was remarkably irrational. The murderous, castrating mob described by Kovel appears to be in the grip of an uncontrollable passion. It was because of the centrality of the miscegenation taboo to whites' racism, at a deep, unconscious level, that overt racists could score debating points with the "your daughter" line. (The fact that this particular line was so effective supports Kovel's claim that the taboo also draws on incest guilt.)<sup>142</sup> When rational-actor models cannot explain human behavior, we must turn to some kind of psychological theory that tries to make sense of human irrationality. The theories described above offer an explanatory apparatus that accounts for all these phenomena more persuasively than any competing model.

Why should we believe these accounts of the psychological underpinnings of the miscegenation laws? Because they help us to make sense of the facts: the bizarre and thoroughly confused mythology of race and sex dangers that grew up around the miscegenation taboo, the centrality of the taboo to the ideology of white supremacy, the taboo's gender asymmetry (black male-white female pairings being the central fear), and its connection with sexist assumptions about the polluting effects of sexual penetration.

Any psychological explanation involves well-known dangers. Because psychological phenomena are obviously not available for empirical observation, it is difficult to identify a standard by which we can verify our hypotheses. As Thomas Nagel has argued, however, this difficulty should not be taken to vitiate the usefulness of psychological explanations:

Much of human mental life consists of complex events with multiple causes and background conditions that will never precisely recur. If we wish to understand real life, it is useless to demand repeatable experiments with strict controls. . . . That doesn't mean that explanation is impossible, only that it cannot be sought by the methods appropriate in particle physics, cancer research, or the study of reflexes. We may not be able to run controlled experiments, but we can still try to make internal sense of what people do, in light of their circumstances, relying on a general form of understanding that is supported by its usefulness in countless other cases, none of them exactly the same.

Explanations that refer to unconscious mental processes should be evaluated by the same standard. There may be some psychoanalytic explanations so simple that they can be tested by experiment or statistical analysis, but most are certainly not like that—rather they

<sup>142</sup> Even Stember, who sharply disagrees with Kovel's analysis, see C. Stember, *supra* note 101, at 53-54, 67-70, concedes that incest guilt plays a role in the taboo. See *id.* at 165.

are applications of psychological insight in highly specific circumstances, which go beyond the bounds of consciousness. . . . [W]e simply have to decide whether this is an intuitively credible extension of a general structure of explanation that we find well supported elsewhere, and whether it is more plausible than the alternatives—including the alternative that there is no psychological explanation.<sup>143</sup>

Because the most plausible story we can tell about the miscegenation taboo is the story we have just told, and because there is so much circumstantial evidence to support it, this story should be provisionally accepted as true until a better one is offered. This is why we can feel reasonably confident that *Loving* was rightly decided. Although we cannot be certain that any of these explanations is true in every detail, all the evidence we have indicates that they are close enough to the truth that we can be reasonably sure that American society cannot purge itself of its racism and achieve the fourteenth amendment's aspiration of racial equality unless and until it destigmatizes miscegenation.

### B. Sexism and the Homosexuality Taboo

I now return to the question of whether laws that discriminate against gays are inconsistent with the underlying purposes of the prohibition of sex discrimination. In order to demonstrate that they are, it will be necessary to draw upon anthropology, experimental social psychology, and cultural history. These may seem like strange sources on which to base a legal argument. Many of the steps of the argument that lead me into this territory will, however, be familiar to the reader after our exploration of the miscegenation question. In both cases, the methodological and epistemological issues are similar. At some points in the argument, unfamiliar and uncertain steps are necessary, but these steps are no more unfamiliar or uncertain than those that are necessary in the miscegenation case, where the correctness of the result is clear.

Much of the connection between sexism and the homosexuality taboo lies in social meanings that are accessible to everyone. It should be clear from ordinary experience that the stigmatization of the homosexual has *something* to do with the homosexual's supposed deviance from traditional sex roles. "Our society," Joseph Pleck observes, "uses the male heterosexual-homosexual dichotomy as a central symbol for *all* the rankings of masculinity, for the division on *any* grounds

<sup>143</sup> Thomas Nagel, *Freud's Permanent Revolution*, N.Y. Rev. of Books, May 12, 1994, at 34, 35.

between males who are 'real men' and have power and males who are not. Any kind of powerlessness or refusal to compete becomes imbued with the imagery of homosexuality."<sup>144</sup> Similarly, the denunciation of feminism as tantamount to lesbianism is depressingly familiar. The connection between sexism and the homosexuality taboo has been extensively documented by psychologists and historians, and I shall shortly survey their work, but it should be obvious even without scholarly support.<sup>145</sup>

*Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality.* The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other. There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so. The recognition that in our society homosexuality is generally understood as a metaphor for failure to live up to the norms of one's gender resembles the recognition that segregation stigmatizes blacks, in that both are "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world."<sup>146</sup>

This common sense meaning shares certain implicit, rather ugly assumptions with the miscegenation taboo. Both assume the hierarchical significance of sexual intercourse and the polluted status of the penetrated person. The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading.<sup>147</sup> Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexu-

<sup>144</sup> Joseph Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, in *The American Man* 417, 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980).

<sup>145</sup> It has been obvious to many of the theorists of gay liberation. See Dennis Altman, *Homosexual: Oppression and Liberation* 79-84 (1971); David Fernbach, *The Spiral Path: A Gay Contribution to Human Survival* 69-112, 197-208 (1981); Homophobia: How We All Pay the Price (Warren J. Blumenfeld ed., 1992); Suzanne Pharr, *Homophobia: A Weapon of Sexism* (1988); John Stoltenberg, *Refusing to Be a Man* 130-33 (1989) [hereinafter *J. Stoltenberg, Refusing to Be a Man*]; John Stoltenberg, *Pornography, Homophobia and Male Supremacy*, in *Pornography: Women, Violence, and Civil Liberties* 145, 145-65 (Catherine Izzin, ed., 1992).

<sup>146</sup> Black, *supra* note 109, at 426. Most readers will be able to think of anecdotal evidence that supports this claim. Anyone who can't should consult Marc Fejer's useful compilation in *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. Miami L. Rev.* 511, 620-24, 631-32 (1992).

<sup>147</sup> Most Americans will immediately understand the significance of the astonishing quotation, which appeared in *Newsweek* in 1991, referring to male sodomy as "the most de-

ality is threatening because it calls into question the distinctive and superior status of being male. Male homosexuals and lesbians, respectively, are understood to be guilty of one aspect of the dual crime of the miscegenating white woman: self-degradation and insubordination. As with miscegenation, a member of the superior caste who allows his body to be penetrated is thereby polluted and degraded, and he assumes the status of the subordinate caste: he becomes womanlike. "[M]en cannot simultaneously be used 'as women' and stay powerful because they are men."<sup>148</sup> Just as miscegenation became the central symbol of the necessity of racial segregation, so today, homosexuality stands as *the* signifier of the importance of maintaining male status. Lesbianism, on the other hand, is a form of insubordination: it denies that female sexuality exists, or should exist, only for the sake of male gratification. The prohibition of lesbianism is, however, less central to the taboo. In the same way that black male-white female intercourse was the paradigmatic act that the miscegenation taboo prohibited, male sodomy is the paradigmatic act that the homosexuality taboo prohibits.<sup>149</sup>

As in the case of miscegenation, the judicial argument may end with a recognition of the homosexuality taboo's misogynistic implications, which are recognizable by most Americans. Both prohibitions clearly violate the fourteenth amendment as it is understood by the stigma theorists.<sup>150</sup> Implicit in both taboos are the premises—incompatible with equal concern and respect for all citizens—that sexual penetration is a nasty, degrading violation of the self, and that there are some people (in the case of the homosexuality taboo, women) to whom, because of their inferior social status, it is acceptable to do it, and others (men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them. Thus, a court could dispose of a law that discriminates against

grading thing one human being can do to another." Quoted in Fajer, *supra* note 146, at 623.

<sup>148</sup> Andrea Dworkin, *Right-Wing Women* 129 (1983). For a similar but distinct analysis, see Leo Bersani, *Is the Rectum a Grave?*, 43 *October* 197 (1987).

<sup>149</sup> Lesbians are often invisible in discussions of homosexuality. Respondents in surveys appear generally to equate "homosexuality" with "male homosexuality." Kathryn N. Black & Michael R. Stevenson, *The Relationship of Self-Reported Sex-Role Characteristics and Attitudes Toward Homosexuality*, 10 *J. Homosexuality* 83 (1984). In the recent political turmoil over the proposed lifting of the ban on gays in the military, there was almost no discussion of lesbians, even though women have been discharged from the armed forces on grounds of homosexuality at a rate far exceeding the rate for men. For the statistics, see sources cited in Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. Rev.* 499, 551 n.200 (1991).

<sup>150</sup> See notes 114-15 and accompanying text *supra*.

gays with a brief allusion to well-known cultural meanings, along the lines of *Loving v. Virginia*.<sup>151</sup>

Here, then, the argument against the homosexuality taboo finds its second firewall. However, it's not as strong a firewall as the first, or as either firewall in the miscegenation case, because many people don't perceive *any* connection between sexism and the homosexuality taboo. It's possible that a kind of willful blindness is operating here, like that of integration opponents who ingenuously defended the idea of "separate but equal," but the objection deserves an answer. These people ask the same question that could have been asked about *Loving*—what is the causal connection between the taboo and the hierarchy with which it is supposed to be linked?—but they are perhaps entitled to ask it with a straight face.

Let us turn, then, from evidence of stigma—for I have offered all that I can on that point—to evidence of process defect. Can it be shown that laws that discriminate against gays are products of a legislative process tainted by sexism? I noted earlier that Chief Justice Warren's claim that laws against miscegenation were "measures designed to maintain White Supremacy" would be strengthened if, for example, experimental social psychology could show a strong correlation between racism and intolerance of miscegenation, or if a historical showing could be made that the miscegenation taboo had developed at the same time as the racial caste system, and was developed by men who were anxious about maintaining racial caste. Such showings can, in fact, be made.<sup>152</sup> Analogous showings can be made in the case of the homosexuality taboo.

Social psychologists have documented that hostility toward homosexuals is linked to other traditional, restrictive attitudes about sex roles. For example, one study found that "[h]igher support for equality between the sexes is associated with more positive attitudes toward male homosexuality and lesbianism," and concluded that "a major determinant of negative attitudes toward homosexuality is the need to keep males masculine and females feminine, that is, to avoid sex-role confusion."<sup>153</sup> Other studies have shown that subjects' dislike of, or unwillingness to interact with, a homosexual person is associ-

151 388 U.S. 1 (1967).

152 For the social-psychological evidence, see G. Myrdal, *supra* note 101, at 60-61. For the historical evidence, see D. Bell, *supra* note 105, at 66-67; Joel Williamson, *New People: Miscegenation and Mulattoes in the United States* 91-100 (1980). See generally Higginbotham & Kopytoff, *supra* note 98; Hodes, *supra* note 104.

153 A.P. MacDonald, Jr. & Richard G. Games, *Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals*, 1 *J. Homosexuality* 9, 19 (1974); accord A.P. MacDonald et al., *Attitudes Toward Homosexuality: Preservation of Sex Morality or the Double Standard?*, 40 *J. Consulting & Clinical Psychol.* 161 (1973).

ated with the person's perceived incongruent sex role behavior.<sup>154</sup> Another study concluded that

the best single predictor of homophobia is a belief in the traditional family ideology, i.e., dominant father, submissive mother, and obedient children. The second best predictor of homophobia was found to be agreement with traditional beliefs about women, e.g., that it is worse for a woman to tell dirty jokes than it is for a man.<sup>155</sup>

Still another found that research subjects who were most prejudiced against homosexuals "held stronger stereotypes of masculinity and femininity and were more willing on the basis of these stereotypes to label a male as homosexual when he exhibited what they thought of as a single feminine characteristic."<sup>156</sup> Still other studies using a wide variety of measures of sex role attitudes and attitudes toward homosexuals have consistently found correlations between conventional expectations about gender roles and hostility toward homosexuals.<sup>157</sup> Correlation, of course, does not indicate the direction of causation,

<sup>154</sup> See Mary R. Laner & Roy H. Laner, *Personal Style or Sexual Preference? Why Gay Men Are Disliked*, 9 Int'l Rev. Modern Soc. 215 (1979); Mary R. Laner & Roy H. Laner, *Sexual Preference or Personal Style? Why Lesbians Are Disliked*, 5 J. Homosexuality 339 (1980); Jim Millham & Linda E. Weinberger, *Sexual Preference, Sex Role Appropriateness, and Restriction of Social Access*, 2 J. Homosexuality 343 (1977).

<sup>155</sup> Stephen F. Morin & Ellen M. Garfinkle, *Male Homophobia*, 34 J. Soc. Issues, Winter 1978, at 29, 31.

<sup>156</sup> John Dunbar et al., *Some Correlates of Attitudes Toward Homosexuality*, 89 J. Soc. Psychol. 271, 278 (1973).

<sup>157</sup> See Rodney G. Karr, *Homosexual Labeling and the Male Role*, 34 J. Soc. Issues, Summer 1978, at 73; Judith E. Krulewitz & Janet E. Nash, *Effects of Sex Role Attitudes and Similarity on Men's Rejection of Male Homosexuals*, 38 J. Personality & Soc. Psychol. 67 (1980); MacDonald & Games, supra note 153, at 9; Fred A. Minnigerode, *Attitudes Toward Homosexuality: Feminist Attitudes and Sexual Conservatism*, 2 Sex Roles 347 (1976); Alma D. Smith et al., *Relationships Among Gender, Sex-Role Attitudes, Sexual Attitudes, Thoughts, and Behaviors*, 46 Psychol. Rep. 359 (1980); Linda E. Weinberger & Jim Millham, *Attitudinal Homophobia and Support of Traditional Sex Roles*, 4 J. Homosexuality 237 (1979); Bernard E. Whitley, Jr., *The Relationship of Sex-Role Orientation to Heterosexuals' Attitudes Toward Homosexuals*, 17 Sex Roles 103 (1987). These results have also been found in cultures outside of the United States. See Marvin Brown & Donald M. Amoroso, *Attitudes Toward Homosexuality Among West Indian Male and Female College Students*, 97 J. Soc. Psychol. 163 (1975); John Dunbar et al., *Attitudes Toward Homosexuality Among Brazilian and Canadian College Students*, 90 J. Soc. Psychol. 173 (1973); see also R.W. Connell et al., *A Bastard of a Life: Homosexual Desire and Practice Among Men in Working-Class Milieux*, 29 Australian & N.Z. J. Soc. 112 (1993) (describing ways in which Australian gay men's masculinity simultaneously depends on and disrupts existing gender order); R.W. Connell, *A Very Straight Gay: Masculinity, Homosexual Experience, and the Dynamics of Gender*, 57 Am. Soc. Rev. 735 (1992) (same). See also the critical review of this literature in Fajer, supra note 146, at 617-20.

Hostility toward homosexuals has also been shown to correlate with the belief that most homosexuals do, in fact, behave like members of the opposite sex—a belief that has been shown to be false. See Alan Taylor, *Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals*, 9 J. Homosexuality 37 (1983).

but it suggests that a causal connection exists which deserves explanation.

A similar connection between sexism and the homosexuality taboo can be inferred from ordinary language. Everyone understands "sexual preference" or "sexual orientation" to refer to the gender of one's object-choice. Why, given the immense number of axes along which human sexuality varies, is *this* presumed to be the one that matters most, the one that is defining?<sup>158</sup> Again, why are concerns about homosexuality so closely linked to gender?<sup>159</sup>

<sup>158</sup> Eve Sedgwick has enumerated a few of the manifold variations in sexuality:

- Even identical genital acts mean very different things to different people.
- To some people, the nimbus of "the sexual" seems scarcely to extend beyond the boundaries of discrete genital acts; to others, it enfolds them loosely or floats virtually free of them.
- Sexuality makes up a large share of the self-perceived identity of some people, a small share of others'.
- Some people spend a lot of time thinking about sex, others little.
- Some people like to have a lot of sex, others little or none.
- Many people have their richest mental/emotional involvement with sexual acts that they don't do, or even don't want to do.
- For some people, it is important that sex be embedded in contexts resonant with meaning, narrative, and connectedness with other aspects of their life; for other people, it is important that they not be; to others it doesn't occur that they might be.
- For some people, the preference for a certain sexual object, act, role, zone, or scenario is so immemorial and durable that it can only be experienced as innate; for others, it appears to come late or to feel aleatory or discretionary.
- For some people, the possibility of bad sex is aversive enough that their lives are strongly marked by its avoidance; for others, it isn't.
- For some people, sexuality provides a needed space of heightened discovery and cognitive hyperstimulation. For others, sexuality provides a needed space of routinized habituation and cognitive hiatus.
- Some people like spontaneous sexual scenes, others like highly scripted ones, others like spontaneous-sounding ones that are nonetheless totally predictable.
- Some people's sexual orientation is intensely marked by autoerotic pleasures and histories—sometimes more so than by any aspect of alloerotic object choice. For others the autoerotic possibility seems secondary or fragile, if it exists at all.
- Some people, homo-, hetero-, and bisexual, experience their sexuality as deeply embedded in a matrix of gender meanings and gender differentials. Others of each sexuality do not.

E. Sedgwick, supra note 15, at 25-26.

<sup>159</sup> An earlier version of the argument I am making here, see Andrew Koppelman, Note, *The Miscogeneration Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L.J. 145 (1988), has been criticized on the following basis: "Because anti-gay bias, like all prejudice, partly derives from fear of difference, completely attributing anti-gay sentiment to gender roles is overly simplistic." Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 Harv. L. Rev. 617, 629 n.63 (1989). But why do people regard sexual orientation as a "difference" that matters so much? Why are gays seen as "other," while most differences in preference—you like to eat liver, I can't stand it—are far less salient? This critic addresses this question only once, writing that "the very existence of the concept of sexual orientation derives from and perpetuates biased conceptions of gender roles." Id. at 629. This concedes my point.

There are significant differences between men's and women's attitudes toward homosexuality. Women's intolerance seems less profound and deeply rooted than that of men.<sup>160</sup> Moreover, laws that discriminate against gays, like most other laws, are produced by an overwhelmingly male population of officials. For these reasons, the following discussion will focus first, and at greater length, on the psychic roots of *male* attitudes toward homosexuals. I shall then consider the somewhat different roots of women's hostility toward lesbians and gay men.

Correlations between sexism and heterosexism, similar to those found by social psychologists, have been noted by historians who have investigated the origins of the modern condemnation of "homosexuality." The work of these scholars, studying historical attitudes in a variety of different times and places, has converged in support of the hypothesis that the modern homosexuality taboo is linked with sexism.

The modern stigmatization of homosexuals as violators of gender norms—gay men as effeminate, lesbians as "mannish"—developed simultaneously with widespread anxieties about gender identity in the face of an emerging ideology of gender equality. It happened to male homosexuals first. Before about 1700, Randolph Trumbach has found that, although homosexual behavior was illegitimate, it was not the preserve of any distinct sub-class of society. The only males who suffered a loss of status were adults who took the passive role.<sup>161</sup> "After

<sup>160</sup> According to Gregory Herek:

National opinion polls typically find no significant difference between males' and females' responses to questions about homosexuality. Smaller-scale experimental and questionnaire studies, in contrast, have generally found more negative attitudes among males than among females, especially with attitudes toward gay men. . . . Both sets of data are revealing. Males and females probably hold roughly similar positions on general questions of morality and civil liberties, but males are more homophobic in their emotional reactions to homosexuality.

Gregory M. Herek, *On Heterosexual Masculinity: Some Psychological Consequences of the Social Construction of Gender and Sexuality*, 29 *Am. Behav. Sci.* 563, 564-65 (1986) (reviewing empirical data). See generally Lawrence A. Kurdek, *Correlates of Negative Attitudes Toward Homosexuals in Heterosexual College Students*, 18 *Sex Roles* 727 (1988); Bernie S. Newman, *The Relative Importance of Gender Role Attitudes to Male and Female Attitudes Toward Lesbians*, 21 *Sex Roles* 451 (1989).

<sup>161</sup> Homosexual acts "were usually between an active adult male and a passive adolescent." Randolph Trumbach, *Gender and the Homosexual Role in Modern Western Culture: The 18th and 19th Centuries Compared, in Homosexuality, Which Homosexuality?* 149, 152 (Dennis Altman et al. eds., 1989) [hereinafter Trumbach, *Gender and the Homosexual Role*]; see also Randolph Trumbach, *The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern Culture, 1660-1750, in Hidden From History: Reclaiming the Gay and Lesbian Past* 129, 129-40 (Martin B. Duberman et al. eds., 1989). The adult male usually also had sexual relations with women, and such men "who took the active role probably actually increased their standing as dominant males." Trumbach,

1700, [however,] it seems to make little difference whether a man takes the active or the passive role, or whether his partner is an adult male or a boy—any sexual desire by one male for another leads to categorization as an effeminate sodomite."<sup>162</sup> Trumbach links this transformation to the major cultural shift that was taking place at that time, in which

a patriarchal morality that allowed adult men to own and dominate their wives, children, servants and slaves, was gradually challenged and partially replaced by an egalitarian morality which proposed that all men were created equal, that slavery must therefore be abolished, democracy achieved, women made equal with men, and children with their parents.<sup>163</sup>

This egalitarian shift, Trumbach contends, "raised profound anxiety in both men and women" that "resulted in a compromise with full equality that historians have called domesticity. Men and women were equal, but they were supposed to live in separate spheres, he dominant in the economy, she in the home."<sup>164</sup> This distinction between the sexes was reinforced by the idea of effeminate males and homosexuals as deviants from their entire gender role. "All women in societies with transvestites experienced sexual domination all their lives, but only the transvestite minority of males ever did so."<sup>165</sup>

The rise of domesticity produced changes in child-rearing arrangements which may have contributed to this anxiety about the boundaries of gender. Men's work was increasingly relocated outside the home. The father was therefore away from home during most of a child's waking hours, while the mother's prime responsibility was child-rearing. She was excluded from other prestigious activities, and she therefore was far more likely than before to make the children the focus of her emotional life.<sup>166</sup> Exploration of the way in which gender identity is formed in such nuclear families helps to clarify the nature of the psychological link between sexism and heterosexism that develops in such a context.<sup>167</sup> Doubtless heterosexism takes many forms,

Gender and the Homosexual Role, supra, at 152. The boy, "provided that he switched to an active role as manhood came on, did not suffer any loss of gender status." Id.

<sup>162</sup> Trumbach, *Gender and the Homosexual Role*, supra note 161, at 153.

<sup>163</sup> Id. at 154.

<sup>164</sup> Id. at 155.

<sup>165</sup> Id.

<sup>166</sup> D. Greenberg, supra note 2, at 388.

<sup>167</sup> The following account is drawn from Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (1988); Nancy Chodorow, *The Reproduction of Mothering* (1978); Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (1976). For a parallel but distinct analysis of the homosexuality taboo, see Paul Hoch, *White Hero, Black Beast: Racism, Sexism, and the Mask of Masculinity* 78-93 (1979).

and develops differently in different individuals, but the following pattern seems typical.<sup>168</sup>

Because childrearing has been primarily a woman's task, children identify first with their mothers. For girls, this primary attachment continues uninterrupted through adulthood, because girls are taught that to become adults, they need only to become increasingly like their mothers. Boys, on the other hand, learn that to become adults, they must renounce this primary attachment and identify with their fathers, whose love is more distant and conditional. Their identity is not discovered, but fashioned, and the materials that constitute it are achievement, competition, hierarchy, and control over their own feminine tendencies. In short, a man must prove his masculinity, over and over again, and continually resist the temptation to identify with his mother. That early renunciation must be continually reaffirmed. At the same time, this renunciation produces an intense guilt and sense of loss for the abandoned mother, and a hopeless yearning to return to her.

As noted earlier, prejudice, especially when it is intensely felt, often functions as the external projection of hated aspects of the prejudiced person's own self. The racist struggles against his own impulses toward lechery, laziness, aggression, and slovenliness, and he accuses blacks of possessing these traits; the anti-semitic struggles against his own sins of pride, deceit, overambition, and sly achievement, and he personifies these evils in Jews.<sup>169</sup> In modern society, the male homosexual often serves a similar projective function. If the argument of the previous paragraph is correct, in the eyes of other men he symbolizes the failure to individuate adequately from the mother.<sup>170</sup> Whether it is correct or not, it is clear that in the community of males, the gay man is regarded as a slacker, one who has failed in or given up the difficult quest for masculinity.<sup>171</sup>

<sup>168</sup> This pattern is sometimes offered as a transcultural explanation for gender hierarchy, but as some critics have noted, it is dependent on modern Western society's gendered public/domestic separation. See, e.g., Linda J. Nicholson, *Gender and History* 84-88 (1986). The historicization of Chodorow's thesis would help to explain why the modern stigmatization of the effeminate gay man emerged at the time that it did.

<sup>169</sup> See Gordon W. Allport, *The Nature of Prejudice* 199 (1954); Lawrence, *supra* note 91, at 333-34.

<sup>170</sup> Lest there be any confusion on this point, I am expressing no opinion whatsoever with regard to psychoanalytic explanations of the etiology of homosexuality. To repeat, this Article is concerned solely with the psychology of those who stigmatize homosexuality. See note 1 *supra*.

<sup>171</sup> Marilyn Frye observes that for some men, the connection of heterosexuality to male supremacy is even starker than this:

A great deal of fucking is . . . presumed to preserve and maintain women's belief in their own essential heterosexuality, which in turn (for women as not for men) con-

It should therefore be unsurprising that adolescent males, who tend to be most troubled by the conflict between their need to be dependent on their parents and the cultural expectation that they will separate from them, are the ones who most often carry heterosexism to the extreme of violent gay-bashing. Violence is, of course, itself regarded as a badge of masculinity.<sup>172</sup> The hypothesis that some defensive mechanism is at work in heterosexism is supported by the extraordinary brutality with which gay-bashers attack their targets. Violence against gays frequently involves torture and mutilation. Homophobic murders typically involve mutilation of the victim. The coordinator of one hospital's victim assistance program reported that "attacks against gay men were the most heinous and brutal I encountered."<sup>173</sup> A physician reported that injuries suffered by the victims of homophobic violence that he had treated were so "vicious" as to make clear that "the intent is to kill and maim":

Weapons include knives, guns, brass knuckles, tire irons, baseball bats, broken bottles, metal chains, and metal pipes. Injuries include severe lacerations requiring extensive plastic surgery; head injuries, at times requiring surgery; puncture wounds of the chest, requiring insertion of chest tubes; removal of the spleen for traumatic rupture; multiple fractures of the extremities, jaws, ribs, and facial bones; severe eye injuries, in two cases resulting in permanent loss of vision; as well as severe psychological trauma the level of which would be difficult to measure.<sup>174</sup>

This kind of behavior cannot intelligibly be attributed to the perpetrators' desire to uphold Judeo-Christian moral standards. Judeo-Christian morality does not require—indeed, it does not permit—the torture, mutilation, or murder of strangers. Nor is this degree of brutality attributable to the sometimes violent propensities of many young men. Outside of war, violence of this degree of savagery is rarely heard of; one of the few parallels is the southern lynch mob's treatment of a black man thought to have raped a white woman. Some extraordinary passion appears to be at work, such that the homosexual appears to the perpetrator to call for an extraordinarily vio-

nects with and reinforces female hetero-eroticism, that is, man-loving in women. It is very important to the maintenance of male-supremacy that men fuck women, a lot. So it is required; it is compulsory. Doing it is both one's duty and an expression of solidarity. A man who does not or will not fuck women is not pulling his share of the load. He is not a loyal and dependable member of the team.

<sup>172</sup> See Richard A. Isay, *Being Homosexual: Gay Men and Their Development* 77-78 (1989).

<sup>173</sup> Quoted in Kendall Thomas, *Beyond the Privacy Principle*, 92 *Colum. L. Rev.* 1431, 1463 (1992).

<sup>174</sup> Quoted in *id.* at 1466. Other illustrations may be found in *id.* at 1462-70.

lent response. If the homosexual's very existence threatens the security of the perpetrator's valued sense of gender identity, then the vehemence of the perpetrator's response becomes at least somewhat more intelligible.

In short, it appears that male hostility toward effeminate men has been a psychological defense against gender-identity conflict since at least the eighteenth century.

In early eighteenth-century England this hostility took the form of diatribes against fops and beaux—men who wore fancy clothes, paid excessive attention to their appearance, and spent too much time courting women. . . . Men's clothing, which had been frilly in the Elizabethan age, became more sharply differentiated from women's from the 1770s on.<sup>175</sup>

And since then, any failure to conform to the norms of masculinity has become imbued with the stigma associated with same-sex sexuality:

[T]he most salient characteristic of the homosexual role from about 1700 to the present day has been the presumption that all men who engage in sexual relations with other men are effeminate members of a third or intermediate gender, who surrender their rights to be treated as dominant males, and are exposed instead to a merited contempt as a species of male whore.<sup>176</sup>

There was no such dynamic at work with respect to lesbianism, which did not so directly challenge male supremacy:

Though it may have challenged men's presumption that all women were placed on earth to gratify men's sexual desires and, when coupled with transvestism and financial independence, male supremacy in other spheres, it did not threaten male identity as such. . . . Nor did it threaten women's gender identity, at least not to any great extent. Whereas a boy had to relinquish his early identification with his mother to become an adult, a girl did not; her sexual identity was thus more secure. As an adult she was not threatened by masculine women as men were by feminine males: she had never been forced to give up a strong childhood identification with her father. His absence from the home did not permit a strong identification with him to develop.<sup>177</sup>

The contemporary notion of the "mannish lesbian," who now seems to be the natural counterpart of the "effeminate queen," achieved that parallel status only in the late nineteenth century, the same time that medical writers created the idea of a "homosexual," a person (male or female) whose very being is constituted by his or her sexual orienta-

<sup>175</sup> D. Greenberg, *supra* note 2, at 390 (footnote omitted).

<sup>176</sup> Trumbach, *Gender and the Homosexual Role*, *supra* note 161, at 153.

<sup>177</sup> D. Greenberg, *supra* note 2, at 390 (footnote omitted).

tion.<sup>178</sup> This was the period in which there first arose widespread concern over the "new woman," who preferred education and career to the traditional roles of wife and mother.<sup>179</sup> Investigations into the medical literature of that time have supported the hypothesis that "[t]he distinguishing of a 'same-sex' from an 'opposite-sex' eroticism reflected an increasing social emphasis . . . on the differentiation of females and males" and was "an effort to contain the contemporary movement of women out of the traditional women's sphere."<sup>180</sup> One illustration comes from the *New York Medical Journal* of 1900:

The female possessed of masculine ideas of independence, the virago who would sit in the public highways and lift up her pseudo-virile voice, proclaiming her sole right to decide questions of war or religion, or the value of celibacy and the curse of women's impurity, and that disgusting antisocial being, the female sexual pervert, are simply different degrees of the same class—degenerates.<sup>181</sup>

The idea of homosexuality was a late development of this period, developing out of an earlier, distinct conception termed "sexual inversion." "Sexual inversion" referred to a broad range of deviant gender behavior, of which homosexual desire was only a logical but indistinct aspect, while 'homosexuality' focused on the narrower issue of sexual object choice."<sup>182</sup> Given that during the Victorian period women were typically thought to be naturally passionless and asexual, a woman who showed any interest in sexuality was thought to have become manlike in her sexual desire, and thereby to have abjured femininity generally. "[A] woman could not invert any aspect of her gender role without inverting her complete role."<sup>183</sup> Moreover, doctors writing about lesbian couples did not regard the women who took passive, "feminine" roles as particularly worthy of study, since these

<sup>178</sup> The role began to appear a century earlier, in the late eighteenth century, but did not become relevant to most women's status until much later. See Randolph Trumbach, *London's Sapphists: From Three Sexes to Four Genders in the Making of Modern Culture*, in *Body Guards: The Cultural Politics of Gender Ambiguity* 112-41 (Julia Epstein & Kristina Straub eds., 1991).

<sup>179</sup> See 2 *Women, the Family, and Freedom: The Debate in Documents* 17-72 (Susan Bell & Karen Offen eds., 1983) (excerpting writings on this issue by Ibsen, Strindberg, Shaw, Nietzsche, and others).

<sup>180</sup> Jonathan Katz, *Gay/Lesbian Almanac* 149 (1983); see also Jonathan N. Katz, *The Invention of Heterosexuality*, *Socialist Rev.*, Jan.-Mar. 1990, at 7; *Law, Homosexuality and the Social Meaning of Gender*, *supra* note 80, at 197-206.

<sup>181</sup> William L. Howard, *Effeminate Men and Masculine Women*, 77 *N.Y. Med. J.* 686, 687 (1900), quoted in Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* 280 (1985).

<sup>182</sup> George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58-59 *Salmagundi* 114, 116 (1982-83).

<sup>183</sup> *Id.* at 121.

roles seemed to be appropriate for women.<sup>184</sup> On the other hand, as Carroll Smith-Rosenberg observes, medical writings of this period reveal profound concern about the medical implications of higher education for women.

The woman who favored her mind at the expense of her ovaries—especially the woman who spent her adolescence and early adulthood in college and graduate school—would disorder a delicate physiological balance. Her overstimulated brain would become morbidly introspective. Neurasthenia, hysteria, insanity would follow. Her ovaries, robbed of energy rightfully theirs, would shrivel . . . Her breasts might shrivel, her menses become irregular or cease altogether. Sterility could ensue, facial hair might develop.<sup>185</sup>

This strategy for repressing women's ambitions failed. As gender roles in American society became increasingly complex, with the number of employed women steadily increasing, the binary division implicit in the inversion theory simply stopped making sense to people.<sup>186</sup> It was easy to show that deviation from traditional female roles did not destroy women's health.<sup>187</sup>

By the turn of the century, gender of sexual object became more important than passive or aggressive sexual behavior in the medical classification of sexuality.<sup>188</sup> Doctors, psychologists, and academics "shifted the definition of female deviance from the New Woman's rejection of motherhood to their rejection of men."<sup>189</sup> The idea of female passionlessness was replaced by an ideology that sought to use women's sexual desires to bond them more tightly to men: the marriage manuals of the 1920s and 1930s stressed the need for men to

<sup>184</sup> *Id.* at 125.

<sup>185</sup> C. Smith-Rosenberg, *supra* note 181, at 258, 260.

<sup>186</sup> Chauncey, *supra* note 182, at 143.

<sup>187</sup> C. Smith-Rosenberg, *supra* note 181, at 262-64.

<sup>188</sup> Lillian Faderman notes, however, that such a distinction is not "to be found in the work of many sexologists well into the twentieth century or in the popular imagination, which often assumes, even today, that lesbians are necessarily masculine and that female 'masculinity' is a sure sign of lesbianism." Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* 41 (1991). A similar tension may be noted in popular discourse about male homosexuality, which as late as World War I was still uncertain whether the essence of the identity stigmatized as sexually deviant was effeminacy or sexual activity with men. See George Chauncey, Jr., *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era, in Hidden From History: Reclaiming the Gay and Lesbian Past*, *supra* note 161, at 294, 294-317. As Eve Sedgwick has observed, "issues of modern homo/heterosexual definition are structured, not by the supersession of one model and the consequent withering away of another, but instead by the relations enabled by the unrationalized coexistence of different models during the times they do coexist." E. Sedgwick, *supra* note 15, at 47.

<sup>189</sup> C. Smith-Rosenberg, *supra* note 181, at 265.

develop "companionate marriages" in order to make marriage more attractive and satisfying to women.<sup>190</sup> "Linking orgasms to chic fashion and planned motherhood, male sex reformers, psychologists, and physicians promised a future of emotional support and sexual delights to women who accepted heterosexual marriage—and male economic hegemony. Only the 'unnatural' woman continued to struggle with men for economic independence and political power."<sup>191</sup> Thus J.F.W. Meagher wrote that "[t]he driving force in many agitators and militant women who are always after their rights is often an unsatisfied sex impulse, with a homosexual aim. Married women with a completely satisfied libido rarely take an active interest in militant movements."<sup>192</sup> For Meagher, healthy female sexuality meant deference to men.

If lesbians arouse bitterness on the part of males, it is of a different kind than that felt toward gay men. Perhaps it is predicated on the fear of being abandoned by the mother that one has oneself abandoned. A lesbian fails to provide the emotional nurturance and solace from the difficult world of maleness that, many men feel, women exist in order to provide; she signifies that there is no way back from that world. The prohibition of lesbianism has an unmediated, direct relation to gender inequality. Adrienne Rich argues that this prohibition is best understood as one item in an arsenal of male-created institutions that enforce "compulsory heterosexuality," institutions that have the purpose and effect of guaranteeing that men will continue to have physical, economic, and emotional access to and control over women.<sup>193</sup> The familiar insinuation that all feminists are lesbians<sup>194</sup> supports Rich's speculation that "men really fear . . . that women

<sup>190</sup> Christina Simmons, *Companionate Marriage and the Lesbian Threat*, *Frontiers*, Fall 1979, at 54, 54-59.

<sup>191</sup> C. Smith-Rosenberg, *supra* note 181, at 283.

<sup>192</sup> John F.W. Meagher, *Homosexuality: Its Psychobiological and Pathological Significance*, 33 *Urologic and Cutaneous Rev.* 510, 513 (1929), quoted in Simmons, *supra* note 190, at 57; see also *id.* ("A homosexual woman often wants to possess the male and not to be possessed by him. . . . With them orgasm is often only possible in the superior position."), quoted in Simmons, *supra* note 190, at 57.

<sup>193</sup> See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *Sigms* 631 (1980).

<sup>194</sup> "In the early days of women's liberation the most hurtful accusation was that they were a bunch of lesbians, and feminists such as Betty Friedan took considerable pain to show that this was untrue and that they really were 'femmine' (i.e. liked men) after all." D. Altman, *supra* note 145, at 90-91. Such accusations continue to be potent weapons against feminists. See S. Pharr, *supra* note 145, at 27-43.

Although lesbians have become prominent in the feminist movement, this kind of labeling precedes that development. Tr-Grace Atkinson reports that she first began to think about the connection between lesbianism and feminism as a consequence of this persistent accusation:

could be indifferent to them altogether, that men could be allowed sexual and emotional . . . access to women *only* on women's terms, otherwise being left on the periphery of the matrix."<sup>195</sup> This entraining fantasy of maternal abandonment helps to explain why the stigmatization of lesbians by heterosexual men typically takes the form of a rape fantasy: all she needs is a good fuck to straighten her out. It also helps to explain why the armed services have tended to apply the label of "homosexual" to women who have resisted sexual harassment by men.<sup>196</sup>

A final puzzle is a much more recent phenomenon, the stigmatization of the gay male "top," the man who is not himself penetrated but who penetrates other men. There is nothing stereotypically effeminate about him. Nonetheless, his stigmatization is tightly bound up with the social meaning of gender. He is perceived as, if anything, *too* masculine; all the socially destructive potentialities of masculinity reach their maximal intensity in him. To the heterosexual male, the gay top is essentially a *dangerous* man. He preys on other men and degrades them by turning them into women. No man is safe from him. No man's masculinity is secure against his assault. Like that other icon of unbridled male sexuality, the black rapist of white women, he defiles the temple and profanes what is most sacred, and he does this by penetrating the bodies of those who, because of their intrinsically superior status, are entitled to be assured that they will not be thus penetrated. With both sodomy and miscegenation, it is of little moment whether the person who is penetrated consents to the act. It is the caste to which that person belongs that is entitled not to be defiled; an individual who does not uphold the impenetrable character of the ruling caste is simply a traitor, whose consent does not excuse the crime committed by the penetrator.

As noted earlier, one effect of the miscegenation taboo, intended or not, is the maintenance of the boundary between the races on

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Since the beginning of the current Movement, feminist activity has been labeled lesbianism. The first time I was called a lesbian was on my first picket line, in front of the New York Times, to desegregate the help-wanted ads. Generally speaking, the Movement has reacted defensively to the charge of lesbianism: 'no, I'm not'; 'yes, you are, 'no, I'm not,' prove it.' For myself, I was so puzzled by the connection that I became curious. Whenever the enemy keeps lobbing bombs into some area you consider unrelated to your defense, it's worth investigating.

Ti-Grace Atkinson, *Lesbianism and Feminism*, in *Amazon Expedition: A Lesbian Feminist Anthology*, supra note 3, at 11.

<sup>195</sup> Rich, supra note 193, at 643.

<sup>196</sup> See Halley, *Sexual Orientation and the Politics of Biology*, supra note 1, at 554, and sources cited therein; see also Michelle M. Benecke & Kirstin S. Dodge, *Lesbian Baiting as Sexual Harassment: Women in the Military*, in *Homophobia: How We All Play the Price*, supra note 145, at 167, 167-76.

which the system of racism depends. Similarly, compulsory heterosexuality keeps women in relationships in which men exert power over their lives. The symbolic message of the miscegenation taboo associates racial equality with sexual danger and endorses the idea that the boundaries enforced by the taboo are terribly important ones. An analogous message can be seen in the homosexuality taboo. Sex equality is dangerous; it will reduce men to the level of women; thus, maintaining the boundary between the sexes is a terribly important undertaking.

The reinforcement of sexism, then, is both a cause and an effect of the homosexuality taboo's survival. The taboo's stigmatizing effect on women and the sexism that infects the legislative process are mutually reinforcing. Note the culturally specific nature of my claim: my evidence is confined to contemporary American culture and its antecedents, and my claim about the function of the taboo pertains only to this culture. I am not claiming that the stigmatization of homosexuality is indispensable to gender hierarchy. Such a claim would be untenable. Functional equivalents exist. Homosexuality has been tolerated and even institutionalized in cultures in which women are thoroughly subordinated, such as ancient Greece.<sup>197</sup> Moreover, it is possible for male homosexuality at least, if not lesbianism, to be associated with male privilege and the repudiation of women.<sup>198</sup> My claim is closer to Eve Sedgwick's argument that "homophobia directed by men against men is misogynistic, and perhaps transhistorically so."<sup>199</sup>

As with the miscegenation taboo and racism, some people support the homosexuality taboo for reasons unrelated to its connection to sexism. For some, it is simply part of the way in which they make sense out of the world: there are certain ways in which a person shouldn't use her body, for the same reasons of convention that there are certain ways in which a person shouldn't hold her spoon when she eats. For others, the taboo is simply an unexamined echo of attitudes that they have unreflectively learned and internalized.<sup>200</sup> But for a significant subset, the taboo is part of a defensive attitude that responds to a perceived threat to the boundaries of the self.<sup>201</sup> It is a

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<sup>197</sup> Revealingly, however, even those cultures tend to stigmatize the man who is penetrated, and this stigma arises out of the fact that he has allowed himself to be used like a woman.

<sup>198</sup> See J. Stoltenberg, *Refusing to Be a Man*, supra note 145, at 132-33; M. Frye, supra note 171, at 128-51.

<sup>199</sup> Eve K. Sedgwick, *Between Men: English Literature and Male Homosexual Desire* 20 (1985).

<sup>200</sup> See Claudia Card, *Why Homophobia?*, 5 *Hypatia* 110 (1990).

<sup>201</sup> Gregory M. Herek, who has devised a test for measuring the different kinds of psychological benefit that different individuals derive from similar attitudes, found that hostile

common view among political scientists that outcomes in democratic decisionmaking are often determined by small groups with intense preferences.<sup>202</sup> One of the groups that is most concerned about maintaining the homosexuality taboo, evidently, is men who are anxious

ity to gays served a defensive function (projecting unacceptable motives onto homosexual persons and then expressing hostility toward them) less often than it served a self-expressive function (providing a vehicle for expressing values that were considered important). "Persons who expressed negative attitudes in the Self-Expressive function usually focused on traditional religious standards of right and wrong." Gregory M. Herek, *Can Functions Be Measured? A New Perspective on the Functional Approach to Attitudes*, 50 Soc. Psych. Q. 285, 290 (1987). Herek therefore dismisses "a popular bit of folk-wisdom that all hostility toward gay persons results from personal conflicts about gender or repressed homosexual desires," because his data "suggest that such conflicts were central to the attitudes of only a minority of the respondents." *Id.* at 295. Herek's study does show that not all hostility toward gay persons can be thus explained, but the minority for whom ego-defense is the explanation is a substantial one: out of 205 respondents who wrote essays explaining their attitudes (both positive and negative) toward gays, 22 expressed negative attitudes in exclusively defensive terms, while 50 mixed defensive with other attitudes; 32 expressed negative attitudes in exclusively self-expressive terms, while 43 combined negative self-expressive attitudes with other attitudes. Three explained their negative attitudes exclusively on the basis of personal experience, and the rest expressed positive or mixed attitudes. *Id.* at 290.

Herek's study does not explore what lies beneath the respondents' values. The self-expressive function was found to correlate with strong attachment to a conservative religious denomination. The fact that a value is taught by one's church is not, however, a sufficient explanation for the fact that one believes it: most American Catholics, for example, routinely ignore and violate the church's teachings against contraception. See J. D'Emilio & E. Freedman, *supra* note 104, at 252. John Boswell observes:

If religious strictures are used to justify oppression by people who regularly disregard precepts of equal gravity from the same moral code, or if prohibitions which restrain a disliked minority are upheld in their most literal sense as absolutely inviolable while comparable precepts affecting the majority are relaxed or reinterpreted, one must suspect something other than religious belief as the motivating cause of the oppression.

J. Boswell, *supra* note 2, at 7.

In his writings on violence against gays, Herek appears to give greater weight to the idea that hostility toward gays is rooted in personal anxieties about gender identity. See Gregory M. Herek, *Psychological Heterosexism and Anti-Gay Violence: The Social Psychology of Bigotry and Bashing, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men*, 149, 161-62 (Gregory M. Herek & Kevin T. Berrill eds., 1992); Gregory M. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men*, *supra*, at 89, 96-97, 100. Such violence is hard to explain in self-expressive terms. Elsewhere Herek writes that it would be a mistake to assume a link between homophobia and the male sex role only for overtly defensive males. Defenses are employed only when more common measures fail. The defensive males I observed probably were not qualitatively different from other homophobic males; they simply were experiencing greater difficulty maintaining a heterosexual masculine identity. Their strategy for reducing the anxiety that ensued was to exaggerate the "normal" level of homophobia associated with the male role.

Herek, *supra* note 160, at 566.

<sup>202</sup> See generally Robert A. Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* (1982).

about their own gender identity. The identity they are so eager to preserve is an identity based on sexual superiority, the superiority of men over women as manifested by the male's status as an "impenetrable penetrator."<sup>203</sup> It should be clear that a law enacted on such a basis is unconstitutional. It stigmatizes women on the basis of their sex, and it is hardly predicated on a lawmaking process that treats their interests with equal concern and respect.

I have thus far focused on the reasons for men's intolerance of lesbians and gay men. Now I shall turn to women's attitudes. It may seem strange to think that women's attitudes can be sexist. It would be most surprising if women were to undertake, as a deliberate project, the perpetuation of the subordination of women. Moreover, experimental social psychologists have found that among women who hold negative attitudes toward gays, sex role attitudes play a less important role than they do for men who hold such attitudes.<sup>204</sup> Gregory Herek has offered the following explanation of this effect:

Because heterosexual females are less likely to perceive rejection of lesbians and gay men to be integral to their own gender-identity, they probably experience fewer social pressures to express hostile attitudes. Consequently, such women may have more opportunities for personal interaction with lesbians and gay men. However, where negative attitudes among heterosexual women exist, these presumably result from ideological concerns (religious beliefs, family- and gender-ideology) rather than gender-identity needs. . . . Gender-specific patterns such as these would help to explain why heterosexual males' attitudes are especially hostile toward gay men while heterosexual females' attitudes do not vary consistently according to the target's gender.<sup>205</sup>

When one examines the cluster of attitudes within which women's antipathy toward gays is typically embedded, however—as Herek puts it, "religious beliefs, family- and gender-ideology"—that cluster seems to be closely tied to traditional meanings of gender. The most important predictor of women's attitudes toward lesbians, one study found, was parents' attitudes toward lesbians.<sup>206</sup> Next in relative importance was gender role attitudes, authoritarian personality,

<sup>203</sup> This phrase is drawn from Richard Mohr, *A More Perfect Union: Why Straight America Must Stand Up for Gay Rights* 118 (1994).

<sup>204</sup> See Newman, *supra* note 160, 461-64; see also Gregory M. Herek, *Heterosexuals' Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences*, 25 J. Sex Res. 451, 470-73 (1988).

<sup>205</sup> Herek, *supra* note 204, at 472. Using the terms of the typology of attitudes discussed in note 201 *supra*, Herek observes that "[h]eterosexual females' attitudes may thus be more likely to serve value-expressive and experiential-schematic functions." *Id.* at 472.

<sup>206</sup> See Newman, *supra* note 160, at 461.

and exposure to education and media regarding lesbians.<sup>207</sup> Although sex role attitudes are an important predictor of women's attitudes toward gays, then, so are these other factors. Do we know enough about the attitudes of women who both hold traditional gender role attitudes and strongly repudiate homosexuality to construct a persuasive hypothesis about the world view within which these attitudes are linked?

Political struggles over abortion and the equal rights amendment, as well as over homosexuality, have produced many writings by and studies of antifeminist women, and such works demonstrate a close relationship between such women's hostility toward lesbians and gay men and their desire to maintain traditional sex roles. On the most visceral level, this hostility seems to have something to do with the resentment that those whose familial responsibilities weigh heavily upon them feel toward those who seem free of such responsibilities.<sup>208</sup> There is also an element of fear. The women who most strongly repudiate feminism do so because, as Jeffrey Weeks has written,

feminism may be seen as precisely a force that is undermining women's basic hold on social, economic, and sexual stability—marriage, family life and protection by men. In a culture where it is still relatively difficult for many women to become economically independent, and where status depends on the position of the male, women may see their very survival as dependent upon family life.<sup>209</sup>

The well-grounded anxiety that underlies this resistance is a belief "that the changes of the past generation have served to undermine the ties that bind men to women. A powerful force in the anti-ERA campaign, was a fear of the sexes mingling, of a breakdown of the traditional boundaries between the sexes, and of women losing traditional male support as a result."<sup>210</sup> From this perspective, homosexuality represents the culmination of the process, the ultimate disintegration of the gender order, with men and women entirely disconnected from one another. For women whose economic security depends on that order, homosexuality thus may connote a personal threat. This sense

<sup>207</sup> See *id.*

<sup>208</sup> "Many heterosexual women see [the lesbian] as someone who stands in contradiction to the sacrifices they have made to conform to compulsory heterosexuality." S. Pharr, *supra* note 145, at 18. See, in this regard, the writings of Midge Decter, which contain strong allegations against homosexuality that are entirely uncontaminated by empirical research, and which may profitably be studied as a naive exposition of one heterosexual woman's fears and fantasies. See, e.g., Midge Decter, *The New Chastity and Other Arguments Against Women's Liberation* (1972); Midge Decter, *The Boys on the Beach*, *Commentary*, Sept. 1980, at 35, 35-48.

<sup>209</sup> Jeffrey Weeks, *Sexuality and Its Discontents* 37 (1985).

<sup>210</sup> *Id.*; see also A. Dworkin, *supra* note 145; Deirdre English, *The Fear That Feminism Will Free Men First*, in *Powers of Desire* 477, 477-83 (Ann Snitow et al. eds., 1983).

of danger is revealingly displayed when Phyllis Schlafly, in trying to articulate her reasons for wanting to exclude gays from jobs as school teachers, slides into fantasy: "Surely the right of parents to control the education of their children is a right of a higher order than any alleged right of, say, the two college-educated lesbian members of the Symbionese Liberation Army to teach our young people."<sup>211</sup>

When writers from this perspective address homosexuality, they overwhelmingly condemn it as a threat to the family.<sup>212</sup> This is, at first blush, a curious argument. Most heterosexual family members do not appear to be so eager to become homosexual that only the fear of externally imposed sanctions prevents them from doing so. Many homosexual relationships are, except for the sex of the participants and the legal status of the union, indistinguishable from heterosexual marriages.<sup>213</sup> Adoption and new reproductive technologies have made it

<sup>211</sup> Phyllis Schlafly, *The Power of the Positive Woman* 90 (1977).

<sup>212</sup> Thus Phyllis Schlafly, for example, argues that the extension of antidiscrimination protections to gays "would be an assault on our right to have a country in which the family is recognized, protected, and encouraged as the basic unit of society." *Id.*; see also Congregation for the Doctrine of the Faith, *Letter to Bishops on the Pastoral Care of Homosexual Persons*, 32 *The Pope Speaks* 62 (Spring 1987); J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 *Cornell L. Rev.* 563, 593-96 (1977); George F. Will, *How Far Out of the Closet?*, in *The Pursuit of Happiness*, and *Other Sobering Thoughts* 55, 55-57 (1978); Samuel McCracken, *Are Homosexuals Gay?*, *Commentary*, Jan. 1979, at 19. This theme appears repeatedly in the briefs of both the State and the amici supporting its position in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the case that declared sodomy laws constitutional. Thus the State argued that "homosexual sodomy is the anathema of the basic units of our society—marriage and the family. To decriminalize or artificially withdraw the public's expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely other alternative lifestyles." Brief for Petitioner at 37-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140); see also briefs of amici Catholic League for Religious and Civil Rights at 1, *Hardwick* (No. 85-140) ("With respect to the instant case, the League is directly concerned with the proper construction of the Constitution and alleged 'fundamental' rights thereunder as they promote or undermine the integrity of family and social relations."); *Concerned Women for America* at 2, *Hardwick* ("We oppose any laws designed to grant special legal protection to those who engage in homosexuality. Such laws are an affront to public morality and our dedication to family life.") (quoting resolution passed at its 1984 convention); Rutherford Institute at 26, *Hardwick* ("Not only does the unregulated practice of sodomy not lie at the base of all our institutions, but our institutions are built on a foundation which is incompatible with such practices—i.e., monogamous marriage and the family unit.")

<sup>213</sup> A study of San Francisco bay area gays found that 29% of the men, and almost three-fourths of the women, were currently involved in a stable relationship. Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 91, 97 (1978). Many of these couples foster the same intimacy, caring, and enduring commitment that are valued in the most successful heterosexual marriages. See generally Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (1991); Letitia A. Peplau, *Research on Homosexual Couples: An Overview*, *J. Homosexuality*, Winter 1982, at 3; and citations contained in both works.

possible for increasing numbers of gay couples to raise children.<sup>214</sup> Moreover, there have been cultures in which homosexuality has been openly tolerated,<sup>215</sup> and families in those cultures do not appear to have been less common or enduring than they are in contemporary America. How, then, can homosexuals be said to threaten the family? The charge is intelligible only if "the family" is rigidly defined as an institution in which men, but not women, belong in the public world of work and are not so much members as owners of their families, while women, but not men, should rear children, manage homes, and obey their husbands. Homosexuality is a threat to the family only if the survival of the family requires that men and women follow traditional sex roles.<sup>216</sup>

It may be that traditional sex roles are the best ones for women. That claim becomes less persuasive, however, when its proponents find it necessary to force women into those roles. Some people evidently do believe that restricting women's options will contribute to the welfare of women. Many opponents of abortion, for example, feel that abortion is wrong "because by giving women control over their fertility, it breaks up an intricate set of social relationships between men and women that has traditionally surrounded (and in the ideal case protected) women and children."<sup>217</sup> Nonetheless, it is clear that those relationships historically have been ones of male domination and female subordination. The view that the subordination of women is a thing of the past is difficult to sustain when women continue to be forced into those roles. As noted above, the Supreme Court's sensible (if, perhaps, inadequate) response to this debate has been to prohibit laws which impose traditional sex roles.<sup>218</sup> The constitutional guarantee of equality isn't worth much if the law can force people into relationships of hierarchy and dependency.<sup>219</sup>

<sup>214</sup> See Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 Wis. L. Rev. 297, 314-16 (1990); see also note 290 *infra*.

<sup>215</sup> See generally, e.g., J. Boswell, *supra* note 2, which demonstrates that homosexuality was widely tolerated in Western Europe in the first centuries of Christianity and during the eleventh and twelfth centuries.

<sup>216</sup> See *Law, Homosexuality and the Social Meaning of Gender*, *supra* note 80, at 218-21.

<sup>217</sup> Kristin Luker, *Abortion and the Politics of Motherhood* 162 (1984).

<sup>218</sup> See text accompanying notes 65-68 and 80-82 *supra*.

<sup>219</sup> Some writers argue that the hierarchy of the sexes is inextricably linked with the stability of families, because families cannot endure unless women willingly subordinate themselves to men and children. I describe and address these arguments in Andrew Kopelman, *Sex Equality and/or the Family*. From Bloom vs. Okin to Rousseau vs. Hegel, 4 Yale J.L. & Human. 399 (1992).

Finally, some of those who most strongly endorse laws that discriminate against gays do so on the basis of their religious beliefs.<sup>220</sup> This group overlaps, to some extent, with the others I have just described. Even if these people's beliefs rest on religion rather than on gender-based concerns (to the extent that these are distinguishable), this hardly saves their position. Religious dogma is a wholly illegitimate basis for legislation. Even from a constitutional perspective that is generously disposed toward giving religious beliefs a role in political decisionmaking, legal discrimination against gays on this basis is impermissible.<sup>221</sup>

If these are the positions from which the homosexuality taboo now receives most of its support, then it is fair to conclude that this taboo is crucially dependent on sexism, without which it might well not exist. And when the state enforces that taboo, it is giving its imprimatur to sexism. As with the miscegenation taboo, the effect that the taboo against homosexuality has in modern American society is, in large part, the maintenance of illegitimate hierarchy; the taboo accomplishes this by reinforcing the identity of the superior caste in the hierarchy, and this effect is at least in large part the reason why the taboo persists.<sup>222</sup> Laws that discriminate against gays are the product of a

<sup>220</sup> See, e.g., Anita Bryant, *The Anita Bryant Story* 16-18 (1977); Jerry Falwell, *Listen, America!* 181-86 (1980).

<sup>221</sup> See, e.g., Kent Greenawalt, *Religious Convictions and Political Choice* 87-95 (1988).  
<sup>222</sup> In an earlier version of the argument I am making here, I expressed this thought by writing that the maintenance of traditional sex roles is the "purpose" or "function" of laws that discriminate against gays. See Koppelman, *supra* note 159, at 147, 158. The word "purpose" is misleading inasmuch as it signifies conscious intention. Although "function" is a somewhat better word to use, I have not emphasized function in the text because the idea of function is associated with a certain kind of bad explanation in the social sciences. See generally Marion J. Levy, Jr., *Functional Analysis: Structural-Functional Analysis*, in 6 *International Encyclopedia of the Social Sciences* 21 (David L. Sills ed., 1968). A word about the notion of function that is implicit in the above account may, however, be helpful to readers interested in methodological issues.

The basic idea behind any kind of functional explanation is that persistent patterns of action can be explained as being the result of other persistent patterns of action. "Function" has a variety of meanings, but in ordinary usage, it refers to what Marion Levy has called "eufunction," meaning "any function that increases or maintains adaptation or adjustment of the unit to the unit's setting, thus making for the persistence of the unit as defined in its setting." *Id.* at 24. In biology, the unit under consideration is typically an organism or a subsystem of an organism; in the social sciences, the unit is usually a system of action involving one or more actors. Put in these terms, my claim is that, in contemporary American society, the stigmatization of homosexuality is eufunctional for the hierarchy of men over women, and vice versa. Each is caused at least in part by the other; each increases the likelihood that the other will persist.

The claim that I made in my earlier work resembles that of Parsons and Bales, who were among the first to suggest that "the prohibition of homosexuality has the function of reinforcing the differentiation of sex roles." Talcott Parsons & Robert F. Bales, *Family, Socialization and Interaction Process* 103 (1955). Parsons and Bales's claim invites Jon

political decisionmaking process that is biased by sexism. They im-

Elster's objection (which he directs at functional explanation in general) that such a claim "seems to rest upon an implicit regulative idea that if you can demonstrate that a given pattern has unintended, unrecognized and beneficial effects, then you have also explained why it exists and persists." Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 32 (rev. ed. 1984). Such a regulative idea, Elster argues, is unjustified in the social sciences unless the scientist can specify, rather than simply posit, "a feedback relation where by the effect maintains its cause." *Id.* This stands in contrast to functional explanations in biology, where it is well established that patterns of anatomy and behavior that persist over time often do so because they increase the gene's likelihood of reproducing itself. Thus, for example, it makes sense to say that the function of a giraffe's long neck is to facilitate the giraffe's nutrition by making it possible to eat the leaves of high branches of trees, because that is the effect of the long neck, and the effect makes it possible (or more likely) for the giraffe to survive and reproduce, therefore producing more giraffes with long necks. A giraffe that, because of a mutation, had a shorter neck would be less likely to survive and to reproduce. In social life, there is usually no corresponding feedback mechanism. Parsons and Bales did not say *how* the reinforcement of differentiated sex roles caused people to continue for generations to prohibit homosexuality.

Moreover, even if a feedback loop is specified, the consequent explanation remains weak. The idea that a trait has a function in a system implies that (1) the system as a whole functions in accordance with certain specifications, (2) this functioning requires the satisfaction of a certain necessary condition, and (3) the presence of the trait in question satisfies the necessary condition. As Carl Hempel observes, claim (2) does not explain the presence of any particular trait, since more than one possible trait may satisfy the necessary condition. A primitive culture's system of magic can be explained in terms of its function—perhaps it satisfies certain needs to make sense of the world—but it might well be replaced by an extension of its rational technology plus some modification of its religion without disrupting the culture as a going concern. Functional analysis of this kind can thus offer only a very weak explanation of the presence of any particular trait. See Carl G. Hempel, *The Logic of Functional Analysis*, in *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science* 297, 310-14 (1965). (I am grateful to Walter Murphy for calling Hempel's essay to my attention.) Finally, account must be taken of the possibility that a trait reproduces itself out of sheer inertia, because it is part of the system, does the system no harm, and so is carried along by the system's process of reproducing itself. See generally S.J. Gould & R.C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, 205 *Bull. Proc. Royal Soc'y London* 581 (1979). The persistence of the human appendix, for example, cannot be explained in terms of its function.

My claim, once more, is about eufunction rather than causation. A claim of eufunction implies little about causation.

Eufunctions or dysfunctions and the corresponding variants of structure may exist, as far as a given unit is concerned, as elements of that unit (i.e., internal to it) or as elements of the setting of the unit concerned. Not all eufunctions for a unit are eufunctions of the unit, although ordinarily, when one uses the concept of eufunction, attention is focused on functions associated with the unit itself rather than on functions of operation in terms of other units in that setting.

Levy, *supra*, at 24. Similarly, the fourteenth amendment may be understood as a command that the law may not be eufunctional in certain ways for systems of ascriptive hierarchy based on birth. Thus understood, the law does not require judges to be sociologists who can sustain strong causal claims; they may appropriately decide cases on the basis of probabilistic or hermeneutic evidence. Since the process theory invalidates laws that are the product of a legislative process contaminated by sexism, one might say that it condemns patterns of lawmaking for which sexism is importantly eufunctional. Since the stigma theory condemns laws that signify the inferiority of women, one might say that it condemns

explicitly stigmatize women, and they reinforce the hierarchy of men over women. Laws enforcing the taboo against homosexuality therefore violate the fourteenth amendment, whether the amendment is theorized as prohibiting a tainted decisionmaking process, the imposition of stigma, or the disadvantaging of groups.<sup>223</sup>

### C. *Secret Identities*

Whites stigmatized (and continue to stigmatize) miscegenation because their own racial identity is a precarious achievement which they value. Men support the stigmatization of homosexuality because their own gender identity is a precarious achievement which they value. In each case, the stigma reinforces the dominant group's sense that this achievement is a secure one, by creating a class of inferior others who have not achieved it and by positing a wide ontological divide between the two classes.

Just as the hierarchy of whites over blacks is greatly strengthened by extreme differentiation of the races, so the hierarchy of males over females is greatly strengthened by extreme differentiation of the sexes. The element of both differentiations that promotes hierarchy is the idea that certain anatomical features *necessarily* entail certain social roles: one's status in society is obviously and unproblematically determined by the color of one's skin or the shape of one's reproductive organs. Blacks are supposed to defer to whites and obey whites' wishes because that is what blacks do. Women are supposed to defer to men and obey men's wishes because that is what women do.

The reification of socially constructed reality is always useful for the maintenance of that reality.<sup>224</sup> But such reification takes on added

laws that, by signifying the state's endorsement of sexist ways of thinking, are eufunctional for those ways of thinking.

My claim in this Article has to do with eufunctions, and thus implies only weak causation. My claim is twofold. First, and relevantly for the process theory, I claim that sexism is eufunctional for the legal institutionalization of the homosexuality taboo, and that without sexism there is good reason to doubt that the taboo would persist. The process theory demands no more; it presumes such classifications unconstitutional on the basis of suspicion alone, as the term "suspect classification" indicates. Second, and relevantly for the stigma theory, I claim—and this is a weaker causal claim than the first—that the homosexuality taboo is eufunctional for the hierarchy of men over women, and that its significance as symbolizing that hierarchy is generally understood. These claims, taken together, may point to a feedback loop of the kind demanded by Elster—that question has been and continues to be explored by others—but they need not; their legal and moral power is undiminished even if there are other important causal factors that reinforce both heterosexism and sexism.

<sup>223</sup> For a description of these competing theories, see notes 112-17 and accompanying text *supra*.

<sup>224</sup> See generally P. Berger & T. Luckmann, *supra* note 125, at 89-92 (discussing the reification of social reality).