

CRAIG J. KONNOTH

Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s

ABSTRACT. Existing accounts of early gay rights litigation largely focus on how the suppression and liberation of gay identity affected early activism. This Note helps complicate these dynamics, arguing that gay identity was not just suppressed and then liberated, but substantially transformed by activist efforts during this period, and that this transformation fundamentally affected the nature of gay activism. Gay organizers in the 1950s and 1960s moved from avoiding identity-based claims to analogizing gays to African-Americans. By transforming themselves in the image of a successful black civil rights minority, activists attempted to win over skeptical courts in a period when equal protection doctrine was still quite fluid. Furthermore, through this attempted identity transformation, activists replaced stigmatizing medico-religious models of homosexuality with self-affirming civil rights-based models. This identity transformation through analogy cemented gay rank-and-file perception of the social treatment they faced as unjust, and helped determine what remedies gays would seek. For example, defensive gay litigation of the 1950s soon gave way to the affirmative impact-type litigation of the civil rights movement. Similarly, in the image of the 1960s racial justice movement, 1970s gays began to pursue legal acceptance of gay marriage rather than first seeking intermediate relationship recognition. Thus, analogies and identity claims can be useful tools for perceiving and remedying oppression. They should, however, be tools that unite, not divide groups: gays and blacks, especially, should recognize their (contingent) commonalities, created as gays remade themselves in the image of blacks.

AUTHOR. J.D. expected 2010, Yale Law School; M.Phil. (History) 2007, University of Cambridge. Thanks are owed to Professor Reva Siegel and Mark Shawhan for reading several earlier drafts. Thanks also to Professors Douglas NeJaime, Robert Leckey, Nicholas Parrillo, and Claire Priest for extremely helpful comments. This Note was the co-recipient of the Yale Law School Joseph Parker Prize in Legal History (2008-2009).



NOTE CONTENTS

INTRODUCTION	318
I. A NOTE ON THEORY: GAY IDENTITY AND HISTORY	324
II. DENYING GAY “IDENTITY”	328
A. Early Gay Activists and the Denial of Identity	329
1. A False Start	329
2. Eliding Group-Based Arguments: Due Process and First Amendment Claims	331
3. Disrupting Identity: <i>Manual Enterprises</i> and <i>Boutilier</i>	334
4. Modern vs. Contemporary Theoretical Perspectives	337
B. Judicial Responses	338
III. CREATION: CONSTRUCTING LEGAL IDENTITY THROUGH THE RACE ANALOGY IN COURTS	340
A. Choosing a Bounded Identity Model	342
B. Shared Harms – Shared Context	344
C. Constructing New Self-Perceptions	346
D. Doctrinal Developments and the Stabilization of Identity	352
1. Doctrinal Developments: A Formal Minority Group	352
2. A Gay Movement	354
3. The Failure of Analogies	355
IV. THE RACE-SEX ANALOGY	357
A. Family Rights: An Area of Disanalogy	358
B. Family Rights as Marriage Rights and the Race-Sex Analogy	360
C. The Continued Reliance on Analogies in Marriage Litigation	364
1. Stereotyping vs. Subordination vs. Classification	365
2. Private/Fundamental Issues vs. Public/Secondary Issues	367
CONCLUSION	370

INTRODUCTION

In today's battle over gay rights, combatants draw upon powerful social and cultural discourses to frame gays in diametrically opposite ways. Opponents of gay rights use traditional religious understandings of sexuality and gender roles. Supporters, in turn, utilize language of civil rights that constructs gays as a legal minority group, both to gain judicial solicitude and to sway broader audiences.

This Note suggests that the construction of gay identity, to a large extent, determines the extent of rights that individuals attracted to the same sex enjoy. Theorists have noted, put simply, that a major function of individual identity is to establish the relationship between the individual and society. An individual's self-perception helps determine where she thinks she fits within society, and the role she plays in it; the way society perceives the identity determines which roles will be granted her, and which denied.¹ That gays are now able to use legal minority group identity to mediate their relationship with society, rather than rely on medicine or religion (which construct gay identity in very different ways), has completely resituated gays within society, both to themselves and, increasingly, to the general public. It has affected which rights gays have sought and the ways in which they have sought these rights.

While the use of law to suppress identity generally has been explored, the relationship between the substantive development of, and alteration in, elements of minority identity (whether suppressed or not) and litigation strategies bears further discussion.² Gay rights history readily lends itself to

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1. The literature that makes this point is varied. A classic statement is ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 123-25 (Touchstone 1986) (1963). For a full, recent review of the history of "identity theory, [which] explains the relationship between society and individuals," see Michael L. Hecht et al., *The Communication Theory of Identity: Development, Theoretical Perspective, and Future Directions*, in *THEORIZING ABOUT INTERCULTURAL COMMUNICATION* 257, 260 (William B. Gudykunst ed., 2005).
 2. The relationship between identity and litigation has thus far focused on the use of law to suppress and liberate identity. Professor William Eskridge, the foremost legal historian on gay rights, has covered legal and doctrinal developments in gay rights litigation across its history, see, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) [hereinafter *ESKRIDGE, GAYLAW*]; William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship*, 1961-1981, 25 *HOFSTRA L. REV.* 817 (1997) [hereinafter *Eskridge, Challenging*], and has developed a theory on the doctrinal trajectory that minority movements take, see William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 *U. PA. L. REV.* 419 (2001) [hereinafter *Eskridge, Channeling*]; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100

this analysis, given a rich theoretical literature on the subject of sexuality and identity. This Note specifically addresses the analogy between race and sexuality made by midcentury gay rights activists, which played a major role in altering gay identity (perceived from within and without the community) and thus gay litigation methods. While the Note focuses on the race analogy, other legal developments have, of course, also played roles in developing the way we think of today's gay community.

As Part II of the Note indicates, the debate over the race analogy has raged since the beginning of the gay rights movement. As gay urban enclaves grew in the post-World War II era, greater visibility led to greater societal suppression, which in turn led to greater gay mobilization.³ Using the analogy, a few early gay organizers argued that gays, like African-Americans, are a minority, that discrimination against them should bear the same stigma as racial discrimination, and that judges should be as attentive to gay rights as they are to racial justice. However, the mid-century "homophiles" who ran the first modern gay rights organizations initially challenged the analogy between race and sexuality.⁴ At the same time, these leaders needed new ways to articulate the relationship between homosexuals and society as a whole in order to aid mobilization efforts. Thus, in their litigation, they resisted allusions to homosexual "identity" and attempted to disrupt group status altogether. Using new scientific models, they argued that homosexuality consisted simply of certain acts, urges, and experiences that were common to all human beings, rather than to one identifiable group of individuals.

Courts and politicians, however, continued to rely on traditional psychiatry and religion to identify gays as a group and emphasized the perverse,

MICH. L. REV. 2062 (2002) [hereinafter Eskridge, *Some Effects*]. However, his extensive corpus speaks primarily to the closetedness and suppression of minority groups, and their response to those conditions. While Eskridge observes that the comparison to the civil rights movement helped engender an identity for gay individuals, the point is related to a doctrinal focus on equal protection arguments. ESKRIDGE, *GAYLAW*, *supra*, at 97; Eskridge, *Some Effects*, *supra*, at 2169. Similarly, Professor Kenji Yoshino has explained that his focus in analyzing 1950s and 1960s gay rights litigation has been upon "the demands of coerced assimilation," rather than the interplay of identity categories and litigation strategies. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 93 (2007); *see also* Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769 (2002) [hereinafter Yoshino, *Covering*]. On the other hand, this Note does not deal with identity-suppression or liberation per se. Rather, it discusses how substantive alterations in identity models (uncloseted or closeted) are produced through litigation; these alterations in how individuals see themselves and how they are seen by society in turn provide impetus for further litigation.

3. *See* ESKRIDGE, *GAYLAW*, *supra* note 2, at 57-59.

4. Homophile is the term that many homosexuals in the 1950s and 1960s used to refer to themselves.

homosexual identity of these organizations. Gays themselves internalized many of these claims. Unable—and often unwilling—to dissolve the separate homosexual group identity bestowed upon them, activists responded to the majority's construction by creating their own, kinder version of a gay identity, analogizing themselves to African-Americans.⁵ This analogy provided a way for gays to articulate an identity which explained how they fit into society and their belief that, while differences existed between homosexuals and heterosexuals, they were not significant. The similarity of the contexts of oppression that blacks and gays faced ensured that the analogy resonated for much of the homosexual, and some of the heterosexual, audiences. Slowly, the identity model that grew from the analogy, combined with other sociocultural events, took root and transformed the way gays saw themselves, from medical patients and outcasts into a legal minority in search of civil rights. In the process, Part III concludes, gay identity began to stabilize on its own terms. While the race analogy continued to be used to transform public perceptions, gays were no longer *required* to invoke racial identity to describe themselves as a legal minority—they began to be understood as such in their own right.

Even as the race-sexuality analogy diminished in importance in the early 1970s, historical developments during the same period solidified dependence on a race-sex analogy in litigation, as Part IV describes. The racial justice movement initially provided no purchase for the family rights concerns of gays. Its focus remained on the right of whites and blacks to intermarry. Gays, in turn, rejected marriage as a desirable relationship form in the 1950s. However, at the end of the following decade, as the women's rights movement gained momentum, its advocates began analogizing the position of women to that of racial minorities for the first time. This led to a sudden change in the approach to relationship rights in the gay movement. Gays, who less than two decades earlier scorned the idea of gay marriage, now drew both from the racial justice movement's focus on intermarriage and the women's movement's use of the race-sex analogy to argue that prohibiting individuals from marrying based on their sex was as impermissible as similar prohibitions based on race.⁶ The race-sex analogy allowed, and perhaps encouraged, gays to leapfrog demands for incremental same-sex relationship benefits (such as domestic partnership rights) and focus on the issue of marriage. Finally, the Part concludes by

5. William Eskridge describes these methods of activists as moving from a "politics of protection," concealing their identity, to "a politics of recognition," adopting their identity. Eskridge, *Some Effects*, *supra* note 2, at 2161-79.

6. It is unclear whether gays in the early 1970s had already changed their minds on the issue of marriage, whether they focused on marriage because it was the only relationship form that fit neatly into the race-sex analogy, or some combination of the two.

explaining why activists continue to rely on the race-sex analogy in litigation, even as the race-*sexuality* analogy has diminished in importance, and describes how courts challenge the race-sex analogy.

The insights gained from this historical discussion of the origins and development of the analogy also help address criticism that the analogy has more recently attracted along at least two significant lines. The first line of criticism identifies certain characteristics of gays that purportedly differentiate them from African-Americans. According to this argument, for example, unlike blacks, gays choose and are able to conceal their minority status (that is, their sexuality) and are politically powerful.⁷ Events in November of last year brought this critique into the mainstream, when a majority of African-American Californians voted to amend the state constitution to ban gay marriage.⁸ The day after the election, a gay *Huffington Post* blogger castigated these African-American voters, suggesting that gays were a minority group analogous to blacks, in a post entitled *African-Americans vs Gay Americans?*⁹

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7. See, e.g., Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL'Y REV. 37, 37-39 (2001) (cataloguing criticisms of the race-sexuality analogy that argue that unlike gay Americans, blacks do not choose their minority status, that discrimination has less severe economic and social consequences for gays, and "that although race is usually revealed by appearance, people can choose not to reveal their sexual orientation, and thus les/bi/gay people can avoid discrimination in a way that most African-Americans cannot," and suggesting that other, religion-based, analogies should be used to gain gay rights). *But see* EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* 164-68 (2004) (describing and criticizing arguments against the race-sexuality analogy); Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 681-83 (1996) (noting criticisms of the race-sexuality analogy, but arguing that the African-American civil rights movement has lessons for the gay rights movement); Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 875-76 (2006) (arguing that concealment of sexuality is as great a burden as the displaying of race). Those discussions that do specifically focus on historical analogies ignore the historical development of the race-sexuality analogy. See DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 39-83 (1999).
 8. See Susan Ferriss & Phillip Reese, *Black Voters Helped Prop. 8 Passage*, SACRAMENTO BEE, Nov. 7, 2008, at 1A ("The Obama people were thrilled to turn out high percentages of African Americans, but (Proposition 8) literally wouldn't have passed without those voters" (quoting Gary Dietrich, President of Citizen Voice)).
 9. Judy Wieder, *African Americans vs Gay Americans?*, HUFFINGTON POST, Nov. 5, 2008, http://www.huffingtonpost.com/judy-wieder/african-americans-vs-gay_b_141606.html; see also Wayne Besen, *Frank Talk on Race and Prop. 8*, 365GAY, Nov. 13, 2008, <http://www.365gay.com/opinion/besen-frank-talk-on-race-and-prop-8> ("[T]here is something particularly galling and repugnant about people who have felt the sting of discrimination, [who then] turn around and step on another minority."); Dan Savage, *Black*

The nation's leading LGBT news magazine, *The Advocate*, echoed this argument the next month. Upon its cover in big white letters against a black background was the slogan: "Gay Is the New Black: The Last Great Civil Rights Struggle."¹⁰ Opponents of this view, including many from the African-American gay community, challenged the analogy, pointing to the generally privileged socio-economic status of gays and the lack of interaction between African-American communities and gay civil rights leaders; these commentators defended the African-American vote.¹¹

This Note, however, demonstrates that gays as a group constructed an important component of their identity through interaction with and lessons from the African-American community. The racial justice movement and the harms and inequalities it targeted colored what gays saw as harmful to them and the appropriate methods and strategies to remedy these harms. Thus, while many differences between gays and African-Americans do exist socially and otherwise, the rights both groups seek are similar precisely because gay activists targeted many rights that the civil rights movement vindicated. This interlinked past may help both critics and supporters of the race analogy to understand the interplay between the movements—supporters should understand that the similarities between groups were in some cases carefully constructed by activists, while critics may find that the groups are more alike than they recognize precisely because of these constructed similarities.¹² Ultimately, gay rights as we understand them today would make very little sense without a fundamental reliance on concepts and arguments formed through reliance on the racial justice movement.

The second critique links the race analogy discussion to the act-versus-identity debate, which has been a central feature of sexuality studies at least

Homophobia, Slog, Nov. 5, 2008, http://slog.thestranger.com/2008/11/black_homophobia (accusing African-American voters of "writing anti-gay discrimination into California's constitution").

10. THE ADVOCATE, Dec. 16, 2008. This issue led to a furor, especially in the blogosphere. See, e.g., Michael Crawford, *Is Gay the New Black?*, The Bilerico Project, Dec. 9, 2008, http://www.bilerico.com/2008/12/is_gay_the_new_black.php; Melissa McEwan, *A Perfect Example, Unfortunately*, Shakesville, Dec. 5, 2008, <http://shakespeareessister.blogspot.com/2008/12/perfect-example-unfortunately.html>; Jennifer Molina, *Is Gay the New Black?* (Newsweek Dec. 7, 2008), available at <http://www.youtube.com/watch?v=3yk7ifzueSE>.
11. See, e.g., Jasmyne A. Cannick, Op-Ed, *The Gay/Black Divide*, L.A. TIMES, Nov. 8, 2008, at A23; Molina, *supra* note 10 (interviewing Michael Crawford). Cannick is an African-American lesbian; Crawford is an African-American gay man.
12. Serena Mayeri makes this point regarding analogical arguments: "The meanings and consequences of analogical argumentation are closely tied to the historical context in which the analogies are invoked . . ." Serena Mayeri, Note, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1052 (2001).

since Michel Foucault's *History of Sexuality*.¹³ For queer theorists, sexual *acts* should not inform or create sexual *identity* categories for the actor (for example, presuming, or creating, a "gay" identity for an individual who engages in same-sex sexual acts). Harvard law professor Janet Halley therefore attacks the race analogy for hardening legal identity categories.¹⁴ Furthermore, as racial identity is itself constructed,¹⁵ this analogy allows activists to bring already unstable and problematic identity categories from racial justice litigation into sexual rights litigation. This forces individuals to perform and act according to these identities, ultimately limiting their range of sexual freedom.

The historical narrative set out in this Note shows that the gay legal "identity" that queer activists criticize was indeed historically "constructed" and therefore contingent. Yet, as the dynamics I explore demonstrate, this construction was a *necessary*—and somewhat successful—strategy for early gay activists to both mobilize themselves and counter opponents.

This Note also suggests how another concern and criticism of queer activists regarding the gay movement—the focus on marriage—is also connected to the race analogy. By analogizing themselves to blacks, gays saw their harms and forged remedies based on the goals and successes of the racial justice movement. Thus, these remedies often reflected the extent to which the original (African-American) identity had already been altered to conform to mainstream (white) standards. Marriage, in particular, into which blacks had only fully assimilated in the previous century, became an important aim for the gay rights movement.¹⁶ Thus, reliance on the claim that gay identity is like

13. See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978); *infra* Subsection II.A.4.

14. See Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115 (David Kairys ed., 3d ed. 1998). The act-identity critique permeates queer theory and has been made by other post-identity/identity-deconstructing authors in related contexts. See, e.g., Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13, 13-14 (Diana Fuss ed., 1991) ("[I]dentity categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression. This is not to say that I will not appear at political occasions under the sign of lesbian, but that I would like to have it permanently unclear what precisely that sign signifies.").

15. Halley, *supra* note 14, at 140.

16. See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 253 (1999) (arguing that "African Americans did not enter civil society on their own terms and accompanied by their own values, but rather did so on the non-negotiable terms set by the dominant culture" and therefore had to subscribe to a white vision of "legal marriage"); Onwuachi-Willig, *supra* note 7, at 884 ("[T]he bind of choosing between the socially constructed concepts of 'The Good Black

black identity enabled and encouraged marriage-based relationship recognition models and linked the act-identity debate itself with the debate over whether gay marriage is an appropriate aim for the movement.

I do not ultimately seek to *resolve* any debates. Under the first line of criticism, both sides will find support in this Note—that gays were *made* to appear similar to African Americans means that as a result of these efforts, today, there are similarities (which supports one side), but also that these similarities are contingent and constructed (which supports the other). Similarly, queer theorists may conclude that even with gays' strategic dependence on the racial justice movement, the use of the race analogy should be limited in the future. They may feel that the fact that gay marriage claims were partially constructed by the race analogy makes limiting the use of the analogy all the more important. Ultimately, though, the analogy undergirds the successes of the gay movement, both in terms of the self- and public perception of gays. Thus, before reaching any conclusions, we must consider the historical context, dynamics, and consequences of the analogy.

I. A NOTE ON THEORY: GAY IDENTITY AND HISTORY

While various characteristics are attributed to gays as a group today, they are commonly seen as a legal minority in search of civil rights, which has not always been the case. This Note provides a historical account of elements in the development of this aspect of gay identity. At the outset, it is important to model what one means by gay identity and understand how its elements may be historically created.

Homosexual identity is an umbrella concept that brings together many elements and categories that are contingently and historically (as opposed to

Man' and 'The Bad Black Man' incentivizes middle-class heterosexual black men to perform their identity in a way that further entrenches current race, sex, class, and sexuality-based hierarchies. For example, these identity performances reinforce status positions that place black men above black women or heterosexual black men above heterosexual black women. . . . [M]iddle-class heterosexual black men who wish to be included in the mainstream often perform their identity in a way that fits the assimilationist ideal of the 'The Good Black Man' by downplaying both their race and sexuality."); *id.* at 888-94 (explaining how blacks may adopt certain forms of reverse covering to avoid destabilizing group identity, which thereby becomes restabilized along stereotyped lines); see also Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 38 U.C. DAVIS L. REV. 853, 859-70, 874-88 (2006) (expanding upon Onwuachi-Willig's observation); cf. Devon W. Carbado, *Straight out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 78 (2000) ("All of us, through the ways in which we negotiate our identities, play a role in entrenching a variety of social practices, institutional arrangements, and laws" (footnote omitted)).

analytically or inherently) related.¹⁷ For example, David Halperin non-exhaustively identifies five coexisting elements—effeminacy, active sodomy, male love, passivity, or inversion,¹⁸ and the “category” of homosexuality (that is, the notion of homosexual identity). These elements come together to form aspects of gay identity, each being emphasized to different degrees in different contexts. They do not have an analytic link with each other. Rather, we discover their relationship only by studying each of their genealogies, their development through time, and ultimately their incorporation into the category of homosexuality.¹⁹ Similarly, many in the modern United States recognize and identify homosexuals as a politico-legal minority group fighting for civil rights. This Note isolates and genealogizes this particular element of gay identity. Halperin and Eve Sedgwick suggest that these coexisting identity categories can be contradictory and context-dependent.²⁰ Activists often successfully deployed this model of gay identity using incompatible arguments, attempting to simultaneously emphasize the insular minority status of gays and their assimilability into the mainstream.

Before gays could debate what group identity should be attributed to themselves, and engage in creating this identity, they first formed groups, congregating in American cities at the turn of the twentieth century.²¹ At this time, the boundaries between this “deviant” minority and the majority were drawn by “[a] society hostile to homosexual expression.”²² Judeo-Christian religious traditions and medical models developed by sexologists defined the “homosexual.” Through these paradigms, the elements that Halperin identifies

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17. See DAVID M. HALPERIN, *HOW TO DO THE HISTORY OF HOMOSEXUALITY* 109 (2002) (citing EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 47 (1990)). See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 45-47 (1990), for a full explanation. This existence of multiple coexisting, but incoherent, aspects of identity, is not unique to “gay identity.” See, e.g., Leonie Huddy, *From Social to Political Identity: A Critical Examination of Social Identity Theory*, 22 *POL. PSYCHOL.* 127, 162-64 (2001) (discussing multiple meanings held by a single group identity).
18. Halperin notes that the difference between effeminacy and inversion is a “blurred” one and describes it further. HALPERIN, *supra* note 17, at 123.
19. See *id.* at 109-10.
20. See *id.* at 47.
21. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 11-13 (1983). George Chauncey and William Eskridge make a similar point and provide fascinating narratives depicting the “[c]ase histories . . . newspaper accounts of the scandalous and the bizarre, and . . . personal correspondence and diaries” to which D’Emilio refers. D’EMILIO, *supra*, at 11; see GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* (1994); ESKRIDGE, *GAYLAW*, *supra* note 2, at 57-97.
22. D’EMILIO, *supra* note 21, at 13.

became artifacts of a medicalized homosexual “identity.”²³ This identity helped police the boundaries between normalized heterosexuality and perverse homosexuality. While state reaction to the homosexual menace in the first half of the twentieth century through legislation, police enforcement, and adjudication was far more intense than that of the medical profession,²⁴ its definitions of homosexuality as impure and psychopathic were drawn from medicine and religion.²⁵ Individuals sexually attracted to the same sex often internalized these early accounts.²⁶

As the ranks of these individuals swelled in post-World War II cities, service-based organizations began to appear. Rather than engage in political mobilization and affirmative litigation, as their activist successors would, these organizations created the first homophile magazines, provided lists and reviews of homophile novels and poetry, and supplied information for rank-and-file individuals in case of entrapment and arrest. The earliest of these organizations generally did not attempt to replace existing accounts of gay identity.²⁷ Rather,

23. *Id.* at 15-19; see also *infra* Subsection II.A.4.

24. See ESKRIDGE, *GAYLAW*, *supra* note 2, at 24.

25. Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 *YALE J.L. & HUMAN.* 163 (2008) (providing the best recent account); see also D’EMILIO, *supra* note 21, at 14 (“Colonial legal codes, drawn either directly from the Bible or from the theologically influenced English buggery statute of 1533, prescribed death for sodomy”); ESKRIDGE, *GAYLAW*, *supra* note 2, at 23 (providing a history of the medicalization of homosexuality and noting that before World War I, “[m]edical and press accounts of sexual and gender deviation triggered social responses” and vice squads); *id.* at 36-37 (describing the new legal definitions of homosexuality, largely drawn from medical vocabulary). In his discussion of the post-World War II period, Eskridge argues that the association of homosexuals with clinical psychopaths grounded further legal hysteria. *Id.* at 57-97; see also Margot Canaday, “Who Is a Homosexual?”: *The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law*, 28 *L. & SOC. INQUIRY* 351, 353 (2003) (“[G]overnment officials . . . anchor[ed] homosexual status in psychiatric definitions.”).

26. See D’EMILIO, *supra* note 21, at 21; *id.* at 37 (describing Kinsey’s influence on gay individuals but suggesting that the influence was ultimately counterproductive in broader society); see also DENNIS ALTMAN, *HOMOSEXUAL OPPRESSION AND LIBERATION* 17 (N.Y. Univ. Press 1993) (1971) (suggesting that homosexuals “allowed themselves to be defined by” society in the 1950s and 1960s). Dana Rosenfeld conducted numerous interviews with elderly gays who explain how they internalized the existent homophobic medico-social discourse on homosexuals. DANA ROSENFELD, *THE CHANGING OF THE GUARD: LESBIAN AND GAY ELDERLY, IDENTITY, AND SOCIAL CHANGE* 26-33 (2003). As Rosenfeld notes, “because images of gay men and women that challenged their stigmatized ‘nature’ were . . . nonexistent before the mid- to late 1960s, accredited [that is, non-stigmatized] identities were simply unavailable before then.” *Id.* at 63.

27. See, e.g., 2 *ENCYCLOPEDIA OF HOMOSEXUALITY* 781 (Wayne R. Dynes ed., 1990). The Mattachine “wanted only collaboration with the professionals—established and recognized

in their litigation, which consisted of attempts to defend the right to provide services (rather than to affirmatively change the law), and primarily involved cases implicating rights of association and speech, gays unsuccessfully attempted to question the coherence of religious and medical identity categories in order to disrupt these identities.²⁸ Furthermore, those arguments made to outsiders were somewhat ingenuous. In their internal operations, these organizations effectively continued to rely on stigmatizing identity models to understand their relationship to society. One interviewer notes that while gay organizations and gay life existed, “gay life . . . was . . . collectively . . . organized around stigma.”²⁹ However, as new activists, familiar with the racial justice struggle, entered the homophile movement, gays began to take a hand in producing their own identity categories to replace old ones, which

scientists, clinics, research organizations and institutions—the sources of authority in American Society.” *Id.* (internal quotation marks omitted); see *ONE*, June 1954 (issue devoted to religion); *ONE’s Annual Midwinter Institute Impressive*, *THE LADDER*, Feb. 1957, at 4 (describing noted psychiatrist Albert Ellis’s speech at the Institute and suggesting that the movement continue to rely on science to work out the basis of homosexuality); *Psychotherapy vs. Public Opinion*, *THE LADDER*, Feb. 1957, at 8-9 (describing the views of a counselor, Alice LaVere, who challenged the perception of homosexuality as an illness); Leo J. Zeff, *Religion and Depth Psychology*, *THE LADDER*, Jan. 1958, at 1. One contributor noted in 1963 that “[t]oo often *THE LADDER* is largely a forum for views hostile to Lesbians—with no rebuttal from persons trained to detect the fallacies involved [such as] psychologists and psychiatrists.” Letter to the Editor, *THE LADDER*, May 1963, at 25, 25; see also DAVID ALLYN, *MAKE LOVE NOT WAR* 152 (2000) (noting that early organizers “often accepted unquestioningly the pronouncements of psychiatric ‘experts’”). While Allyn probably overstates the case, see Martin Meeker, *Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s*, 10 *J. HIST. SEXUALITY* 78, 99 (2001), there was significant weight given to these claims. The question as to why gays would initially accept definitions that subjugated them is theorized by Michael Hogg and Dominic Abrams. They note that self-esteem is not the only reason for group identity to be accepted: rather, individuals also seek group identity for “self-knowledge,” the search for “meaning,” and resultantly “self-efficacy,” “power,” and control over the self. Michael A. Hogg & Dominic Abrams, *Social Motivation, Self-Esteem and Social Identity*, in *SOCIAL IDENTITY THEORY: CONSTRUCTIVE AND CRITICAL ADVANCES* 28, 42-45 (Dominic Abrams & Michael A. Hogg eds., 1990). Michael Hogg and Barbara Mullin make similar points. Michael A. Hogg & Barbara-A. Mullin, *Joining Groups To Reduce Uncertainty: Subjective Uncertainty Reduction and Group Identification*, in *SOCIAL IDENTITY AND SOCIAL COGNITION* 249 (Dominic Abrams & Michael A. Hogg eds., 1999). Rosenfeld’s interviews uphold this theoretical account. See ROSENFELD, *supra* note 26, at 29 (describing one interviewee who accepted stigma in exchange for knowing that she was not one of a kind).

28. This is typical for low-status groups. See Huddy, *supra* note 17, at 135 (“[O]ne option available to members of low-status groups, especially groups in which membership is permeable, is to deny one’s group membership or identify with an alternative higher status group.”).
29. ROSENFELD, *supra* note 26, at 63.

helped them reconceptualize their role in society. They layered a new “legal” meaning of gay identity upon self-understandings of gays as a group through analogy with African-Americans as a defined minority group seeking equal rights under the law.³⁰ This identity clearly affected self-perception of gays in social and other contexts—it is, however, appropriate to refer to it as a *legal* identity, insofar as the analogy is dependent upon legal, rights-seeking frames and contexts for its power and origins. That said, legal minority identity did not completely replace methods eschewing reliance on identity categories, which gays continued to use and exploit in various contexts.³¹

This Note does not attempt to provide an exhaustive description of historical developments in the LGBT movement during this period. This account does not exhaust all of the new “accredited,” nonstigmatized, identity categories gay individuals began creating during this period,³² but rather, only that category which developed through argument based on the race analogy. Second, given this limitation, it is hardly surprising to find that my protagonists are generally white, privileged, middle-class members of the movement, who had the greatest access to the social and legal resources which helped lay the ground for this new identity through litigation and media dissemination. Generally speaking, perspectives that may have been held by marginalized groups within the movement, such as low-income individuals, racial minorities, and transsexuals, do not figure prominently in originating this new account of gay identity.

II. DENYING GAY “IDENTITY”

The arguments of early gay activists elided, and often explicitly denied, the existence of gays as a separate legal minority group both within and without the courtroom. These activists thus attempted to erode the notion of a gay legal identity, especially in the First Amendment and due process claims they made. Section II.A. describes these arguments. As Section II.B. explains, however, courts and the legal mainstream refused to accept such claims; their continued conception of gays as a distinct (and reviled) minority group forced gay advocates to consider different strategies.

30. Cf. Huddy, *supra* note 17, at 139 (“[G]roup identification increases in strength with the sense that . . . group membership is voluntary.”).

31. See *infra* Part IV.

32. See, e.g., ROSENFELD, *supra* note 26, at 64-67 (describing the affirming identity adopted through Radicalesbians, a group of radical lesbian feminists, and sexual liberation).

A. *Early Gay Activists and the Denial of Identity*

1. *A False Start*

Communities of people attracted to the same sex congregated in cities following World War II. A vibrant subculture sprang up in many cities, with bars and other establishments catering to these individuals.³³ Two individuals that figure prominently in the history of the gay rights movement began to treat this new group as a distinct minority fighting for civil rights. These individuals worked independently of each other, but both were influenced by events in the racial justice movement, nationally and internationally.

In 1950, Edward Sagarin pseudonymously published his seminal work, *The Homosexual in America*,³⁴ which would be widely read by homophile audiences in the succeeding decade. In this work, he explained that, like those united by “the color of [their] skin,” homosexuals had an “important trait in common that not only unites them to each other, but differentiates them from the rest of society.”³⁵ That differentiation made homosexuals a minority group with their own history, culture, argot, and identity,³⁶ undergoing the same dynamics of oppression as other groups.³⁷ Accordingly, for the first time in the United States, the proposition appeared in print that “the parallel [with racial minorities] is inescapable,” for “[t]here is no Negro problem except that created by whites; no Jewish problem except that created by Gentiles. To which I add: and no homosexual problem except that created by the heterosexual society.”³⁸

33. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 244-79 (1990); D'EMILIO, *supra* note 21, at 23-39; ESKRIDGE, GAYLAW, *supra* note 2, at 59.

34. DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* (1951).

35. *Id.* at 5.

36. Barbara Gittings & Kay Lahusen, *The Rabble Rousers*, in *MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, 1945-1990: AN ORAL HISTORY* 104 (Eric Marcus ed., 1992). Martin Duberman, in one of the few, and arguably the best, discussions of Sagarin's work, explains that while Harry Hay, the pioneering gay radical, himself often called the father of the movement, expressed the same notion that homosexuals were a minority, Sagarin's book was the first to give the “minority” concept wide circulation, becoming the cornerstone for identity or the “*Ur-text*” for politics in the gay movement. Martin Duberman, *The “Father” of the Homophile Movement*, in *LEFT OUT: THE POLITICS OF EXCLUSION/ESSAYS/1964-1999*, at 59, 68-69, 71 (1999).

37. CORY, *supra* note 34, at 10-25 (basing his argument on the idea of stereotype and majority insecurity).

38. *Id.* at 228.

In 1951, Harry Hay organized the Mattachine Society, the first major “homophile” group in the nation, and for many years, the only group with national affiliates. Like some of his co-founders, such as Chuck Rowland, Hay was an ardent communist³⁹ and organized the Mattachine as communist-like cells with anonymous members.⁴⁰ His political background provided him with ready analogies. In 1938, the Comintern had drawn up five principles of what constituted a minority group, which were based on racial status. As Hay explained to his biographer, he explicitly invoked the race-sexuality analogy based on these principles in much of his thinking, writing, and speeches at the time.⁴¹ Hay made other analogies as well, arguing that the “Guilt of Androgynity [the manner in which he referred to homosexuality] BY ASSOCIATION, equally with guilt of Communist sympathy by association, can be employed as a threat against any and every man and woman in our country . . . to insure thought control and political regimentation.”⁴²

Soon, however, the Mattachine Society was accused of being a communist organization.⁴³ In response, fearful of further investigation, the Mattachine revolted against Hay. They called for a public declaration against communism and threatened to turn the names of defectors over to the FBI.⁴⁴ They also

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39. JAMES T. SEARS, *BEHIND THE MASK OF THE MATTACHINE: THE HAL CALL CHRONICLES AND THE EARLY MOVEMENT FOR HOMOSEXUAL EMANCIPATION* 151 (2006) (“The original founders of the Mattachine were Marxists and . . . were going to marry Marxism and homosexuality.”); STUART TIMMONS, *THE TROUBLE WITH HARRY HAY: FOUNDER OF THE MODERN GAY MOVEMENT* 144 (1990); *see also* SEARS, *supra*, at 166 (illustrating the founding members’ communist sympathies); TIMMONS, *supra*, at 177 (same).
 40. Interview by Jonathan Katz with Harry Hay (Mar. 31, 1974), in JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 410 (1976). For the best overview, see D’EMILIO, *supra* note 21.
 41. HARRY HAY, *RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER* 40-43 (Will Roscoe ed., 1997).
 42. TIMMONS, *supra* note 39, at 136; *see also id.* at 151 (describing Hay’s use of the analogy); KATZ, *supra* note 40, at 409 (same).
 43. D’EMILIO, *supra* note 21, at 75-81 (discussing the accusation, published in a Los Angeles newspaper, and the subsequent witchhunt).
 44. *Id.* at 85; *see also* SEARS, *supra* note 39, at 198.

rejected Hay's and Rowland's comparison of gays to the racial minority group⁴⁵ as unacceptably "making 'niggers' out of them."⁴⁶

After the 1953 shake-up, the Mattachine moved away from the notion that gays constituted a discrete and subordinated minority group with a common experience of discrimination, of whose rights courts should be solicitous.⁴⁷ Rather, the new spokesmen for the Mattachine sought to disrupt homosexual identity and group status, portraying homosexuality as a difference too slight to warrant treating homosexuals as a separate group or attributing a marginalized identity to them.⁴⁸ Instead, they sought the right to perform certain *acts*, divorced from any notion of homosexual identity. Simultaneously, the Mattachine moved away from any organized political and legal activism, preferring instead to focus on services to LGBT individuals, such as counseling, and on public education efforts.⁴⁹

2. *Eliding Group-Based Arguments: Due Process and First Amendment Claims*

In the 1950s and early 1960s, those who challenged government action against gays did so under two main theories. First, those arrested or otherwise

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45. Rowland had incited ire among the dissidents at a 1952 meeting, arguing that "[w]e must disenfranchise ourselves of the idea that we differ only in our sexual directions and that all we want or need in life is to be free to seek the expression of our sexual desires [T]he fact is we are a minority with a minority culture . . . and interests." SEARS, *supra* note 39, at 182 (quoting a 1952 speech of Chuck Rowland to the Mattachine Society).
46. TIMMONS, *supra* note 39, at 151; cf. Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 47 (1996) (advocating, based on *Romer v. Evans*, 517 U.S. 620 (1996), a program of appealing to judges' empathy and rationality, rather than using "thick doctrinal arguments that alter existing legal categories, extend the upper echelon tiers of review, or construct gay rights as such").
47. At least, it did so in its legal arguments. See Meeker, *supra* note 27 (discussing, in contrast to D'Emilio, the radical activities of the Society in other areas). John Tehranian interestingly suggests that "[t]he availability of covering (and passing and conversion) strategies makes organization as a group less likely. . . . [T]he much wider latitude of covering options available to both the gay and Middle Eastern populations might explain why both groups have been relative latecomers to the civil rights movement." John Tehranian, *Selective Racialization: Middle-Eastern American Identity and the Faustian Pact with Whiteness*, 40 CONN. L. REV. 1201, 1224 (2008).
48. Statements such as the following were typical: "The Lesbian . . . [has the] attributes of any other woman. . . . Her only difference lies in her choice of a love partner." Editorial, *The Positive Approach*, THE LADDER, Nov. 1956, at 8.
49. NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 337 (1995).

targeted as homosexual challenged governmental action for violating procedural due process requirements, frequently claiming that statutes that failed to specifically define homosexuality or sodomy were void for vagueness. Second, bars and publications targeted as homosexual used First Amendment freedom of speech arguments to vindicate their rights. Activists did not use or need the rhetoric of minoritization for either argumentative strategy.⁵⁰ Two cases in particular received a high level of publicity in the few homophile publications of the time; neither case focused on gays as a legal minority.

The Mattachine took on the first case in 1952 under Hay's leadership. This case involved a due process claim: one of the Mattachine's original members, Dale Jennings, was arrested through police entrapment in a public park for public solicitation and vagrancy, admitted to being homosexual, pled not guilty—and won his case.⁵¹ It was the first time that a gay individual who was arrested on these charges became the center of an organized fundraising campaign and claimed, in what some refer to as the entrapment defense, that *even* if he had committed the alleged acts, the policy of entrapment violated procedural privacy protections.⁵²

In general, when defending against sodomy prosecutions, activists put their emphasis on solely procedural claims, both in and out of court. No one argued that the police action unfairly targeted homosexuals as a group, or pointed to the general oppression homosexuals faced.⁵³ Similarly, when gay leaders turned their attention to sodomy laws in their publications, the privacy rights of all Americans, rather than minority persecution, formed the theme.⁵⁴ Ultimately, as John D'Emilio explains, the Mattachine itself was worried about becoming

50. William Eskridge similarly notes that the first round of gay rights litigation relied on a politics of "protection," that is, on arguments that downplayed the minority status of gays. This approach is in contrast to the later use of a politics of "recognition" as a homophile minority that they later adopted. Eskridge, *Some Effects*, *supra* note 2, at 2161-69.

51. D'EMILIO, *supra* note 21, at 70-71.

52. ESKRIDGE, *GAYLAW*, *supra* note 2, at 87.

53. See *The Law: A Discussion of Entrapment*, ONE, Apr. 1954, at 7 (providing advice from ONE's legal counsel on the general entrapment defense).

54. Letter to the Editor, THE LADDER, May 1957, at 20, 20-21 (calling for decriminalization of acts "privately indulged in by consenting adults and not involving the use of force or coercion, which do[] not involve a minor child and which do[] not violate any ordinance of private conduct," and recommending that readers remain "courteously inconspicuous"); Del Martin, Editorial, *Open Letter to Assemblyman John A. O'Connell*, THE LADDER, Sept. 1958, at 5 (calling for the revision of sodomy laws). The American Law Institute also revised its laws in 1955. MODEL PENAL CODE § 207.5 cmt. (Tentative Draft No. 4, 1955).

too visible;⁵⁵ after the success of the Jennings trial, gay organizers voted to avoid litigation that would make them visible as a distinct minority to prevent “hysteri[a].”⁵⁶

The second case involved defensive First Amendment challenges brought in order to preserve the right to provide publication services.⁵⁷ In the mid-1950s, two homophile publications, *ONE* and *The Ladder*, were started and slowly gained a significant readership. While subscribers had been afraid that their identities would be revealed since publication began,⁵⁸ matters came to a head when the United States Postal Service seized *ONE* on obscenity charges. The ensuing litigation went up to the Supreme Court. The short brief for the petitioners in *ONE* was completely lacking in detail that, if provided, would have brought into relief the “homophile” nature of the magazine. Instead, petitioners argued that the magazine engaged in “a free[] discussion of human and social problems”⁵⁹ that have “plagued the human race through the centuries.”⁶⁰ Similarly, *The Ladder*, which catered to a lesbian readership, argued, “The basic problem herein presented [in *ONE*] is *not* whether the homophile press shall continue to exist but rather *whether a free press can continue to exist.*”⁶¹

Likewise, in other briefs submitted to the Supreme Court, gays avoided making group-based claims. Plaintiffs generally pled not guilty to being homosexual, unlike Jennings, and once more, focused on the procedural violations of the state in the investigation and of the district court during trial.⁶²

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55. D’EMILIO, *supra* note 21, at 70. The reaction to the case and the increase in membership, *see id.* at 75, may well have resulted in a different strategy had Hay been able to stay on. However, the Mattachine’s deposing of Hay ensured a conservative legal strategy.
 56. MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, & THE POLITICS OF RIGHTS 17-18 (2002).
 57. ESKRIDGE, GAYLAW, *supra* note 2, at 93-97; Eskridge, *Some Effects*, *supra* note 2, at 2161-68.
 58. *See The Law of Mailable Material*, *ONE*, Oct. 1954, at 4 (trying to quell fears of the early readers of the magazine who were worried that *ONE* was unlawful).
 59. Petition for Writ of Certiorari at 7, *ONE, Inc. v. Oleson*, 355 U.S. 371 (1957) (No. 290).
 60. *Id.* at 8.
 61. Editorial, *THE LADDER*, June 1957, at 5, 5 (emphasis altered).
 62. *See* Petition for Writ of Certiorari, *Robillard v. New York*, 385 U.S. 928 (1966) (No. 447) (raising procedural objections to entrapment); Petition for Writ of Certiorari, *Poore v. Mayer*, 379 U.S. 928 (1964) (No. 223) (raising arguments based on the Fourth Amendment search and seizure prohibitions); Brief for Petitioner, *Williams v. Zuckert*, 371 U.S. 531 (1963) (No. 133) (raising procedural arguments); Petition for Writ of Certiorari, *Hudson v. Esperdy*, 368 U.S. 918 (1961) (No. 382) (raising the procedural defense that moral turpitude in New York is an offense, not a crime, and therefore lacks necessary safeguards against

3. *Disrupting Identity: Manual Enterprises and Boutilier*

If activists were content to avoid group-based arguments in the early 1950s cases examined in detail above, in the 1960s one can begin to see signs not just of avoidance, but of group disruption. In *Manual Enterprises v. Day* and *Boutilier v. INS*, the plaintiffs challenged the coherence of the term “homosexual” and argued that homosexuality was not restricted to a small minority group at all.⁶³

The petitioner in *Manual Enterprises*, soft-core pornographer Herman Womack, had challenged the Postal Service’s seizure of his material once before in *Womack v. United States*.⁶⁴ In *Womack*, both the unfavorable lower court opinion and the government’s opposition to certiorari emphasized the homosexual nature of the publications that had been confiscated.⁶⁵ Womack’s cert petition, however, avoided the “homosexual issue,” noting the “female touch-ups” that were in the publication and focusing on procedural arguments.⁶⁶ In discussing the particular images referred to in the government brief, Womack simply argued that they were not of an undue sexual nature—since, for example, no two male nudes appeared together in photographs—and that the audience was simply “art students and teachers.” The discussion eschewed any reference to homosexuals altogether.⁶⁷ The Court denied certiorari.

In *Womack*, the petitioner had more or less ignored the government’s implicit treatment of homosexuals as a group. The brief for the petitioner in *Manual Enterprises*, on the other hand, attacked this argument directly, arguing that “[t]here is, in truth, no definitely definable and distinct group of human beings

erroneous conviction); Petition for a Writ of Certiorari at 13-14, *Shields v. Sharp*, 366 U.S. 917 (1961) (No. 773) (denying charges and claiming failure to comply with required procedures such as disclosure of evidence to the accused (citing *Greene v. McElroy*, 360 U.S. 474 (1959))); Petition for Writ of Certiorari, *Ganduxe y Marino v. Esperdy*, 364 U.S. 824 (1960) (No. 224) (denying homosexuality, but primarily raising procedural arguments).

63. See *Boutilier v. INS*, 387 U.S. 118 (1967); *Manual Enters. v. Day*, 370 U.S. 478 (1962).

64. *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961); see Rodger Streitmatter & John C. Watson, *Herman Lynn Womack: Pornographer as First Amendment Pioneer*, 28 JOURNALISM HIST. 56 (2002).

65. Cf. *Womack*, 294 F.2d at 205; Brief of the United States in Opposition at 4, *Womack*, 365 U.S. 859 (No. 717) (“[W]e don’t have to kid each other, we know who is interested in magazines and pictures of that type . . . homosexuals.”).

66. Petition for Writ of Certiorari at 11, *Womack*, 365 U.S. 859 (No. 717) (arguing that the government in a “prejudicial maneuver” “twisted” certain “letters . . . to throw a homosexual issue into the case which the petitioner was forced to answer”).

67. *Id.* at 12.

classifiable as 'homosexuals' set apart from the rest of the population."⁶⁸ Rather, citing Alfred Kinsey's work, the petitioner claimed that "'homosexual' is not a characteristic of a small, isolated, group of people, but is a type of sexual activity or propensity which directly affects and [o]ccurs in the lives of vast proportions of our population."⁶⁹

Furthermore, it was supposedly questionable whether *Manual Enterprises* had any relation to homosexual propensity at all. Rather, this magazine was sold to the "hundreds of thousands of people in the United States interested in physical development and body building."⁷⁰ The petitioner would only "admit" that this bodybuilding group was a "by number . . . minority,"⁷¹ rather than a minority by *identity*. Finally, even if some minoritized homosexual interest could be identified, this interest was "analogous to a so-called heterosexual male person purchasing a nude pin-up photograph of Marilyn Monroe."⁷²

Boutilier v. INS,⁷³ in turn, was one among many immigration cases that the Supreme Court was asked to decide in which various plaintiffs challenged INS action taken because of their alleged sexual orientation.⁷⁴ In 1963, when Clive Boutilier applied for citizenship, he volunteered that he had been arrested for sodomy in New York. The INS determined that as a homosexual, he fell under the definition of "psychopathic personality" and was therefore excludable under the Immigration and Nationality Act.⁷⁵ The Board of Immigration Appeals agreed, noting that "'psychopathic personality is a term of art . . . [that] includes an alien upon mere proof that he is a homosexual."⁷⁶ After the Second Circuit upheld the BIA's determination,⁷⁷ Boutilier appealed.

The outcome was uncertain. In a previous case, *Fleuti v. Rosenberg*, the Ninth Circuit had ruled that the INS could not deny a homosexual petitioner's

68. Brief of Appellant at 16, *Manual Enters.*, 370 U.S. 478 (No. 123) (emphasis added).

69. *Id.* (citing ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 616-17 (1948)).

70. *Id.* at 28; see also Petition for Writ of Certiorari, *supra* note 66, at 8 (referring to Womack's other bodybuilding magazines).

71. Brief of Appellant, *supra* note 68, at 29.

72. *Id.* at 28.

73. 387 U.S. 118 (1967).

74. See Canaday, *supra* note 25.

75. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (repealed 1990).

76. JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 105 (2001).

77. *Boutilier v. INS*, 363 F.2d 488 (2d Cir. 1966).

reentry to the United States after an afternoon visit to Mexico, as the term “psychopathic personality” was unconstitutionally vague.⁷⁸ The Supreme Court affirmed on the different ground that a return from a short visit to Mexico could not be deemed an “entry” for the purpose of the statute.⁷⁹

Relying on *Fleuti*, the lawyers in *Boutilier* made several different arguments. First, they again claimed that the term “psychopathic personality” violated constitutional prohibitions on vague statutes.⁸⁰ As in previous immigration-related cases,⁸¹ they questioned whether Boutilier’s homosexual acts made him psychopathic.⁸² They challenged whether the INS had proven that Boutilier had performed the acts described.⁸³ Finally, they also argued that, since the statute only authorized expulsion based on evidence that would have allowed the INS to deny him entry in the first place and that Boutilier’s sodomy charge postdated his entry, the INS had therefore invalidly targeted him based on postentry acts.⁸⁴

However, the Ninth Circuit *Fleuti* decision suggested a new, intriguing line of argument that would lead to the *Boutilier* litigants attempting to disrupt the very notion of homosexuality. The Ninth Circuit, curiously, raised the question of whether *Fleuti*’s homosexuality was “compulsive [or] a matter of choice.”⁸⁵ Arguing that it was a matter of choice, the court claimed that *Fleuti* was “substantially prejudiced” by the vagueness of the term “psychopathic personality,” since if he knew the term targeted homosexuality, he could have avoided homosexual acts.⁸⁶ Thus, the Ninth Circuit destabilized homosexual identity—in dicta.

Significantly, while the immigration statute at issue never used the word “homosexual,” the petitioner in *Boutilier* went out of his way to discuss—and disrupt—the term. “Who is a homosexual?” Boutilier’s brief demanded. “If, as Dr. Kinsey estimated in his *Sexual Behavior in the Human Male*, at least 37% of the American male population have had homosexual experiences, are they all people who would be excludable were they aliens seeking entry here! . . . [T]he statute as thus interpreted . . . could apply to persons engaging in both

78. 302 F.2d 652 (9th Cir. 1962).

79. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

80. Petition for Writ of Certiorari at 4, 10, *Boutilier*, 387 U.S. 118 (No. 440).

81. Canaday, *supra* note 25, at 369, 373.

82. Petition for Writ of Certiorari, *supra* note 80, at 5-7.

83. *Id.*

84. *Id.* at 33-35.

85. *Fleuti v. Rosenberg*, 302 F.2d 652, 656 (9th Cir. 1962).

86. *Id.*

heterosexual and homosexual experiences alike”⁸⁷ Ultimately, on this view, the line between heterosexual and homosexual was simply not tenable.

4. *Modern vs. Contemporary Theoretical Perspectives*

Modern queer activists who draw from the arguments of Michel Foucault may well applaud the arguments of these early litigators. Foucault argued that creating an “identity” around acts allowed a “new *specification of individuals*” and acts.⁸⁸ In brief, Foucault and his successors argue that the acts we now term homosexual were forbidden in medieval times but without a definition being applied to them. The individuals who performed them were not socially branded with any particular identity. After a definition was applied to these acts, and they were characterized as homosexual, the individuals who performed them were given a homosexual identity. This enabled mechanisms of control, discrimination, and hierarchy to form around these acts and individuals in their daily social existence, creating the boundaries that made them a marginalized minority. This dynamic, commentators argue, was apparent in the post-World War II antihomosexual hysteria that swept the nation. For example, Nan Hunter describes laws that were amended to target a certain “psychological type” instead of specific acts.⁸⁹ Thus, the performance of certain acts created an identity, the possessor of which would be controlled by the state.

It bears noting that, though they were working before Foucault wrote, these early activists appeared attuned to these social dynamics. By attempting to delink homosexual acts from homosexual identity and homosexuals as a class, the activists potentially struck at the very basis of social control over those who perform same-sex acts. Yet, ironically, as the historical dynamics I describe above demonstrate, from a contemporary point of view, activists were conservative, attempting to dissolve their identity not as a move towards radicalism, but rather, in an attempt to hide their identity from the law. As we

87. Petition for Writ of Certiorari, *supra* note 80, at 9; *see also id.* at 6 (“There is no indication by either the respondent or the [lower] court what is meant by a homosexual; whether it includes one who engages in both homosexual and heterosexual acts as the petitioner did . . . whether it applies to someone who has engaged in it once in his life, once a year, four times a year, or constantly . . .”).

88. FOUCAULT, *supra* note 13, at 42-43. For examples of commentators quoting these pages, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1739 (1993); and Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 777 (1989). *See also* Halley, *supra* note 14, at 140 n.2 (“[Q]ueer theory is . . . unimaginable without . . . *The History of Sexuality*.”).

89. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1698 (1993).

see, these strategies did not work, because of resistance from courts and because they did not reflect gay individuals' social reality.

B. Judicial Responses

Courts ignored these activists' attempts to disrupt homosexual identity and group status, relying on existing models of homosexuality to understand the issues before them.⁹⁰

As contemporary government behavior illustrated, homosexual identity was the basic means used to police sexuality. In the 1950s, the entrapment defense was rarely a successful one.⁹¹ In general, the defense only worked if the defendant could prove that he had no "predisposition" to sodomize, that is, he was not *identified* as homosexual, even if he had committed the *act*.⁹² Many courts allowed evidence to be admitted, from incriminating evidence regarding past homosexual acts⁹³ to exculpatory evidence from psychiatrists and family members that supported the defendant's claims of heterosexuality.⁹⁴ Other government bodies, such as the INS, also targeted "gay" as descriptive of a personality type, rather than of an act, by connecting acts to identity.⁹⁵ As Foucault suggests, the overarching umbrella of identity became the primary mechanism of control, which could not easily be relinquished. This becomes apparent in the First Amendment context, where speech and association, rather

90. For more on how these constructions did ultimately control sexuality, see JAY HATHEWAY, *THE GILDED AGE CONSTRUCTION OF MODERN AMERICAN HOMOPHOBIA* (2003); LEILA J. RUPP, *A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA* 79-129 (1999); and sources cited *supra* note 21.

91. William Eskridge notes that "[t]he Jennings case is the only one [he] ha[s] found where the defendant won with an entrapment defense . . ." ESKRIDGE, *GAYLAW*, *supra* note 2, at 88.

92. *Id.*

93. While not presented as part of an act-identity dynamic, Eskridge provides several such examples. *Id.* at 89-92.

94. *Id.*

95. See *Canaday*, *supra* note 25, at 377 ("In the final view of the Court, homosexuals were a type of people, not a set of free-floating practices from which no conclusions about identity could be drawn."); Hunter, *supra* note 89, at 1698 (describing the shift "from a brain disease model to a developmental personality model" in the military and Congress). Notably, Justice Douglas's dissent, while quoting Kinsey and appearing to problematize the notion that homosexuals comprised a distinct group on one hand, also unproblematically referred to the homosexual as "the product of an arrested development." *Boutilier v. INS*, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting). The resulting, very confused, opinion left commentators with the impression that "he kept finding quotes that he wanted to slap into his work." MURDOCH & PRICE, *supra* note 76, at 123; see also *id.* at 123-30 (describing the many contradictory quotes and views Justice Douglas took in earlier drafts).

than sodomy charges, were at issue. Homosexual identity sexualized the speech and association at issue, even where no sex was involved.

For example, in *ONE*, where the Court sided with the appellants without an opinion, the magazines were themselves nonsexual—a clerk for Chief Justice Warren noted that they were “far less offensive than the average ‘men’s’ magazine . . . [and were] no more descriptive of sexual practices than dozens of magazines” like “[*Women’s Home Journal*].”⁹⁶ Accordingly, it would appear, there was no homoeroticism to brand the magazines as homosexual.

However, behind a discussion of homosexuals was the specter of the sexual act. Thus, Justice Douglas’s law clerk queried whether homosexual matters were similarly situated to heterosexual issues, because of the criminalization of sodomy⁹⁷ and because homosexual “*practices* differ from those of the ‘normal’ person.”⁹⁸ Homosexuality as an identity, therefore, was inherently sexual because of the acts with which it was associated. In turn, the identity sexualized otherwise nonsexual acts. The clerk for Chief Justice Warren admitted that, “Were the contributions dealing with heterosexual matters, it is doubtful the community would find them prurient,” and considered the possibility that because of their homosexual nature, “a stricter standard [would be] available even under *Roth*.”⁹⁹ Accordingly, even in a case without a sexual act or eroticism at issue, the mechanism of homosexual identity was ever present as a means to control sexuality.

We see a similar dynamic in activists’ engagement with nongovernment actors. Early gay organizers, for example, suggested that their readers dress and behave in gender-appropriate ways to minimize their differences from the mainstream.¹⁰⁰ Ultimately, even those who applauded this strategy suggested that this would make little difference to those who targeted homosexuals. As an African-American reader of *The Ladder*, responding to the exhortations to dress and behave well, noted:

96. MURDOCH & PRICE, *supra* note 76, at 43.

97. *Id.* at 42-44 (discussing a memo from Justice Douglas’s law clerk).

98. *Id.* at 43 (emphasis added). This by itself, though, would be insufficient to make the magazine “obscene.” *Id.*

99. *Id.* Similarly, the lower court’s opinion identified a “particular group of individuals constituting a small segment of the population [whose] . . . moral standards are far below those of the general community. Social standards are fixed by and for the great majority and not by or for a hardened or weakened minority.” *ONE, Inc. v. Olesen*, 241 F.2d 772, 777 (9th Cir. 1957).

100. *Readers Respond*, *THE LADDER*, May 1957, at 27.

As one raised in a cultural experience (I am a Negro) where those within were and are forever lecturing to their fellows about how to appear acceptable to the dominant social group, I know something about the shallowness of such a view as an end in itself . . . Ralph Bunche with all his clean fingernails, [and] degrees . . . could still be insulted, denied a hotel room or meal in many parts of our country.¹⁰¹

She thus acknowledged the majority contention that “one is different.” The trick is to somehow construct and shape this difference, so that it is not “‘wrong’ or ‘bad’ somehow.”¹⁰² A new group of activists would take on this challenge.

This Part opened by discussing the medico-religious basis of homosexual identity. This definition drew a dividing line between a homosexual minority and a mainstream majority. Activists attempted to deny this identity by challenging the existence of the division itself—the majority, they claimed, had been incorrect in defining them into minority status in the first place. Yet gay individuals often relied on these medico-religious definitions to understand themselves. Combined with the growing number of bars, publications, and nascent organizations catering specifically to the homosexual minority, this reliance would have made these disrupting efforts hard to sell within the gay community. Courts certainly did not buy the identity-disrupting claims. Thus, despite the efforts of activists, publications like *ONE* and *The Ladder* were clearly identified as homosexual—to their readers and to courts. Accordingly, if the boundary dividing gays from straights could not be erased, the only way to engage with the majority would be to graft on new meanings within existing boundaries.

III. CREATION: CONSTRUCTING LEGAL IDENTITY THROUGH THE RACE ANALOGY IN COURTS

By the 1960s, the racial justice movement had won several significant victories in courts and in public opinion. Activists from other minority groups therefore found analogizing themselves to blacks useful both in legal and extralegal contexts. An activist who took up the cause for gay rights in the 1960s, Franklin Kameny, took the lead in introducing the race-sexuality

101. *Id.*

102. *Id.* She ends with the utopian vision, “I have long since passed that period when I felt personal discomfort at the sight of an ill-dressed or illiterate Negro. . . . Someday, I expect the ‘discreet’ Lesbian will not turn her head on the streets at the sight of the ‘butch’ strolling hand in hand with her friend in their trousers . . . [F]or the moment, it still disturbs.” *Id.*

analogy into gay advocacy, as well as the racial justice movement's legacy of activism and litigation.

This was a remarkable move. Other minority groups, most famously women, analogized themselves to blacks during this period.¹⁰³ While the race-sex analogy led to much debate within the women's and racial justice movements,¹⁰⁴ in the gay rights movement, however, the use of a civil rights analogy between the situations of gays and blacks heralded an even more fundamental shift in strategy. The feminist movement had always accepted that women constituted a legal minority, treated unequally with respect to the political majority, men.¹⁰⁵ The race-sex analogy was made precisely to reinforce this already existing point. As this Part explains, gays instead *came to be* perceived as a legal minority seeking civil rights through the use of the race-sexuality analogy.

When Franklin Kameny was dismissed from his position as a government astronomer in 1957, he took his case all the way to the Supreme Court. Though other litigation on sexual orientation issues at the time focused on identity- and group-disrupting arguments, Kameny relied on the race-sexuality analogy. Section III.A. closely analyzes Kameny's pro se brief. I suggest that the analogy-based identity model in the brief helped gays engage with the majority, based on the shared premise that gays were different, by providing a distinct, bounded, minority identity and reframing this difference in a nonthreatening manner. The contexts in which race discrimination and discrimination based on sexual orientation occurred were often similar, giving greater resonance to the analogy, as Section III.B. explains.

After the Supreme Court denied certiorari, Kameny engaged with the gay rights movement. He emphasized the race-sexuality analogy outside courts, writing in magazines and giving impetus to the formation of activism- (rather than service-) oriented organizations. Section III.C. examines these efforts, showing that the identity that the race analogy elaborated was legitimating and activism-inducing, and briefly discusses early reactions to it. As Section III.D. explains, the 1970s saw both social and legal developments which further established this identity and made the self-perception of gays as a legal minority group independent of the race analogy in homosexual—and increasingly, popular—consciousness. As a result, it was no longer necessary to invoke the analogy to race every time gays were discussed as a legal minority.

103. See Mayeri, *supra* note 12.

104. See *id.* at 1052-53.

105. In fact, as Mayeri describes, the race-sex analogy was made as far back as the antebellum period. See *id.* at 1052-55.

While the comparison to blacks would continue to be made for rhetorical reasons, the analogy was no longer central to this identity, and gays became a minority group on their own terms.

A. Choosing a Bounded Identity Model

The instability of equal protection doctrine in the 1960s prevented contemporary activists from understanding how exactly they needed to make their claims. Essentially, they were in a double bind, needing to present themselves on the one hand as assimilable and nonthreatening, in order to appear sympathetic and deserving, and on the other as different and marginalized, in order to gain judicial protection.¹⁰⁶ Frank Kameny's petition to the Supreme Court, usually considered the first attempt to invoke a "politics of recognition" for homosexuals in the legal realm,¹⁰⁷ notes this problem— "[t]he government [wa]s acting vigorously and properly to secure to the Negro his civil rights"¹⁰⁸—but without articulating the particular formal characteristics of blacks that made them a deserving minority. Thus, the petition took blacks themselves as the lodestar: it conceded the existence of certain, harmless, differences between gays and heterosexuals that were analogizable to the black experience in similar contexts in order to construct gay identity, while concealing other differences that would make the identity appear intimidating.¹⁰⁹

The "Preamble to Arguments" section opened by presenting gays as a separate minority group, analogizing the number, and level of persecution, of "homosexuals" to that of the "Negro," "Catholic," and "Jewish minorit[ies]."¹¹⁰ This claim simultaneously accepted the majority claim that homosexuals are a different group and neutralized this claim using the analogy. After a factual and

106. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (discussing the lack of formal doctrinal criteria to identify appropriate minority groups).

107. Eskridge, *Some Effects*, *supra* note 2, at 2169.

108. Petition for a Writ of Certiorari at 47, *Kameny v. Brucker*, 365 U.S. 843 (1961) (No. 01-676).

109. The debate about whether it was desirable for blacks themselves to proclaim a separate black identity—nationally and internationally—was ongoing even as these developments took place. For example, criticizing the "Negritude" movement, an attempt by members of the Pan-African Congress to develop a distinct black identity, Wole Soyinka wrote, "A tiger does not proclaim its tigritude, he pounces." JANHEINZ JAHN, *A HISTORY OF NEO-AFRICAN LITERATURE* 265-66 (Oliver Coburn & Ursula Lehrburger trans., 1968).

110. Petition for a Writ of Certiorari, *supra* note 108, at 14-15.

procedural discussion,¹¹¹ the petition turned to the validity of the regulation itself and defended homosexuality from the point of view of “those choosing voluntarily to engage in homosexual acts, [for whom] such acts are moral . . . good, right, and desirable.”¹¹² Here, for the first time, Kameny transported the subjective experience of individuals engaging in sexual activities with those of the same sex into the legal arena.¹¹³

As if to limit this separate and foreign identity, Kameny immediately retreated from this identity creation in three ways. First, he reverted to the early activist focus on acts rather than identity, by claiming that the moral standards used to judge certain acts were too vague to pass constitutional muster.¹¹⁴ Second, he began the longest section of the petition by emphasizing the assimilability of homosexuals, informing the Court that gays to a large extent look much like heterosexuals. The *Kameny* petition, like the *Manual Enterprises* brief, emphasized the numerosity of homosexuals, and then noted that the “most dominant characteristic [of homosexuals] is their utter heterogeneity.”¹¹⁵ Finally, Kameny used the race analogy to clinch this difference-minimization argument: he noted that “*stereotype*” often makes a homosexual, like a “Negro and . . . [a] Jew,” appear more different from the mainstream than they actually are. This causes the prejudiced to inaccurately attribute to gays stereotypical threatening identity characteristics such as an “effeminate physique and mannerism.”¹¹⁶ In reality, he argued, these differences are spurious: “[t]he average homosexual is as well-adjusted in personality as the average heterosexual.”¹¹⁷ Indeed, in some ways, homosexuals are a “group” that is much less cohesive as a minority than are racial minorities: “[i]n character traits, homosexuals, once again, are not a group [They] have no more in common than have red-heads outside their red-headedness, or six-footers outside their six-footedness.”¹¹⁸ Therefore, gay identity is not so different that gays should be denied the benefits of the “policies, practices, aims and goals of the nation, as well as . . . the most fundamental precepts of

111. *Id.* at 19-25.

112. *Id.* at 26.

113. Such subjective perspectives were rare in self-presentations of gays to outsiders. See BÉRUBÉ, *supra* note 33, at 209-10, for some of the earliest such presentations to army interrogators.

114. Petition for a Writ of Certiorari, *supra* note 108, at 26-30.

115. *Id.* at 36.

116. *Id.* at 36-37 (emphasis added).

117. *Id.* at 37.

118. *Id.* at 38.

human and individual freedom and liberty.”¹¹⁹ Thus, in the first well-known exposition of a gay legal identity, deploying the race analogy helped both to create and limit this identity. This petition provides the best exposition of the race analogy, but was, as we shall see, only one manifestation of the analogy in the movement. Ultimately, the invocation of race gave form to homosexuality as a new gay legal identity for both courts and activists, with important consequences.

B. Shared Harms—Shared Context

In making the race-sexuality analogy, early activists generally focused on those issues where the law discriminated against both blacks and homosexuals. For example, the first problems gay litigants began to address involved discrimination in employment, procedural due process, and First Amendment violations. In these areas, they were able to rely on well-established precedents in race discrimination cases.¹²⁰ To some extent, activists had no choice: as noted above, between 1950 and 1970 it was unclear from what harms the Equal Protection Clause could protect minorities, or in what areas it could ensure equality.¹²¹ Activists could only rely on doctrine from—and form analogies with—cases arising from the racial justice movement. Yet focusing on those areas in which gays were discriminated against in similar ways as blacks in particular also gave additional resonance to the analogy.

Kameny’s lawsuit, involving employment discrimination, is one such example. Similarly, in the area of First Amendment protections, the right of association was established in *NAACP v. Alabama ex rel. Patterson*,¹²² where the Court held a subpoena of NAACP membership lists to be invalid. It reaffirmed this right in *Gibson v. Florida Legislative Investigation Committee*,¹²³ which overturned a lower court decision holding the Miami NAACP in contempt for refusing to disclose the names of its members to the Johns Committee of Florida.¹²⁴ Activists used these decisions to reassure members of gay rights

119. *Id.* at 55.

120. Eskridge, *Some Effects*, *supra* note 2, at 2161-69.

121. Siegel, *supra* note 106, at 1484-89.

122. 357 U.S. 449 (1958).

123. 372 U.S. 539, 557-58 (1963).

124. Eskridge, *Challenging*, *supra* note 2, at 866. The Johns Committee (formally the Florida Legislative Investigation Committee) was a committee of the Florida Legislature established in 1956. Like the U.S. Senate Permanent Subcommittee on Investigations chaired by Senator McCarthy, the purpose of the Johns Committee was to target communists, homosexuals, and subversives in state government, public education, and elsewhere. *See*

organizations who used pseudonyms within their organizations,¹²⁵ as well as the regular readership of the various homophile magazines, who feared public disclosure of their names.¹²⁶ Finally, most important for the rank-and-file gay man or African-American were the procedural due process protections that the Court began to demand of the police.¹²⁷ Interestingly, often it was individuals who belonged to both racial and sexual minorities that were targeted by the police, as William Eskridge has described.¹²⁸

Furthermore, activists and organizations agitating for gay rights were familiar with the civil rights movement and the harms blacks faced. For example, the ACLU became involved in LGBT issues after Kameny organized discussions between the ACLU and gay rights activists. Its reports describing procedural irregularities specifically discussed the problems of blacks and gays within the same publication.¹²⁹ Edward Sagarin himself had long been acquainted, politically and otherwise, with the difficulties of black Americans. In 1933, the radical National Student League sent him, with two classmates, to observe the Scottsboro trial in Alabama.¹³⁰ Similarly, in 1950, a year before the publication of *The Homosexual in America* (under the pseudonym of Donald Webster Cory), Sagarin co-authored *The Negro in American Business*, focusing on issues of discrimination African-Americans faced in employment, the concept of separate versus integrated economic models, and other areas.¹³¹ Other key activists such as Randy Wicker and Barbara Gittings had a history in

Michael Gannon, The Reubin O'D. Askew Inst., *Crises That Have Faced Florida from Statehood in 1845 to the Present*, in DEMOCRACY AND THE ECONOMY IN FLORIDA AT A TIME OF CRISIS 6, 8-9 (2002).

125. Eskridge, *Challenging*, *supra* note 2, at 866 n.211.

126. Cf. Mayeri, *supra* note 12, at 1067-68, 1070 (discussing employment and jury service as concrete contexts in which women and blacks were discriminated against).

127. Eskridge, *Challenging*, *supra* note 2, at 830-31.

128. See *id.* at 832-36.

129. See, e.g., ACLU OF GA., POLICE PROCEDURES IN ATLANTA (1966) (on file with author).

130. Duberman, *supra* note 36, at 61; see also Stephen O. Murray, *Donald Webster Cory (1913-1986)*, in BEFORE STONEWALL: ACTIVISTS FOR GAY AND LESBIAN RIGHTS IN HISTORICAL CONTEXT 333, 336 (Vern L. Bullough ed., 2002) (discussing Cory's numerous affairs with African-Americans, which some have concluded made him especially sensitive to their plight).

131. ROBERT H. KINZER & EDWARD SAGARIN, THE NEGRO IN AMERICAN BUSINESS: THE CONFLICT BETWEEN SEPARATION AND INTEGRATION (1950); Duberman, *supra* note 36, at 66; Murray, *supra* note 130, at 334. The book shows familiarity with analogizing blacks to other minorities, among other characteristics that would appear in Cory/Sagarin's book the following year. See, e.g., KINZER & SAGARIN, *supra*, at 135-36.

the racial justice movement.¹³² Seeing the similarities of the harms suffered by both gay and black individuals, it was easy for these individuals to analogize the claims of both groups.

Finally, some commentators of the period concentrated not on the harms of the minority, but rather on the “harms” the majority was forced to suffer in the name of equal protection: enabling African-American rights, for example, harmed whites’ right to associate freely.¹³³ While the majority could be forced to forego *some* privileges in the name of equality, it was unclear how large a sacrifice the law could demand. Accordingly, activists touched on the fact that the burdens the majority would have to bear in the name of gay rights were minor compared to those it bore for racial justice to justify their claims. Kameny, for example, characterized the social harms caused by the acceptance of homosexuality as less than those of preventing racism, noting that while the “force of Federal troops” overwhelmed “the public . . . in Little Rock” over the issue of integration, “[t]here will be no riots in the streets if homosexuals are no longer fired from the government service; no government buildings will be blown up[,] . . . no need to call out troops[,] . . . no mass resignations or boycotts”¹³⁴

While the harms gays faced were similar to those of blacks, they were not identical. Accordingly, the like-race analogy limited gay claims—it would be unconvincing for gays to claim protections based on their similarity to blacks if that protection was from a set of harms that blacks did not experience. Thus, as we shall see in Part IV, the race analogy not only determined the extent to which gays admitted their difference from the majority, and the way they portrayed this difference, but also what harms they could claim protection from.

C. *Constructing New Self-Perceptions*

The audience for the race-sexuality analogy was not just courts. Ultimately, the force of the analogy was felt, not through litigation, which was limited by a lack of activism in the community, but rather in its ability to invoke the activist legacy of the racial justice movement for new leaders and rank-and-file gays and lesbians. The verisimilitude of the analogy altered individual gay self-perceptions from that of religious outcasts and medical case studies to those of members of a political minority seeking legal rights. Slowly, Mattachine-like

132. See *infra* Section III.C.

133. See Siegel, *supra* note 106, at 1484-89.

134. Petition for a Writ of Certiorari, *supra* note 108, at 51.

service-oriented models of organization gave way to activism-oriented rights-seeking organizations. The formation of these organizations, in turn, paved the way for new conceptions of homosexuality in popular consciousness.

After deposing Hay, the new *Mattachine* eschewed legal action for service and education, relying on existing models of homosexuality. However, readers of the contemporary gay magazines were familiar with the activist nature of the civil rights movement and the status of blacks as a legal minority. Kameny began contributing to these magazines after the Supreme Court rejected his challenge, and exploited this familiarity to encourage activism and help reformulate gay identity. He began by criticizing other writers' focus on science and education. Psychiatry was irrelevant as "[gays] ha[d] been *defined* into sickness."¹³⁵ Unlike the gay movement so far, "[t]he Negro is not engrossed in questions about the origins of his skin color, nor the Jew in questions of the possibility of his conversion to Christianity."¹³⁶ Similarly, we must "start off with the fact of the homosexual and his homosexuality and his right to remain as he is," just "as a Negro and as a Jew" have the right to retain these qualities.¹³⁷

This argument led to a fiery response from Florence Conrad, who was prominent among the older generation of lesbian leaders. Discussing a recent resolution by the *Mattachine* Society of Washington (MSW) which stated that homosexuality was not a disease, she argued that advocates should avoid "militant and unsupported assertions" in areas in which the public "do[es] NOT consider the homophile movement as experts."¹³⁸ Rather, strategies by which researchers are brought "into informative personal contact with a broader cross-section of homosexuals" were desirable to educate both them and the public.¹³⁹ Kameny responded by insisting that this research was pointless and that explicit positions needed to be taken: he noted that blacks, for example, had not benefited from medical research on equality between the races, but had rather done a "superb job of 'selling'!" their equality.¹⁴⁰ Similarly,

135. Franklin E. Kameny, *Does Research into Homosexuality Matter?*, THE LADDER, May 1965, at 14 (emphasis altered).

136. *Id.* at 18. Thus, ironically, before the Court was persuaded by arguments presented in *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), that immutability should be *made* an issue, Kameny was arguing precisely for the irrelevance of immutability of the single defining characteristic of a group.

137. *Id.* at 19.

138. Florence Conrad, *Research Is Here To Stay*, THE LADDER, July-Aug. 1965, at 15.

139. *Id.* at 21.

140. Franklin E. Kameny, *Emphasis on Research Has Had Its Day*, THE LADDER, Oct. 1965, at 10, 12-13 (emphasis added). In full, Kameny's assertion was,

instead of relying on medical research regarding homosexuality, “a group like the Washington Mattachine which considers itself a civil liberties organization in major part . . . MUST have a formal position” that homosexuality is not a disease.¹⁴¹

Kameny continued by inventing new slogans such as “Gay is Good” in deliberate counterpoint to “Black is Beautiful.”¹⁴² By framing gay rights as similar to racial justice, Kameny tapped into the activism of the civil rights movement to end an exclusive focus on “education” and “social services” in favor of legal action.¹⁴³

In doing so, he provided a whole new perspective to other activists. As Barbara Gittings, one of the most well known leaders of the movement, noted:

My thinking didn’t change until Frank Kameny came along and he said plainly and firmly and unequivocally that homosexuality is no kind of sickness or disease or disorder or malfunction Whew, that knocked me for a loop. He said, “The hell with their research, the hell with their causation theories Our problem is we need our rights, let them do the research if they are so concerned about it. We shouldn’t be helping them with it. We have to go out and get our rights.” And it was a revelation. This was a whole new philosophy.¹⁴⁴

These activists, such as Gittings, Ernestine Eckstein, and Randy Wicker, frequently with backgrounds in the racial justice movement, aided Kameny in

The Negro’s claim to equality—which incidentally I accept wholeheartedly—is not nearly as well bolstered by research findings as Miss Conrad implies. This is not to say that research findings show inequality, just that not nearly as much research has been done to show equality as most people believe. What *has* been done is a superb job of ‘selling’!

Id. Kameny was specifically responding to others in the movement who objected to his methods. Kameny here arguably anticipates Sedgwick’s movement of the debate from constructionism/essentialism (that is, the causes of identity) to universalizing/minoritizing models. SEDGWICK, *supra* note 17, at 40.

141. Kameny, *supra* note 140, at 11.

142. KAY TOBIN & RANDY WICKER, *THE GAY CRUSADERS* 89 (1972); Eskridge, *Channeling*, *supra* note 2, at 470; see also Claud Anderson & Rue L. Cromwell, “Black Is Beautiful” and the Color Preferences of Afro-American Youth, 46 J. NEGRO EDUC. 76 (1977) (studying how the “Black is Beautiful” slogan affected perceptions within the African-American community).

143. Franklin E. Kameny, Speech to the Mattachine Society of Washington 2 (May 1, 1964) (on file with author).

144. Manuela Soares, *The Purloined Ladder: Its Place in Lesbian History*, 34 J. HOMOSEXUALITY 27, 38 (1998) (quoting Interview by Manuela Soares with Barbara Gittings, in Phila., Pa. (1988)).

the task of making gays self-consciously seek to change the law as a minority movement.¹⁴⁵

Simultaneously, as many writers note, organizations that were activist, rather than service-oriented, began to take root and replace existing groups.¹⁴⁶ For example, Kameny created and mobilized the Mattachine Society of Washington as the first organization to perform litigation on behalf of the “homosexual community.”¹⁴⁷ Along with the ACLU, the MSW would aid in the fight for gay rights, in a similar context to that of black rights. Similarly, organizations such as Lambda Legal, which formed soon after¹⁴⁸ and whose

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145. See ROXANNA THAYER SWEET, *POLITICAL AND SOCIAL ACTION IN HOMOPHILE ORGANIZATIONS* 63 (1975) (“[L]eaders and members of the [homophile] organizations belong to a wide variety of other organizations dedicated to . . . the advancement of some oppressed minority . . .” (citations and quotations omitted)); *id.* at 121-22 (noting how organizations founded to prevent police abuse of gays most often helped racial minorities); *see also* D’EMILIO, *supra* note 21, at 172 (noting the civil rights connections of early gay rights mobilizers). Eckstein, in fact, had worked at the NAACP. *Id.*
146. See ELIZABETH A. ARMSTRONG, *FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950-1994*, at 46; *id.* at 52 (charting the growth of identity-based homophile organizations in this period); SWEET, *supra* note 145, at 45 (“[O]lder organizations, which pioneered in the formation of the movement, were forced to change to fit in with the new ideas, or they ceased to receive the active support . . . of homosexuals.”). Other methods of organization and communication were also borrowed from the racial justice movement. Direct action and confrontational methods, for example, while less directly connected to the law, also affected gay self-perception as a minority group. See ALTMAN, *supra* note 26, at 117-62. Elizabeth Armstrong and Steven Seidman suggest that these direct action, sexual liberation models sought identity-disrupting paradigms. Elizabeth Armstrong, *Crisis Collective Creativity and the Generation of New Organizational Forms*, in 19 *RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS* 361, 369, 372, 383 (Michael Lounsbury & Marc J. Ventresca eds., 2002); Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in *FEAR OF A QUEER PLANET* 105, 110 (Michael Warner ed., 1993). The accounts of Altman and Sweet, however, suggest that many of the direct action models relied upon the race analogy and upon identity-affirming paradigms such as Black Power (this despite the fact that Altman’s own project wished to disrupt identity). See ALTMAN, *supra* note 26, at 128, 140-41; SWEET, *supra* note 145, at 64; *see also* Jeffrey Escoffier, *Sexual Revolution and the Politics of Gay Identity*, *SOCIALIST REV.*, July-Oct. 1985, at 119, 145, 149 (pointing to “public identity” as a basis of the liberation movement and to the “internal conflict[s]” within the movement—between identity affirmation and disruption—that other authors ignore).
147. CONST. OF THE MATTACHINE SOC’Y OF WASH. (MSW) (1963) (emphasis added) (on file with author).
148. The Appellate Division denied its application for incorporation in 1972, but the Court of Appeals reversed in 1973. *In re Thom*, 301 N.E.2d 542 (N.Y. 1973), *rev’g* 337 N.Y.S.2d 588 (App. Div. 1972).

charter was based on the Puerto Rican Defense Fund,¹⁴⁹ understood themselves as “seek[ing] to function for gay people in the same way the NAACP Legal Defense and Educational Fund, Inc. has functioned for black people.”¹⁵⁰ In a detailed contemporaneous organizational study, Roxanna Thayer Sweet similarly pointed to a myriad of other new organizations that took root at the time, connecting them to the legacy of the racial justice movement.¹⁵¹ These organizations also reached audiences beyond legal actors: they not only litigated, but also created publicity that encouraged debates over gay rights in legitimacy-enhancing legal terms. Thus, even though no *legal* action followed a raid upon a gala held by the Council on Religion and the Homosexual in 1965 as all charges were dismissed, historians point to the publicity surrounding the event as significant.¹⁵²

As Elizabeth Clemens notes, “[A]s a group . . . adopts a specific model of organization, it signals its identity both to its own members and to others. Models of organization are part of the cultural tool kit of any society and serve expressive or communicative as well as instrumental functions.”¹⁵³ Several authors have noted that public interest organizations in the early 1970s were well respected—their activities possessed a perceived legitimacy, both in the legal profession and beyond.¹⁵⁴ Not every group, however, could take

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149. JUDITH A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 60 (2000).
150. Brief for Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae, in Support of Petition for Certiorari at 2, *Enslin v. North Carolina*, 425 U.S. 903 (1975) (No. 75-897); see also *Thom*, 301 N.E.2d at 545 (noting that Lambda’s petition was “substantially identical to that of Puerto Rican Defense Fund”).
151. Sweet notes that activist gays in San Francisco, for example, had begun to define themselves as “members of a minority group” analogous to racial groups during this period. SWEET, *supra* note 145, at 47.
152. CAIN, *supra* note 149, at 55-56.
153. Elisabeth S. Clemens, *Organizational Repertoires and Institutional Change: Women’s Groups and the Transformation of U.S. Politics, 1890-1920*, 98 AM. J. SOC. 755, 770-71 (1993); see also Robin Stryker, *A Political Approach to Organizations and Institutions*, in 19 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 169, 179-80 (Michael Lounsbury & Marc J. Ventresca eds., 2002) (describing how activists mobilize institutional models “as a symbolic resource”).
154. Robert Rabin points to contemporary law journal discussion of public interest law, which “heralded . . . ‘public interest lawyer[s]’ . . . as an encouraging manifestation of social consciousness among young attorneys as well as a healthy antidote to the ills of the pluralistic political system.” Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 208 (1976). Yves Dezalay and Bryant Garth, along with Ann Southworth, also point to the symbolic message of public interest lawyering, in other contexts. Yves Dezalay & Bryant G. Garth, *Constructing Law out of Power: Investing in Human Rights as an Alternative Political Strategy*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 354 (Austin Sarat & Stuart Scheingold eds., 2001); Ann Southworth, *Conservative*

advantage of this model and the legitimacy it produced: as Clemens notes, “[c]ultures have rules about who should organize in what way and for what purposes; consequently, the choice of a conventional model by an unconventional group may [not] produce . . . efficacy.”¹⁵⁵ Using the race analogy, gay rights activists were able to frequently claim the right to utilize these organizational forms.¹⁵⁶ In turn, these organizations engaged in activism, which to some onlookers both within and outside the gay community resembled racial justice advocacy and contributed to the changing perception of homosexuals.¹⁵⁷ These groups helped reinforce gays’ affirming self-perceptions and arguably even had an influence on mainstream perceptions of the gay movement.

A series of wide ranging interviews that Dana Rosenfeld has carried out with elderly gay individuals lends support to the connection between the race analogy and self-accepting models of homosexuality among nonactivists. Rosenfeld’s interviewees explain that before the 1960s, homosexuality was perceived critically, by themselves and others, through the models of religion and medicine. They date the availability of “accredited” rights-based models of homosexual identity to the mid- to late 1960s,¹⁵⁸ when Kameny first wrote. The sole exception among her interviewees, Leonard, dates his self-acceptance based on an individual rights concept of homosexuality to the 1950s, which he connected with his involvement in the racial justice movement.¹⁵⁹

The fora where the analogy was discussed were therefore frequently nonlegal. Through the use of the race analogy, however, Kameny and others sought (and, as we now know, were able) to make gays *see* themselves as a

Lawyers and the Contest over the Meaning of “Public Interest Law,” 52 UCLA L. REV. 1223, 1252 (2005).

155. Clemens, *supra* note 153, at 770.

156. This was seen in the legal battle over the approval of Lambda Legal’s charter, where the analogy to the Puerto Rican Defense Fund drew the ire of the Appellate Division of the New York State Supreme Court. CAIN, *supra* note 149, at 60.

157. ARMSTRONG, *supra* note 146, at 53-54.

158. ROSENFELD, *supra* note 26, at 63. While Rosenfeld does mention one exception where another individual developed an “accredited” identity through interaction with the civil rights movement in the 1950s and analogized himself to the oppressed blacks of his acquaintance, *id.* at 68, 70, she notes the irrelevance of this individual perspective for the collective identity of the group, *id.* at 72. Sweet, whose work was written in 1968, SWEET, *supra* note 145, at i, dates the “homophile movement” to 1964-1965, when gays “increasingly began to define themselves as members of a minority group [comparable to] other minority groups of ethnic or racial bases,” *id.* at 45.

159. ROSENFELD, *supra* note 26, at 68, 70.

group fighting for legal rights in the image of African-Americans, rather than as individuals trying to understand themselves and educate others through medical and theological research. Ultimately, this would encourage activism within the community.

D. Doctrinal Developments and the Stabilization of Identity

Soon, however, activists no longer needed to invoke the race analogy every time they wished to speak of gays as a legal minority. As doctrine developed, minority groups more broadly became understood both formally and actually in general terms, as evincing certain indicia of suspectness such as trait-immutability, political powerlessness, and histories of discrimination. The lodestar became these categories, rather than racial identity, though African-Americans remained the quintessential suspect class. Simultaneously, extralegal developments in the gay rights movement consolidated its members' sense of minority status independently of the racial justice movement, as briefs from this period demonstrate. Also, while blacks and gays were often burdened in similar ways, there were also points of disanalogy which discouraged a focus on the analogy. Finally, courts themselves were not receptive to the race-sexuality analogy, which further discouraged exclusive reliance upon it.

1. Doctrinal Developments: A Formal Minority Group

Serena Mayeri has pointed out that as the women's movement progressed, it became clear that women's interests were implicated in contexts untouched by the civil rights movement. Furthermore, as the Court began to limit the remedies available for race-based discrimination, women's rights activists began to decrease their dependence on the race analogy.¹⁶⁰ Accordingly, women's rights activists did not always rely on direct, rhetorical comparisons of sex discrimination to racial discrimination in court. Rather, in the foundational sex discrimination case of *Reed v. Reed*,¹⁶¹ the plaintiffs, represented by Ruth Bader Ginsburg, described minority status using "abstract" factors such as trait-immutability, political powerlessness, and

160. Mayeri, *supra* note 12, at 1076-77 ("[R]acial analogies became hazardous to feminists when the racial baseline legal remedy did not comport with their conception of appropriate remedies for sex discrimination in a particular case. . . . [ACLU Women's Rights Project (WRP)] briefs [in 1970s cases after *Frontiero*] relied upon arguments independent of the race parallel, stressing the Supreme Court's new sex discrimination jurisprudence without making an explicit bid for the recognition of sex as a suspect classification.").

161. 404 U.S. 71 (1971).

histories of discrimination.¹⁶² Formally, these characteristics were independent of the race analogy. In actual fact, however, they were firmly based in a comparison with race, since their significance lay in their being attributed to African-Americans. Soon, however, they gained formal significance in Supreme Court doctrine on their own terms. Groups (including blacks) were not legally recognized minorities because of their resemblance to another group; technically, they were minorities because they possessed the relevant characteristics.¹⁶³ This would lay the groundwork for gay activists' reliance on these categories rather than directly on the analogy.

While women's rights activists proffered formal criteria of suspectness to the Court in a bid to extend the logic of antidiscrimination to areas untouched by the racial justice movement (but before the Court had accepted this argument), those considering gay equality suggested similar criteria in an academic context and stopped focusing on the race analogy. A *Yale Law Journal* note¹⁶⁴ and a *Journal of Family Law* comment¹⁶⁵ on gay marriage, for example, advocated that the Court use a formal characteristics approach. Like women's rights advocates, the authors were unsure how the Court would approach an area of litigation untouched by the racial justice movement. As of 1973, as the articles note, the Court did not always apply the reasoning of the race cases to other areas.¹⁶⁶ Furthermore, family rights were not a typical locus for racial justice litigation.

Thus, while the articles suggested that it would be desirable for the Supreme Court to apply strict scrutiny to antigay discrimination, they did not rely on the direct rhetorical comparison between blacks and gays that Kameny used. Instead, they engaged in a doctrinal construction of what constituted a suspect class,¹⁶⁷ based on the familiar notions of immutability, control over

162. Mayeri, *supra* note 12, at 1075.

163. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

164. Note, *The Legality of Homosexual Marriage*, 82 *YALE L.J.* 573 (1973). Reva Siegel identifies the authors of the note as S.T. Perkins and A.J. Silverstein. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 *CAL. L. REV.* 1323, 1400 n.232 (2006).

165. Arthur J. Silverstein, Comment, *Constitutional Aspects of the Homosexual's Right to a Marriage License*, 12 *J. FAM. L.* 607 (1972-1973).

166. Note, *supra* note 164, at 575; Silverstein, *supra* note 165, at 611-15.

167. This is so even though they were unsure what the criteria would be. The *Yale Law Journal* note explains, "The Supreme Court has never explicated its grounds for declaring certain classifications to be inherently suspect," and instead based its analysis on Justice Marshall's dissent from *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). Note, *supra* note 164, at 575. The brief in an early marriage case appears to agree with the

classification, history of discrimination, and lack of political power. Even if the locus of discrimination involved (family rights) was not rhetorically comparable to the areas in which African-American litigants generally filed suit, groups possessing the formal characteristics deserved protection. Instead of relying on the similarity of contexts and loci of discrimination described above,¹⁶⁸ or a point-by-point comparison to a particular group, the authors suggested that the comparison be mediated through abstract legal categories. Later in 1973, the Court formally endorsed this approach.¹⁶⁹ Since then, other academic writers have similarly focused on the formal criteria of suspectness, ignoring or deemphasizing the race analogy.¹⁷⁰ This emphasis on abstract criteria rather than analogies aided gay litigants in the bid for an independent identity, without reliance on the race analogy.

2. *A Gay Movement*

These developments were significantly aided by social changes. The uprising at the Stonewall Inn consolidated the gay activism that Kameny had encouraged and deepened its sense of community; a new generation of activists came to the fore. As gays became more secure in their group status and their legal and political activism, the use of the race analogy declined in litigation—not a single brief related to gay issues filed with the Supreme Court in the early 1970s referred to the analogy.¹⁷¹ While it had been politic for gay activists to

Perkins and Silverstein analysis: “the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied . . . in this case . . . they tend to merge.” Jurisdictional Statement for Appellants at 12, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027); see also Silverstein, *supra* note 164, at 611 (“[T]he Supreme Court has not been explicit as to its ground for labeling classifications as suspect.”).

168. See *supra* Section III.B.

169. See *supra* note 163.

170. The cases in which this has occurred are too numerous to mention here. Articles that fully explore the argument for sexual orientation as a suspect class include Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); and Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984).

171. In addition to the brief in *Nelson*, see Jurisdictional Statement, *supra* note 167, and the petitioners’ brief in *Enslin*, see Petition for Writ of Certiorari, *Enslin v. North Carolina*, 425 U.S. 903 (1975) (No. 75-897) (standing in contrast to the Lambda amicus, see *supra* note 150), see also Petition for Writ of Certiorari, *Singer v. U.S. Civil Serv. Comm’n*, 429 U.S.

develop a narrative of an independent minority status distinct from the mainstream, they soon understood this status on its own terms without continued reliance on the race analogy.

Thus, in briefs filed to the Supreme Court in the 1970s, mini-histories of the discrimination that *homosexuals* as a group had experienced since time immemorial became regular. In ACLU litigation, references to the ban on sodomy in Justinian's Code to establish this history, for example, became almost perfunctory.¹⁷² Furthermore, activists articulated their relationship with the heterosexual majority independently, without looking to that between blacks and whites. In *Baker v. Nelson*, petitioners advanced "hypotheses" for earlier forms of discrimination by the majority due to their "fear and ignorance," not of *minorities* in general, but of "all *sexual* matters."¹⁷³ Simultaneously, they criticized this majority outlook from the point of view of "psychiatr[y] and sociolog[y]," which were bringing about a change in the majority's "attitude."¹⁷⁴ Thus, the appellants implied, since the ignorance of the majority regarding sexuality and homosexuals had decreased, gays deserved marriage rights, whatever the situation of other minorities. Thus, gays acknowledged that the causes of homophobia were different from and independent of the origins of racism and that the status of gays as a minority group was therefore not contingent on that of blacks.

3. *The Failure of Analogies*

Race-based analogies had generally failed in courts, discouraging activists from within and outside the gay rights movement from emphasizing the analogy. In the context of the race-sex analogy discussed further below, courts often discounted direct comparison between race and sex, relying more upon formal categories. Equal protection cases such as *United States v. Virginia* demonstrate the refusal to rely on a direct analogy. The majority opinion

1034 (1976) (No. 75-1459); Petition for Writ of Certiorari, *McConnell v. Anderson*, 405 U.S. 1046 (1972) (No. 71-978); Petition for Writ of Certiorari, *Adams v. Laird*, 397 U.S. 1039 (1970) (No. 1258); and Petition for Writ of Certiorari, *Schlegel v. United States*, 397 U.S. 1039 (1970) (No. 1257) [Hereinafter *Schlegel* Cert Petition].

172. The *Nelson* and *Schlegel* briefs in fact use the same language. Jurisdictional Statement, *supra* note 167, at 8-9; *Schlegel* Cert Petition, *supra* note 171, at 6-7.

173. Jurisdictional Statement, *supra* note 167, at 8 (emphasis added).

174. *Id.* at 8-10.

mentions “race” four times in its main text.¹⁷⁵ Twice, it is quoting the same passage of the lower court’s decision.¹⁷⁶ The remaining times, the Court uses it to highlight the *disanalogy* between race and sex claims.¹⁷⁷ The Court in *Virginia* instead relied heavily on the formal, doctrinal bases of *Reed* and *Frontiero*.

Furthermore, while women’s activists may have made what initially appeared to be a successful bid for the creation of formal categories, to avoid being limited by the areas that racial justice had touched, it appears that ultimately they were unsuccessful. In spite of the *formal* reliance on the categories in the cases after *Reed* and *Frontiero*, which avoid explicit analogical argument, Mayeri suggests that courts still allow the Equal Protection Clause to protect women only from harms similar to those blacks faced. Harms to women lacking a ready racial analogue, such as reproductive control, have been thus siphoned off into doctrinal areas where the primary focus was not equal protection or race analogies.¹⁷⁸ Equal protection arguments in those contexts have arisen only in the context of academic writing¹⁷⁹ and dissenting opinions.¹⁸⁰

To conclude, doctrinal developments, the development of a grassroots gay movement, and court reactions acted as interlocking, and mutually reinforcing, factors, which helped ultimately to make gay identity independent of the race analogy. For example, the basic elements of abstract equal protection doctrine—a focus on trait-immutability, political powerlessness, and histories of discrimination—reinforced the notion of a stable, separate identity,

175. It is mentioned once more in a footnote to explain that even strict scrutiny is not “fatal in fact.” *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

176. *Id.* at 525 (“[I]t is extremely important that [colleges and universities] deal with faculty, staff, and students *without regard to sex, race, or ethnic origin.*” (quoting *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992) (alterations in original) (internal quotation marks omitted))).

177. The disanalogy is based on “inherent differences” which exist between the sexes. *Id.* at 533 (internal quotation marks omitted).

178. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that pregnancy discrimination is not the same as sex discrimination); *Roe v. Wade*, 410 U.S. 113 (1973); Mayeri, *supra* note 12, at 1078 & n.160 (discussing *Geduldig*).

179. See, e.g., Reva B. Siegel, *Siegel, J., Concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 63 (Jack M. Balkin ed., 2005).

180. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (citing Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002-28 (1984); and Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992)).

independent of a race analogy.¹⁸¹ Similarly, a movement that confidently self-identified as gay strengthened doctrinal abstraction by decreasing reliance on concrete analogies in litigation.

However, by suggesting that later litigation provided tools to allow gay identity to stand separate from race analogies, tools which activists frequently took advantage of, I do not suggest that the use of analogies ended. Even where analogies were not explicitly present, they lurked beneath the surface of activists' arguments: as activists invoked formal criteria of suspectness, the judges, their opponents, and the activists themselves were aware of the racial justice movement's role in producing the formal categories. Because of this, even while applying abstract categories, litigants and courts even today often ultimately refer to race as an example of these categories.¹⁸² Similarly, nonlegal arguments, lacking the formal boundedness of legal claims, often engage with the analogical reasoning that underlay these indicia of suspectness.¹⁸³ Yet, even though proponents and opponents continue to use race analogies, their direct invocation became increasingly superfluous to the gay self-conception of being a distinct legal minority.

IV. THE RACE-SEX ANALOGY

Even as the gay rights movement began somewhat to detach itself from the race-sexuality analogy in the early 1970s, it became firmly reliant on the race-sex analogy. Section IV.A. describes the birth of the race-sex analogy in the gay rights movement. It points to the limited relevance of the race-sexuality analogy to family rights issues concerning gays in the 1950s and 1960s which curtailed activism in that area. However, by comparing interracial and same-sex relationships, the race-sex analogy soon allowed gays to make claims for relationship rights, as Section IV.B. explains. Yet activists still had to analogize their claims to the specific *form* of relationship rights at stake in the debate over interracial relationships, namely, marriage. Thus, the race-sex analogy specifically enabled litigation for gay marriage, rather than other forms of relationship recognition. Section IV.C. explains why the race-sex analogy remains a potent force, despite judicial resistance.

181. See, for example, the reliance on histories of discrimination, *supra* note 172, to characterize gays as a group.

182. Most recently, see, for example, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); and *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

183. The Proposition 8 debate indicates this point.

A. *Family Rights: An Area of Disanalogy*

The racial justice movement largely failed to engage with issues involving family rights, thus depriving gay activists of a ready analog in that area. As I suggest in Subsection III.B., in contexts where the race analogy had limited relevance it was often rejected and ignored: activists curtailed litigation efforts in these areas due to the lack of a racial analog. Accordingly, the gay rights movement focused upon “sexual liberty” and other concerns of generally male plaintiffs in the public sphere such as employment, and overlooked the demands of gay women relating to family issues and gender equality. While sexism contributed to this imbalance,¹⁸⁴ another cause for the shortcoming was the limited legal language made available to the gay rights movement by the racial justice movement.

Early gay male activists were hostile to the notion of family rights, suggesting that capitalism, which underlay the institution of heterosexual marriage, was responsible for antihomosexual sentiment.¹⁸⁵ This hostility reflected a broader, antimarriage sentiment among gay men that lasted through the early 1950s.

ONE magazine first touched on the issue of gay marriage in 1953 in an article by a contributing author.¹⁸⁶ The author asked, “We have a greater freedom now (sub rosa as it may be) than do heterosexuals and any change will be to lose some of it in return for respectability. Are we willing to make the trade?”¹⁸⁷ The issue of gender roles was not lost upon him, causing him to ask what the implications of one of the partners being “kept” or being expected to reproduce would be.¹⁸⁸ Even though the article merely considered the question of marriage, without unequivocally supporting it, the article received an overwhelmingly negative response from gay readers. One such reader suggested that it was desirable that “the deviate [homosexual] . . . be able to evolve institutions which suit his needs. I doubt if marriage will do that. What is marriage? It is an heterosexual concept buttressed and blessed by the Church and State.”¹⁸⁹ Several other letters and at least one article noted that because of promiscuity and the lack of procreation in gay relationships, marriage would be

184. See Eskridge, *Channeling*, *supra* note 2, at 827.

185. KATZ, *supra* note 40, at 394.

186. E.B. Saunders, *Reformer's Choice: Marriage License or Just License?*, *ONE*, Aug. 1953, at 10, 12.

187. *Id.* at 12.

188. *Id.* at 11.

189. Letter to the Editor, *ONE*, Oct. 1953, at 11.

an unsuitable institution for gays.¹⁹⁰ Marriage, in the only major homophile publication in 1953, had been rejected.

Later in the decade we find a slow movement towards discussions on domestic issues in both *ONE* and *The Ladder*.¹⁹¹ In 1961, discussions were held at *ONE*'s Midwinter Institute on issues gay couples faced in the limited contexts of insurance, taxes, and adoption and custody of biological children.¹⁹² However, no legal action was contemplated; demands remained limited and untranslatable into the language of a civil rights movement that had not incorporated such "domestic" concerns. There were certainly no public calls for gay marriage.

The lack of the racial analogue on relationship issues was connected to broader issues within the racial justice movement. The civil rights movement failed to take into account the needs of black (and white) women within the movement and their more "domestic" concerns. As Pauli Murray noted, in spite of black women's broad participation in the civil rights movement, "the aspirations of the black community have been articulated almost exclusively by black males. There has been very little public discussion of the problems, objectives, or concerns of black women."¹⁹³ The civil rights movement largely concerned itself with government oppression in the public sphere. Some scholars have hypothesized that this was because African-Americans, both male and female, had often experienced family life as a locus that was free from government interference and oppression.¹⁹⁴ Others suggest that early access to the public sphere was denied to black men and women alike. However, growing exposure of African-American communities to the gendered public sphere enhanced sexism in the racial justice movement.¹⁹⁵ That is, as blacks

190. Letter to the Editor, *ONE*, Oct. 1953, at 13, 15; Letter to the Editor, *ONE*, Nov. 1953, at 19; Letter to the Editor, *ONE*, Nov. 1953, at 21, 21-22; *The 3rd Choice*, *ONE*, Apr. 1954, at 4, 4-6.

191. Del Martin, *Me vs. Insurance*, *THE LADDER*, June 1958, at 12; *Report on Social Service*, *ONE*, Feb. 1955, at 17; Helen Sanders, *Me vs. Taxes*, *THE LADDER*, May 1958, at 10.

192. *Homosexual Bill of Rights Sizzles and Fizzles*, *THE LADDER*, Mar. 1961, at 8, 11, 18.

193. Pauli Murray, *The Liberation of Black Women*, in *AMERICAN IDENTITIES: AN INTRODUCTORY TEXTBOOK* 187, 188 (Lois P. Rudnick et al. eds., 2006).

194. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419, 1439-40, 1470-71 (1991) (noting that unlike white women, "[w]omen of color . . . often experience the family as the site of solace and resistance against racial oppression"); see also Mayeri, *supra* note 12, at 1075 ("Unlike the employment and jury service contexts, where race and sex discrimination overlapped in concrete, practical ways, discriminatory estate administration policies and spousal military benefits had no immediately evident racial counterparts.").

195. See Diane K. Lewis, *A Response to Inequality: Black Women, Racism, and Sexism*, 3 *SIGNS* 339, 341-43, 349 (1977); see also Constance M. Carroll, *Three's a Crowd: The Dilemma of the Black*

gained greater access to broader societal public life, the profoundly gendered character of that public life affected the civil rights movement. The racial movement therefore focused only on racial inequality in the public sphere, dismissing women's rights groups to make claims for rights within the private sphere on their own.¹⁹⁶

Moreover, insofar as the racial justice movement did touch on "domestic" issues by targeting antiscegenation laws,¹⁹⁷ the analogy was difficult to make. Antiscegenation laws prevented blacks from marrying whites. However, heterosexual marriage laws prevented gays from marrying *each other*. This was not a case of prohibited intermingling between the majority and minority group. Thus, it is hardly surprising to find activists pointing to domestic issues as the one place where gay rights lacked an analogy. As one (probably male) writer noted:

But for some problems besetting the homosexual there is no analogy among other minorities. How does one reply, for example, to the homosexual who wants to know how he can perpetuate his "marriage" with another homosexual? There are no text books on homosexual marriage to which one can go for the answer, and most "authorities", when confronted with such a question, merely reply that homosexual relations are illegal and degenerate anyway and the best solution lies in marrying a charming young girl and rearing a family.¹⁹⁸

Unsurprisingly, those who made the race analogy and emphasized activism often ignored issues involving family rights. Conversely, those who wrote in *The Ladder* and spoke at the Midwinter Institute on the domestic problems gays faced ignored the race analogy and took a nonlitigation based position.

B. Family Rights as Marriage Rights and the Race-Sex Analogy

Arguments against antiscegenation laws gained purchase within the gay rights movement in the early 1970s, but through the race-sex, rather than the

Woman in Higher Education, in *ACADEMIC WOMEN ON THE MOVE* 173 (Alice S. Rossi & Ann Calderwood eds., 1973).

196. Cf. Susan Okin, *Is Multiculturalism Bad for Women*, in *IS MULTICULTURALISM BAD FOR WOMEN* 7, 21-22 (Susan Okin ed., 1999) (explaining why using the "private sphere" to enable multiculturalism is problematic for women's equality); Reva B. Siegel, "The Rule Of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2150-74 (1995) (explaining how legal reform in wife beating was undermined by a privacy dynamic).

197. See, e.g., *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

198. See *Report on Social Service*, *supra* note 191, at 17.

race-sexuality, analogy. Until the early 1960s, women's rights groups had refrained from emphasizing the similarities between sex and race discrimination in the civil rights movement.¹⁹⁹ Prominent activists and academics rejected the early discussion of the race-sex analogy.²⁰⁰ When the issue of sex discrimination was discussed in the mid-1960s, a memo that prominent African-American women's rights activist Pauli Murray had written discussing the analogy was widely circulated. However, during the Title VII debates, the discussions on the Senate floor emphasized the *disanalogies* between race and sex.²⁰¹ ACLU lawyers in the mid-1960s also rejected the analogy.²⁰²

However, various circumstances led to a revision of opponents' positions by 1970.²⁰³ For example, in 1970, the ACLU reversed its position on the Equal Rights Amendment (ERA).²⁰⁴ In the same year, Ruth Bader Ginsburg's ACLU amicus brief in *Reed v. Reed* (and other briefs of amici in the case) were grounded in the race-sex analogy.²⁰⁵ Simultaneously, in the debate over the Equal Rights Amendment (ERA), women's groups reversed their position on the issue and analogical arguments became common.²⁰⁶

199. Mayeri, *supra* note 12, at 1054-55, 1072.

200. *Id.* at 1061-62.

201. *Id.* at 1064-65.

202. *Id.* at 1066.

203. *Id.* at 1071.

204. ACLU, Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff (Mar. 7, 2006), <http://www.aclu.org/womensrights/gen/24412pub20060307.html>.

205. Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1970) (No. 70-4); Brief for the National Federation of Business and Professional Women's Clubs as Amicus Curiae Supporting Appellant at 8, *Reed*, 404 U.S. 71 (No. 70-4) ("[S]ex discrimination takes an even greater economic toll than racial discrimination."); Brief of the City of New York as Amicus at 16, *Reed*, 404 U.S. 71 (No. 70-4) ("[T]he net effect of sexual, like racial classifications is the same."); Joint Brief of Amici Curiae American Veterans Committee and NOW Legal Defense & Education Fund at 10-12, *Reed*, 404 U.S. 71 (No. 70-4) ("Because sex and race discrimination are so similarly based and motivated, they deserve similar constitutional scrutiny and treatment."). For a full discussion, see Mayeri, *supra* note 12, at 1073.

206. See *Hearings Before the S. Comm. on the Judiciary on S.J. Res. 61 and S.J. Res. 231*, 91st Cong. 74-75 (1970) (statement of Professor Paul A. Freund); Mary Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U. L. REV. 281, 313 (1971); Rita E. Hauser, Address at the Annual Meeting of the American Bar Association (Aug. 10, 1970), in *Symposia: Edited Proceedings of the Annual Meeting Program of the Section of Individual Rights and Responsibilities*, HUM. RTS., July 1971, at 54, 62 ("I also believe that the proposed Amendment, if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes.").

The newly popular race-sex analogy suddenly allowed the gay rights movement to gain purchase on the limited intersection between the racial justice movement and domestic issues. As ERA opponents pointed out, if *Loving v. Virginia*²⁰⁷ stood for the proposition that formally equal prohibitions on racial intermarriage were unconstitutional discrimination, and if the ERA made it clear that sex discrimination was as impermissible as racial discrimination (even if formally applied equally to both sexes), then sex discrimination in the case of marriage was impermissible, and one could not force an individual to marry someone of the opposite sex.²⁰⁸ Thus, when Matthew Stark, an ACLU Board Member, asked the Board in 1970 to litigate what would be the first same-sex marriage case, on behalf of University of Minnesota Law School student body president Jack Baker, the race-sex analogy would ultimately undergird the case.²⁰⁹

Yet, the “relationship” recognition that activists in the racial justice movement sought was of a particular kind. As Ariela Dubler notes,²¹⁰ the ultimate goal was always to validate interracial marriage, even when the particular law being challenged prohibited only interracial cohabitation (as in *McLaughlin v. Florida*²¹¹). Thus, *marriage* epitomized the meaning and legacy of the push for interracial relationship recognition—*Loving* ultimately became its symbol, for courts and commentators. For gay litigants, *Loving* and the race-sex analogy were the only vehicles that could carry forward formal arguments for gay relationship recognition. However, they inevitably carried these arguments towards claims for marriage. It is unclear whether the litigation context created and channeled activists’ preferences and perceptions about relationships towards marriage or whether it merely provided a means to argue for existing (though recently created) preferences for marriage rather than less formal relationships. Either way, while later activists sought incremental benefits,²¹² litigation in the early 1970s was aimed at gay marriage.²¹³

207. 388 U.S. 1 (1967).

208. See *supra* note 206.

209. Stark was also Board President and later the Executive Director of the Minnesota ACLU. The National ACLU rejected Stark’s proposal, but the MCLU went forward. Telephone Interview with Matthew Stark (Apr. 21, 2009).

210. Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1179–80 (2006).

211. 379 U.S. 184 (1964).

212. This incremental litigation, often though not always aimed to attain marriage, was suggested by later commentators. See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage,”* 66 FORDHAM L. REV. 1699, 1711 (1997) (detailing similar calls for gradualism, though not always to gain marriage);

By 1973, cases seeking marriage recognition were filed in Kentucky, Minnesota, New York, and Washington,²¹⁴ four law review pieces were (independently) written,²¹⁵ and a cert petition was filed with the Supreme Court.²¹⁶ The arguments of these early cases and much of the commentary were squarely based in the race-sex analogy. As the relationship recognition movement gained traction in subsequent decades, these cases and arguments set the stage for later activism around family rights issues. Furthermore, as the events in California discussed in the Introduction indicate, the race-sex analogy becomes further reinforced by the race-sexuality analogy on the marriage issue: marriage rights have become part of the gay rights movement just as *Loving* made them part of the racial justice movement. Ultimately, while many today see the focus on marriage as a serious blow to the movement,²¹⁷ it is important

Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 27 (1994) (calling for gradualism in the marriage-seeking process).

213. Stark notes that after all these years, the race analogy issue “melled” in his mind with the more tangible benefits of marriage in the litigation. Telephone Interview with Matthew Stark, *supra* note 209.
214. Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). *Anonymous v. Anonymous*, 325 N.Y.S.2d 449 (Sup. Ct. 1971), was only heard at the trial court level and was not a consensual same-sex marriage: the plaintiff had been unaware of his partner’s sex.
215. In addition to Note, *supra* note 164; and Silverstein, *supra* note 165, see also James W. Harper & George M. Clifton, *Heterosexuality: A Prerequisite to Marriage in Texas?*, 14 S. TEX. L. REV. 220 (1972), which primarily addresses the voidability of a mistakenly performed same-sex marriage and considers the issue of what constitutes marriage from a policy and law-as-preference-shaping perspective; and Ian McColl Kennedy, *Transsexualism and Single Sex Marriage*, 2 ANGLO-AM. L. REV. 112 (1973), which discusses gay marriage from a policy perspective. Other law review articles that followed, such as Catherine M. Cullem, Note, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 TULSA L.J. 141 (1979); Case Comment, *Homosexual “Marriage”: The Definition of Marriage Precludes Permitting Marriage of Same-Sex Couples*. Singer v. Hara, 11 Wn. App. 247, 522 P.2d 1187, cert. denied, 84 Wn. 2d 1008 (1974), 10 GONZ. L. REV. 292 (1974); Comment, *Homosexuals’ Right To Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979); and Leo Sullivan, Note, *Same Sex Marriage and the Constitution*, 6 U.C. DAVIS L. REV. 275 (1973), rely upon the criteria for suspect scrutiny that the Court announced in *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which were unavailable to those who filed their lawsuits in 1971 and 1972 and are therefore irrelevant for a discussion of their strategies.
216. Jurisdictional Statement, *supra* note 167.
217. See Yoshino, *Covering*, *supra* note 2, at 848 & n.426. See also Katherine Franke’s “fear[s] that *Lawrence* and . . . gay rights organizing . . . have created a path dependency that privileges privatized and domesticated rights . . . while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality.” Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004). She

not to lose sight of these early litigation dynamics that helped establish this focus in the first place.

C. *The Continued Reliance on Analogies in Marriage Litigation*

Activists today still use the race-sex analogy in marriage litigation, and, like their 1971 counterparts, generally enjoy limited success in doing so.²¹⁸ The reliance in 1971 on the analogy in the face of judicial unresponsiveness is perhaps understandable. The lack of an independent ERA²¹⁹ or sex discrimination jurisprudence at the time meant that the reach of sex discrimination constitutional law tracked that of race discrimination law. Accordingly, both women's rights activists and litigants who argued for same-sex marriage based on a sex discrimination argument were committed to the race-sex analogy.

Since then, however, legal doctrine has established the unconstitutionality of sex discrimination on its own terms, independent of the analogy. Given this fact, the sex discrimination inherent in prohibitions on gay marriage should be unconstitutional in its own right. Thus, the grounds for this dependence and the grounds of judicial rejection of the analogy invite further exploration. Modern reliance on the *Loving* analogy is based primarily on two factors. First, gay plaintiffs use *Loving* to emphasize that they are denied the benefit that was granted in *Loving*, namely marriage. Second, the analogy is the only effective way to rebut the equal application argument.²²⁰

According to this argument, laws prohibiting interracial marriage applied equally to whites and blacks, and therefore did not violate equal protection principles. The Supreme Court famously rejected this argument in *Loving*, establishing the case as a fundamental piece of racial justice jurisprudence. Other areas of equal protection doctrine involving race have been formalized

suggests that "*Lawrence* offers us no tools to investigate 'kinds of intimacy [and sex] that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation.'" *Id.* at 1416 (alteration in original) (quoting Lauren Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547, 558 (1998)).

218. Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 *HARV. J.L. & GENDER* 461, 473 (2007) (describing efforts in Hawaii, Massachusetts, and California).

219. In *Singer*, a state ERA had actually been passed. Commentators who opposed the Washington state ERA did raise the specter of gay marriage, a fact that the plaintiffs raised in their case as evidence of legislative intent favorable to gay marriage. The Washington Supreme Court rejected their argument. *Singer*, 522 P.2d at 1190-91 & n.5.

220. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d 1, 28 (N.Y. 2006); *Singer*, 522 P.2d at 1187.

into, for example, criteria of suspectness; yet in *Loving*, the Court did not formalize its rejection of the equal application argument as an abstract principle such as “arguments that the equal application of a rule within each class upholds equal protection will always be rejected.”

Gay activists must therefore depend on the circumstances and specific example of *Loving* itself, rather than on formal rules or categories, to make their claims. Yet judges have consistently refused to accept this parallel: they have found against gay marriage claims based on what they take to be differences between the dynamics of race and sex and disanalogies between *Loving* and gay marriage cases.²²¹ Their rejection of the analogy and the equal application argument can be traced to two main issues.

1. *Stereotyping vs. Subordination vs. Classification*

By the 1970s, opponents of affirmative action had begun to argue that the Constitution prohibited both classification and subordination on the basis of race. However, several commentators have suggested the primary thrust of the race discrimination opinions in the 1950s and 1960s such as *Loving* was that the *subordination* of one race to the other violated equal protection principles.²²² Others have argued that in the sex discrimination context, the antisex-stereotyping principles form the analog to antisubordination principles from

221. Readers will note that I do not discuss two recent cases in which gay activists gained heightened equal protection scrutiny, namely *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), as these cases rely on the “legal categorical abstractions” of doctrine referred to earlier, rather than upon the race analogy per se. I also do not detail recent marriage cases that do not add to the argument of this Note; for them, see Widiss et al., *supra* note 218, at 461.

222. Siegel, *supra* note 106, at 1513-32 (describing the contemporary “[c]onstructing [of] an [a]nticlassification [p]rinciple”); see also, e.g., Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1009 (2002) (“Current Supreme Court doctrine understands equal protection as an antidiscrimination principle rather than an antisubordination principle”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 37 (1991) (“The modern Court has moved away from . . . notions of race that recognize the diverging historical experiences of Black and white Americans In place of these concepts, the Court relies increasingly on the formal-race concept of race, a vision of race as unconnected to the historical reality of Black oppression.”). But subliminally, antisubordination concerns may still lie at the heart of the issue. See Siegel, *supra* note 106, at 1538-44.

the race context: rules that *stereotype*, rather than simply classify, are particularly problematic.²²³

Therefore, Deborah Widiss and her co-authors have recently argued that to rely on *Loving*, whose opinion was based on antisubordination concerns, activists must emphasize anti-stereotype arguments. Today's legal arguments in favor of gay marriage implicitly include both anticlassification and antistereotyping arguments. Anticlassification arguments were present in the original *Nelson* brief, which claimed that "restrictive marriage statutes facially discriminate on the basis of sex" by classifying individuals seeking to marry based on their sex.²²⁴ The sex stereotyping argument explains that "the rationales offered as justifications for the sex-based classifications in these statutes [prohibiting homosexual marriage] rely upon sex stereotypes" such as heteronormative parental roles and modeling of appropriately gendered behavior.²²⁵ Widiss, Rosenblatt, and NeJaime observe that the anticlassification argument, especially in its reliance on *Loving*, "draws normative strength from, and vindicates values associated with, the sex stereotyping argument"; they suggest coordinating the two arguments in legal briefs, to "strengthen[] the analogy between the sex discrimination argument in these cases and the race discrimination argument in . . . *Loving*."²²⁶

However, herein lies the problem. Judges do appear to realize that *Loving* was based on antisubordination principles. However, they have declined to equate racial subordination and sex stereotyping. In *Hernandez v. Robles*, which declined to extend marriage rights to gay couples in New York, for example, the court held that the parallel between race discrimination and marriage laws as sex discrimination was inapt, because women are not subordinated "as a class."²²⁷ Similarly, in *Baker v. State*, the court suggested that discriminatory marriage laws simply do not subordinate an identifiable group sufficiently as a class based on sex. It noted that "[i]t is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about

223. See Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449-50 (2000); Widiss et al., *supra* note 218, at 486-87.

224. Cf. Widiss et al., *supra* note 218, at 462 (describing the arguments).

225. *Id.*

226. *Id.* at 462, 479-84.

227. 855 N.E.2d 1, 11 (N.Y. 2006).

gender roles or anxiety about gender-role confusion.”²²⁸ After all, “[p]laintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy.”²²⁹ The refusal to equate stereotype with subordination is the first point of judicial pushback.

2. *Private/Fundamental Issues vs. Public/Secondary Issues*

Second, judges suggest that *Loving* dealt solely with race discrimination, a public phenomenon, and did not reach the private sphere of marriage and any sex discrimination therein.

The litigants, and thus the courts, in the movement to end laws against miscegenation took traditional forms of marriage for granted. Katherine Franke has discussed in some detail how Reconstruction-era African-American communities adopted traditional hetero-patriarchal marriage forms to gain public social status.²³⁰ The litigants in the movement to end miscegenation laws a century later inherited this orientation towards conventional marriage forms. As a result, these litigants (and as a result, the courts that heard their cases) effectively separated and publicized the racial overtones of the marriage laws they challenged from other, more intimate, established characteristics, which they did not question. These characteristics of the institution—for example, the formalization of intimacy, or gender hierarchies—remained uninterrogated and unexposed. For example, as Ariela Dubler notes, there was

228. 744 A.2d 864, 880 n.13 (Vt. 1999).

229. *Id.* at 887 (arguing that *Loving* showed subordination of a sort not demonstrated in the case).

230. Katherine Franke suggests that the focus on marriage in the African-American rights movement, accompanied with a rejection of the radically different kinship structures which resulted from slavery, was strategic:

Many African-American leaders were quite aware that white northerners and southerners alike used marriage as a barometer of their people’s fitness for freedom, and they urged poor blacks to adopt the domestic patterns common among elite whites. This, they argued, would help convince the nation that ex-slaves deserved the rights and privileges of freedom.

Franke, *supra* note 217, at 1422 (quoting LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* 56 (1997)). Indeed, “it was not uncommon for ‘respectable’ members of the community to turn in their erring brothers and sisters to white legal authorities if they were known to be cohabitating without marrying, maintaining more than one spouse, or violating the obligations of marital monogamy.” *Id.* at 1423.

no question that *McLaughlin v. Florida*, a case of cohabitation rather than of marriage, was merely a stepping stone to the brass ring of marriage in *Loving*—actors did not even stop to question the value of the cohabiting relationship in its own right or the value of seeking the right to intermarry as an ultimate goal.²³¹

The antimiscegenation cases, therefore, ironically reinforced divisions between what was considered private and axiomatic about marriage, and its more public elements, which are up for debate—for example, race discrimination in the institution. Thus, contemporaries argued that *Loving* did not bring into question fundamental “domestic” tenets of the marital relationship that implicated issues of sex. “In *Loving* and *Perez*,” said the Washington Court of Appeals in *Singer*, “the parties were barred from entering into the marriage relationship because of an impermissible racial classification.”²³² The race of the individuals was not a quality intrinsic to the marital definition, however; nor would that definition be altered by ending prohibitions on interracial marriage.²³³ In “*Loving* . . . [the] [C]ourt[] did not change the basic definition of marriage as the legal union of one man and one woman [T]he Fourteenth Amendment did not require any change in the definition of marriage”²³⁴

231. See, e.g., Dubler, *supra* note 210, at 1169 (discussing the orientation toward *Loving* and away from *McLaughlin* as evidence of “law’s generally myopic view of marriage as the only form of sexual intimacy tied to one’s place in the public, constitutional order”); *id.* at 1180. Tucker Culbertson argues that *Loving* was wrongly decided because instead of destroying marriage, it simply modified it. Tucker Culbertson, *Arguments Against Marriage Equality: Commemorating & Reconstructing Loving v. Virginia*, 85 WASH. U. L. REV. 575 (2007). He argues:

[T]he Supreme Court should have condemned Virginia’s homophobic Heterosexual civil marriage laws as an infringement not upon the fundamental right to marry, but rather upon the Lovings’ rights to *the ends of marriage*—such as erotic pleasures and communities of care, which for ease I refer to as the rights to sex and family. Doing so would avoid the nearsighted and naturalizing defense of marriage *as such*, which mistakes a governmental means for a constitutional end, and thus perpetuates and legitimates discrimination against those whose forms of sex and family remain unrecognized and/or prohibited by civil marriage regimes.

Id. at 577.

232. *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974).

233. *Id.*

234. *Id.* at 1192 n.8. Certainly, marriage between whites and blacks was recognized as interracial marriage, however illegitimate, for centuries. See Peter W. Bardaglio, “Shameful Matches”: *The Regulation of Interracial Sex and Marriage in the South Before 1900*, in *SEX, LOVE, RACE* 112, 114 (Martha Hodes ed., 1999) (noting the rare existence of interracial marriages in the seventeenth century). The question as to whether these were marriages appears never to have been raised.

Similarly, courts today treat *Loving* as a case that, in retrospect, is part of the broader legacy of racial justice that was being discussed in the public sphere. As the court in *Hernandez* explains:

This country fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.²³⁵

Loving was a piece of a grand historical narrative, taking place on the public stage of the nation, not within its relationships and homes. Other hierarchies or forms of discrimination were therefore not brought into question by that case.

Thus, judges continue to reject the idea that the private stereotypes of sex and marriage discrimination are analogous to the public classification or subordination implicit in race discrimination. Sexual hierarchies within the family, perpetuated through marriage, are ultimately a private matter.

Thus, while race-sexuality analogies are not directly applied to link discrimination on the basis of race and sexual orientation today, race analogies continue to affect the gay rights movement. Yet, even as courts ignore and sidestep the analogy—the reader will note that gay activists have been unsuccessful in making “like race” claims and were more successful in cases emphasizing assimilation, discussed in Part II, rather than the disassimilationist cases in Part III—the disassimilationist notion of gays as a legal minority with civil rights claims has stabilized and stuck within the gay community.

235. 855 N.E.2d. 1, 8 (N.Y. 2006). Few other unsympathetic courts explain the differentiation from *Loving*. *Nelson* simply stated that “there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.” 191 N.W.2d, 185, 187 (Minn. 1971). Similarly, *Andersen v. King County* relies on the fact that most other states had rejected the race analogy, 138 P.3d 963, 977 (Wash. 2006), and on *Nelson* and *Baker v. State*, *id.* at 989, for its rejection of the equal protection (as distinguished from due process) analogy to *Loving*. *Jones v. Hallahan*, 501 S.W.2d 583 (Ky. 1973), did not discuss the analogy. *Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006), merely refers us to the “fact-specific background” of *Loving*. Other grounds that have been identified include the lack of intent to discriminate based on sex. See *Conaway v. Deane*, 932 A.2d 571, 601-02 (Md. 2007); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting); *Baker v. State*, 744 A.2d, 864, 880 n.13 (Vt. 1999); Craig M. Bradley, *The Right Not To Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 29, 32-33 (1994).

CONCLUSION

This “legal” identity, created over time, coexists with other dynamics within the movement, rather than wholly replacing them. Even in the decades after the race analogy became “abstracted,” courts generally remained unwilling to reward gays with the heightened scrutiny sought by those putting forward equal protection arguments.²³⁶ Activists responded by combining minority-based arguments with assimilationist due process arguments redolent of the early phase of the gay rights movement: these arguments claim a denial of the right to perform certain *acts*, without claiming minority group status. This trend continued into the 1980s, with litigants in cases such as *Bowers v. Hardwick* completely avoiding equal protection claims, relying purely on privacy-based analysis;²³⁷ those same arguments later became the basis for the victory in *Lawrence v. Texas*.²³⁸

The legal audience to such claims slowly became more receptive: during the consideration of *Bowers*, one of Justice Marshall’s clerks observed in a memo to the Justice, in striking contrast to Chief Justice Warren’s clerk in *ONE*,²³⁹ “THIS IS NOT A CASE ABOUT ONLY HOMOSEXUALS . . . ALL SORTS OF PEOPLE DO THIS KIND OF THING.”²⁴⁰ A complete discussion

236. Appellate courts have generally denied heightened scrutiny for gays. See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995) (denying heightened scrutiny), *rev’g* 860 F. Supp. 417 (S.D. Ohio 1994); Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992) (same), *rev’g* 759 F. Supp. 1543, 1545 (D. Kan. 1991); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (same), *rev’g* 668 F. Supp. 1361 (N.D. Cal. 1987); Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988) (according sexual orientation heightened scrutiny), *vacated and aff’d on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

237. The brief for the respondent in *Bowers* concentrates completely on the due process argument, invoking the backing of “society whose constitutional traditions have always placed the highest value upon the sanctity of the home against governmental intrusion or control.” Brief for the Respondent at 4, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140). Of the LGBT impact litigation groups that filed amicus briefs (including Lambda Legal, GLAD, GLAAD, etc.), only the National Center for Lesbian Rights used the equal protection argument. Compare Amicus Curiae Brief on Behalf of the Respondents by Lambda Legal Defense and Education Fund, Inc. et al., *Bowers*, 478 U.S. 186 (No. 85-140), with Brief Amicus Curiae for Lesbian Rights Project, Women’s Legal Defense Fund, et al., *Bowers*, 478 U.S. 186 (No. 85-140).

238. 539 U.S. 558 (2003) (invalidating sodomy laws nationally).

239. See *supra* note 99 and accompanying text.

240. Memorandum from Daniel C. Richman to Justice Thurgood Marshall on *Bowers v. Hardwick*, quoted in Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1.

of this trend is beyond the scope of this Note.²⁴¹ Suffice it to say that federal appellate courts have begun to show greater receptiveness to heightened scrutiny arguments, not through minoritizing equal protection arguments, but through due process arguments flowing from *Lawrence*.²⁴²

The legacy of the analogy, in aiding the creation of a gay identity as members of an independent minority group, has, however, remained alive and well. It is thus important to remember, even when criticizing the race-sexuality analogy analytically, that gay legal identity is historically constructed largely around black legal identity. Gays began to fight against discrimination in similar contexts as blacks. Ultimately, developments in the racial justice movement affected how gays saw the harms they suffered, placing them on the road to marriage equality. To be sure, the analogy has its limitations, which have been explored by courts and commentators. However, it may be critical for the success of the gay rights movement in the immediate future for those invested in the struggle for gay—and racial—equality to at least understand, if not approve of, the historic connections of the gay rights and racial justice movements. This Note has sought to create a better understanding of this analogy’s past to help others analyze how future use of the analogy may affect the movement.

Second, we should realize that the creation of a gay legal identity was neither a whim nor an accident, but a deliberate effort to enter into dialogue with a majority that had already constructed, and engaged gays within, a certain stereotype of homosexuality. To castigate the creation of a gay “identity” is perhaps theoretically understandable, but historically problematic. Gays had to carefully construct a gay identity, limiting it along the lines of the racial analogy in order to mobilize themselves and engage the majority in the first place, even if in so doing they limited the harms they were able to address. Even if gay reliance upon the race analogy in courts declined²⁴³ as gay identity stabilized on its own terms, and as equal protection doctrine formalized and became more hostile to racial analogies, its use in legal and public activism outside the courts has continued.

Third, as racial litigation extended to new areas, gays initially used it to initiate litigation in domestic rights. However, the only litigation the analogy would support was marriage litigation, resulting in a focus on marriage rights.

241. For a fuller treatment, see, for example, Eskridge, *Some Effects*, *supra* note 2, at 2169–75.

242. *Cook v. Gates*, 528 F.3d 42, 51–58 (1st Cir. 2008) (explaining that equal protection arguments guarantee only rational basis scrutiny, but due process arguments demand heightened scrutiny); *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (same).

243. Indeed, gay use of the equal protection progeny of the race analogy has itself declined in favor of due process arguments.

This focus has continued in recent years, along with a reliance on the race analogy, sometimes with disappointing results. However, the historical context in which marriage litigation began must be remembered, even as it is criticized.

Finally, this Note began by pointing out tensions between the African-American and gay communities. Hopefully, this Note's demonstration that gay reliance on the race analogy has not been simply opportunistic and cynical, but an undertaking that has created and transformed gay understanding of themselves as a minority group and of the harms they face, will cause non-gay critics of the analogy to view it, and the gay rights movement, more favorably. Similarly, gays must be cautious about seeking to cast blame upon the African American community for recent events. *The Advocate* reminds us that "African-American leaders . . . worked hard on our behalf" in the battle over Proposition 8, "even though white gay people have never, en masse and in force, showed up to support them and their issues."²⁴⁴ However, the inspiration and support the racial justice movement has provided gays goes further. Like "[t]he work of our black allies," the racial justice movement itself "created an immense reservoir of opportunity and possibility for [our] movement going forward. [This alliance] should not be squandered for the cheap satisfaction of finding a scapegoat."²⁴⁵

Ultimately, group identity plays a major role in a group's relationship with and utilization of the law. Many groups have internalized social stigma: they fail to recognize oppression, and, not realizing there is anything to say, keep silent in the face of injustice. The use of the analogy helped modify gay identity to make us want to take action, to seek rights, and most importantly, to recognize our self-worth. Furthermore, for every difference that critics point to, early activists have demonstrated that there are many similarities between blacks and gays: we must therefore recognize and remember it as a manifestation and demonstration of our common humanity. Thus, even if analogical and identity based arguments channel preferences, limit options, and must ultimately be discarded, they should also be valued as a means for initially providing a voice to those that we, as a society, have constructed and stigmatized into anesthetized silence.

²⁴⁴ Michael Joseph Gross, *Pride and Prejudice*, THE ADVOCATE, Dec. 16, 2008, at 30, 31.

²⁴⁵ *Id.*