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Undercover Other

Angela Onwuachi-Willigt†

INTRODUCTION

Every now and then, I find myself passing.¹ Not passing in the conventional sense as white, though.² After all, I have what most people would refer to as a chocolate complexion, African features, and kinky hair dreadded into locks.³ I am clearly black in appearance, and yet I sometimes

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1. See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 283 (2003) [hereinafter KENNEDY, *INTIMACIES*] (defining “passing” as “a deception that enables a person to adopt specific roles or identities from which he or she would otherwise be barred by prevailing social standards”).

2. See R. Richard Banks, *Intimacy and Racial Equality: The Limits of Antidiscrimination*, 38 HARV. C.R.-C.L. L. REV. 455, 462 (2003) (reviewing KENNEDY, *INTIMACIES*, *supra* note 1, at 283) (noting that “[p]assing is usually undertaken by light-skinned blacks” who conceal their blackness). People pass or have passed, racially, for a variety of reasons. For example, some black people have temporarily passed as Whites on a daily basis to work in certain jobs, then returned home to their communities at the end of each day. See KENNEDY, *INTIMACIES*, *supra* note 1, at 289-90, 314-15 (describing how some Blacks passed during the nine-to-five workday in the 1930s-1950s); Mary Coombs, *Interrogating Identity*, 11 BERKELEY WOMEN’S L.J. 222, 233 (1996) (reviewing JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* (1995)) (same); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1711 (1993) (describing how her grandmother passed to work in a department store). Additionally, Walter White, former leader of the NAACP, passed as white to investigate lynchings in the South. See KENNEDY, *INTIMACIES*, *supra* note 1, at 287-89.

3. See Trina Jones, *Shades of Brown, The Law of Skin Color*, 49 DUKE L.J. 1487, 1493, 1515-22 (2000) (“[G]ross morphological differences (e.g., the broadness of the nose, the fullness of the lips, the curl of the hair) have and continue to be used to delineate racial categories and to assign persons to racial groups.”). Locks, also called dreads or dreadlocks, “are matted ropes of hair which will form by themselves if the hair is allowed to grow naturally without the use of brushes, combs, razors or scissors for a long period of time.” Wikipedia, *Dreadlocks*, <http://en.wikipedia.org/wiki/Dreadlocks> (last visited Jan. 13, 2006).

feel that I need more than my appearance to confirm my membership and acceptance within the black community. To earn this acceptance, there are ways in which I am required to “pass” to fit within my own racial identity group.

One may wonder why my appearance alone does not confirm my blackness. Why and how, as someone who looks black in outward appearance, could I be confronted with the challenge of also having to pass as black? The answer lies in the fact that I am married to a white man, a life choice that, as I explore more fully below, destabilizes my racial identity in the eyes of some people.⁴ But I begin this Essay with my own in-group passing not to discuss the problem of prejudice and discrimination against interracial couples or the continuing problem of racism in the United States.⁵ Rather, I raise my in-group passing as a means of addressing a prevalent attitude in the black community that rejects an analogy between contemporary legal bans on same-sex marriages and once-existing bans on interracial marriages on the ground that gays, lesbians, and bisexuals, unlike Blacks,⁶ can pass—in this case, as heterosexual—and thereby avoid discrimination.⁷

4. My claim is that “passing” has many manifestations, only one of which has to do with a member of a socially disadvantaged group pretending to be a member of a social group with greater social capital. With regard to passing based on race, in this Essay I identify the concept of “in-group passing,” which embraces the notion that, because racial group membership is conferred not just based on skin color but also on social behavior, there are identity performance factors which can be used to confirm or destabilize one’s authentic membership within their own racial group. Passing within this context, in-group passing, involves hiding, even if only temporarily, or remaining silent about those behaviors or circumstances that would undermine one’s in-group status. Out-group passing, on the other hand, involves hiding or remaining silent about those characteristics or qualities that tend to keep one outside of various dominant groups in society. See *infra* notes 66-103 and accompanying text.

5. For a discussion of these issues, see Randall Kennedy, *How Are We Doing With Loving?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 820 (1997) [hereinafter Kennedy, *How Are We Doing?*].

6. Throughout this Essay, I capitalize the word “Black” or “White” when used as a noun to describe a racialized group. I do not capitalize the terms “black” or “white” when used as adjectives. Also, I prefer to use the term “Blacks” to the term “African-Americans” because the term “Blacks” is more inclusive. Additionally, “[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies.” Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4 (1992).

7. For the sake of simplicity, I primarily discuss interracial couples as though they are all heterosexual, black-white couples and use the terms “heterosexual” and “straight” interchangeably. In making my arguments, I in no way mean to render black gays, lesbians, and bisexuals invisible in this discourse. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1473-1514 (2000) [hereinafter Carbado, *Rights*] (analyzing the ways in which black gays, lesbians and bisexuals have been excluded from the public gay identity in the debate about the “Don’t Ask, Don’t Tell” policy). Of course, the prohibition on same-sex marriages affects all gays, lesbians, and bisexuals regardless of their racial identity. Likewise, the same issues of racially passing as “black” in a gay or lesbian couple apply, even where the black person’s family and community have been accepting of such person’s sexuality. The scope of this Essay is limited, however, and therefore does not address these complex issues.

This Essay joins recent debates concerning the legality of same-sex marriages by exploring the similarities between same-sex and interracial marriages. It unpacks the claim that the ability of gays, lesbians, and bisexuals to pass as heterosexual distinguishes their struggle from the black civil rights movement, such that there is no viable comparison between the ban on same-sex marriages and former bans on interracial marriages. Deconstructing this argument is especially important today, given that in 2004 eleven states passed constitutional amendments that define marriage as between only a man and a woman⁸ and that racial minorities, in particular black Americans, played a critical role in passing such amendments.⁹ Many Blacks who oppose the use of an analogy between the former prohibition on interracial marriage to the current one on gay marriage argue that while Blacks and other racial minorities cannot hide their racial status to escape racism, gays, lesbians, and bisexuals can hide their sexuality to escape discrimination based on sexual orientation.¹⁰ I often respond to this criticism by asking, "If you could hide your blackness, would you want to be forced to do so? If compelled to conceal whom you love, would you

8. See Victor C. Romero, *An Other Christian Perspective on Lawrence v. Texas*, 45 J. CATHOLIC LEGAL STUDS. (forthcoming 2006) (manuscript at 7 n.27) (detailing the successful passage of marriage amendments in eleven states during 2004); Jack Balkin, *Bush and the Fear Factor*, HARTFORD COURANT, Nov. 7, 2004, at C1 (asserting that President Bush's reelection in 2004 was "forged from fear: . . . above all, fear of homosexuals," and finally moved the Republican Party "beyond race baiting"); Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2004, at P9 (noting that ten of the eleven states—Arkansas, Ohio, Georgia, Kentucky, Mississippi, Michigan, Montana, North Dakota, Oklahoma, and Utah—passed the amendments by wide margins); Larry McShane, *Amendment Banning Same-Sex Marriage Passes in 11 States*, S.F. CHRON., Nov. 3, 2004, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/11/03/politics0419EST0627.DTL> (noting that measures in eight of the states—Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, and Utah—also banned civil unions). On November 8, 2005, Texas became the eighteenth state to amend its constitution to ban same-sex marriages. See Janet Elliott, *Same-Sex Marriage Ban Wins OK*, HOUSTON CHRON. AUSTIN BUREAU, Nov. 8, 2005, available at <http://www.chron.com disp/story.mpl/elect2005/3446405.html>.

9. President Bush garnered a fairly important increase in votes from Blacks in 2004, partially because of his stance against same-sex marriage. See Chip Johnson, *Flash Point for Black Churches*, S.F. CHRON., Sept. 27, 2004, at B1 (stating that Pastor Earl Crawford of Oakland, California, "is part of a statewide coalition of black ministers voting for the president because of his stance on same-sex marriage"); Caryle Murphy & Hamil R. Harris, *Thousands Rally on the Mall to Protest Same-Sex Marriage*, WASH. POST, Oct. 16, 2004, at B1 (describing how the issue of same-sex marriage is causing Blacks to change their traditional political alignments); see also Sonji Jacobs, *Sermons Focus on Election: Many Stand on Issues, Others Less Outspoken*, ATLANTA J.-CONST., Nov. 1, 2004, at 1D (discussing the ways in which black ministers supported Bush during the 2004 election because of his stance against same-sex marriage); cf. Joseph Brown, *Gay-Bashing Only Discredits Men of God*, TAMPA TRIB., Aug. 21, 2005, at 1 ("Yes, the same-sex marriage debate has created a strange alliance between some black preachers and white conservatives.").

10. See, e.g., Ellyn Ferguson, *Many in Black Community Reject Civil-Rights Comparison*, STATESMAN J. (Salem, Or.), Oct. 24, 2004, at 1A (describing arguments by black religious leaders that discrimination against gays, lesbians, and bisexuals and against Blacks is not comparable because gays, lesbians, and bisexuals can remain closeted for their entire lives).

want to do so?"¹¹ This Essay looks past these initial questions to explore the concept of passing and how Blacks, even those who are visibly black as that term is defined by skin color, often pass to avoid discrimination both within and outside of the black community. It then juxtaposes the costs Blacks, gays, lesbians, and bisexuals pay for the concealment of their respective identities, and concludes that the arguments against the validity of comparing interracial marriage with same-sex marriage are not without any flaws.

Part I of this Essay describes policy-based critiques of a *Loving*-based argument for legalizing same-sex marriage, which one scholar coined, "playing the *Loving* card,"¹² meaning to analogize racism that motivated anti-miscegenation statutes struck down by the Supreme Court in 1967 to anti-gay animosity that motivates contemporary opposition to same-sex marriages.¹³ In particular, this Part focuses on critiques of this analogy by black religious leaders based on the ability of gays, lesbians, and bisexuals to pass as heterosexual. Part II briefly describes social constructionist theories of identity and explores the various ways in which Blacks and gays, lesbians, and bisexuals may pass, both in a physical and a social sense, to avoid forms of discrimination—by their own groups as well as by majority groups. Part III then clarifies the relevance of *Loving* to the same-sex marriage debate by exploring the similarities between passing in the contexts of interracial and same-sex relationships and argues that social constructions of race and sex have encouraged both types of passing. This analysis destroys the argument that same-sex couples should be treated differently than interracial couples merely because individuals in same-sex couples have the option of passing as heterosexual. Finally, this Essay defends the legal recognition of same-sex marriages on the basis of these parallels.

I

PLAYING THE LOVING CARD

[C]an the discrimination faced by a predominantly white constituency [the gay community] ever be equivalent to the systemic mistreatment of black people for much of America's history?

11. Professor Patricia Cain posed a similar question to a group of female academics. She said, "I ask those of you in the audience who are heterosexual to focus on an important love relationship in your life. . . . I ask you: how would you feel about this relationship if it had to be kept utterly secret?" Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 207 (1989-90).

12. David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 B.Y.U. J. PUB. L. 201, 204 (1997).

13. See *Loving v. Virginia*, 388 U.S. 1 (1967); Coolidge, *supra* note 12, at 204 (arguing that there are "problematic aspects of the analogy" and that "those advocating 'same-sex marriage' . . . are 'playing the *Loving* card'").

-Ellyn Ferguson¹⁴

For years, advocates of same-sex marriage have invoked the Supreme Court's decision in *Loving v. Virginia*¹⁵ to support the removal of the ban on gay marriages.¹⁶ In *Loving*, Virginia citizens Mildred Jeter and Richard Loving challenged the constitutionality of the State's anti-miscegenation statutes.¹⁷ Jeter, a black woman, married Loving, a white man, in Washington, D.C., which did not prohibit interracial marriages.¹⁸ The Lovings then returned to their home in Virginia, where they were arrested, charged with leaving the state to evade the law and unlawfully residing as an interracial couple in Virginia, and threatened with the enforcement of a one-year prison sentence unless they left the state and did not return for twenty-five years.¹⁹ Ruling in favor of the Lovings and striking down Virginia's anti-miscegenation statutes,²⁰ the Supreme Court rejected Virginia's argument that the statutes did not violate the Equal Protection Clause because they equally disadvantaged both Whites and non-Whites. The Court reasoned that such a claim could not legitimate statutes that had no purpose other than to invidiously discriminate against racial minorities and maintain white supremacy.²¹ The Court also reasoned that the statutes violated the Due Process Clause because marriage was a vital individual right, which the State could not restrict by invidious racial discrimination.²²

In arguing for legal recognition of same-sex marriages, proponents have relied on the principles that the Court used to reach its decision in *Loving*. For example, supporters of same-sex marriage often have highlighted the Court's decision to strike down the Virginia statutes on due

14. Ferguson, *supra* note 10, at 1A (posing and addressing this question in her newspaper article).

15. 388 U.S. 1 (1967).

16. See Coolidge, *supra* note 12, at 202 ("For almost thirty years, there has been a spirited debate going on about the implications of *Loving* for the status and rights of same-sex couples in our society.").

17. See *Loving*, 388 U.S. at 2.

18. See *id.*

19. See *id.* Indeed, the Lovings' action of traveling to Washington, D.C. to get married is mirrored by recent actions of many long-term gay and lesbian couples, who traveled to San Francisco from all over the nation to become legally married in 2004. See Brooke Adams, *Gays Disappointed, Vow to Press for Marriage Rights*, SALT LAKE TRIB., Aug. 14, 2004, at B1 (noting that "[m]any gay couples have criss-crossed the country to take advantage of various legal recognitions of their relationships" and that approximately "4,000 couples queued up at City Hall [in San Francisco] to pick up licenses between Feb. 12 and March 11"); Robert E. Pierre & Alan Cooperman, *More Cities Supportive of Gay Marriage: Officials Say They Would Grant Licenses if They Could, But Others Urge Caution*, WASH. POST, Feb. 20, 2004, at A09 (stating that approximately 2,800 gay couples had been married in San Francisco within a few days). These marriages were later held to be void and of no legal effect. See *Lockyer v. City of San Francisco*, 95 P.3d 459, 498-500 (Cal. 2004).

20. See *Loving*, 388 U.S. at 11-12.

21. See *id.* at 10-11; see also Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61, 71 (2000) (discussing the Court's reasoning in *Loving*).

22. *Loving*, 388 U.S. at 11.

process grounds as a basis for establishing the freedom to marry as a fundamental right. In so doing, they have pointed to the following language:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.²³

This language supports a view, some gay rights advocates argue, that a state may no longer restrict the personal right to marry on the basis of other classifications, such as sexual orientation.²⁴

Advocates for gay-marriage rights also have invoked the *Loving* rationale that an "equally-disadvantaging" statute intended to maintain white supremacy violates the Equal Protection Clause. These advocates contend that statutes banning same-sex marriage similarly violate the Equal Protection Clause on the basis of *Loving* because they, too, work to maintain the inferiority of a particular class.²⁵ And, as the Supreme Court indicated in *Romer v. Evans*,²⁶ statutes that classify "homosexuals not to further a proper legislative end but to make them unequal to everyone else"²⁷ will not be deemed constitutional.²⁸ Additionally, advocates of same-sex marriage emphasize the structural similarity between *Loving* and cases regarding gay marriage, such as *Baehr v. Lewin*,²⁹ in which the Hawaiian Supreme Court relied, in part, on *Loving* to determine that strict scrutiny governed the plaintiffs' equal protection challenge against the Hawaii Marriage Law as construed and applied to withhold marriage rights from same-sex couples.³⁰ Cases such as *Baehr* demonstrate the amenability of courts to the parallel between the unconstitutionality of anti-gay

23. *Id.* at 12 (citations omitted).

24. See Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999, 1009-10 (2002) [hereinafter Ross, *Riddle for Our Times*].

25. Opponents often dismiss the analogy based on equal protection grounds as inapplicable because classifications based on race, unlike those based on sexual orientation, are subject to strict scrutiny and the mandate for racial equality in *Loving* was predicated on the Fourteenth Amendment's explicit prohibition of racial classifications. See, e.g., *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *20-21 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

26. 517 U.S. 620 (1996).

27. *Id.* at 635.

28. *Id.* at 632.

29. 852 P.2d 44 (Haw. 1993).

30. *Id.* at 61-63 (highlighting the parallel "neutrality" argument that the Court rejected in *Loving*); see also Martha Nussbaum, *Loving v. Virginia and the Literary Imagination*, 17 QUINNIPIAC L. REV. 337, 348-49 (1997) (arguing that narratives of hierarchy are important in determining whether the meaning of a law is discriminatory).

marriage laws—which appear neutral in that they apply equally against men and women—and the unconstitutionality of anti-miscegenation statutes—which appeared neutral in that they applied equally against Whites and non-Whites.³¹

The use of *Loving* to advance arguments against the exclusion of gays and lesbians from state and federal statutes governing the ability to marry³² has generated a number of legal and non-legal responses in the black community that challenge the analogy between the prohibition of same-sex marriage today and the pre-1967 ban on interracial marriages. The view of one black religious leader demonstrates the core of the opposition: “[t]he rights for which . . . African-American ancestors have died are [simply] not the same as gay rights.”³³ These black leaders reject any congruence between the civil rights of gays and lesbians and those of Blacks, because they argue that the former choose their sexuality, thus voluntarily exposing themselves to discrimination. But Blacks, the argument goes, do not

31. See Nussbaum, *supra* note 310, at 348-39; see also Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 271 (2002) [hereinafter Ross, *Sexualization of Difference*] (“Intellectually, prohibiting race discrimination in marriage statutes is a small step away from prohibiting sex discrimination in marriage statutes.”); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208-19 (1994) (same).

32. See Coolidge, *supra* note 12, at 204-05 (describing four formulations of the *Loving* analogy). In 1996, Congress enacted the Defense of Marriage Act, 1 U.S.C. § 7 (2000), which explicitly restricts marriage to unions between a man and a woman. Additionally, it provides that no state shall be required to give effect under the Full Faith and Credit Clause of the Constitution to any other state law recognizing same-sex marriage. More than two-thirds of all fifty states have passed their own version of the Defense of Marriage Act, which limits government-recognized marriages to those between a man and a woman. See William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119, 120 & n.9 (2002). Eighteen states have amended their constitutions to “define marriage as a heterosexual-only union.” Richard Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 305 (2006). One state, Vermont, enacted legislation in 2005 that permits civil unions between persons of the same sex. VT. STAT. ANN. TIT. 15, § 1201 et seq. (2005); see also *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). Most recently, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Supreme Judicial Court of Massachusetts ruled that a ban on same-sex marriage violated the state constitution. Likewise, in March of 2005, the California Superior Court ruled that statutes that limit marriage to unions between a man and a woman do not rationally relate to a legitimate state purpose and violate the state equal protection clause. *In re Coordination Proceedings, Special Title [Rule 1550(c)], Marriages Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

33. Lawrence Aaron, *Black Clergy Speak Out Against Gay Marriage*, N. J. MEDIA GROUP, Oct. 6, 2004, at L11; see also EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY AND GAY PEOPLE’S RIGHT TO MARRY* 164-65 (2004) (detailing similar comments). Of course, numerous black leaders, such as Julian Bond, Carol Moseley Braun, Jocelyn Elders, the Reverend Al Sharpton and the now-deceased Coretta Scott King all have expressed their support for gay marriage in the name of civil rights. Ferguson, *supra* note 10 (quoting Julian Bond, chairperson of the NAACP, as stating, “‘Civil rights is a battle for rights denied. Of course the gay-rights movement is a civil rights movement.’ . . . ‘There’s no requirement that the discrimination be equivalent to that faced by blacks’”); see also 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 (1996).

choose their status—their race—and thus have no choice but to suffer irrational discrimination.³⁴ According to Professor Odeana Neal,

Many African-Americans resent the comparison [between their struggle for equality and the gay rights movement] because they feel that homosexuality is behavioral. . . . Some feel that sexual orientation may be hidden, and is hidden, when it serves lesbians and gay men politically, economically, or socially to do so: They argue that since race cannot be hidden in the same way, the two forms of discrimination are in no way comparable. Others feel that most gay men and lesbians—and particularly white gay men—do not suffer from the type of economic, educational, and social disadvantages that many African-Americans do and therefore should not be entitled to the same type of legal protections. Yet another group feels that comparisons to the African-American struggle for civil rights is ahistorical.³⁵

In 1993, Colin Powell described what he perceived as the difference between black and gay civil rights issues: “[s]kin color is a benign, non-behavioral characteristic[while s]exual orientation is perhaps the most profound of human behavioral characteristics.”³⁶ For Powell, “[c]omparison of the two [was] a convenient but invalid argument.”³⁷ Ten years later, Reverend Jeff Beacham of the Faith Alliance echoed Powell’s concerns, asserting that he was insulted by analogies drawn between the struggles of Blacks and homosexuals because “[g]ay is not something you’re born with . . . it’s a choice you make.”³⁸

The criticisms do not end here. Black leaders who oppose same-sex marriage have constructed a number of arguments against legalizing gay

34. See Carbado, *Rights*, *supra* note 7, at 1479-82 (critiquing the distinctions made by some between what is perceived as racial status and what is considered to be gay conduct—the “notion that race is a static identity and that homosexuality is a changeable lifestyle”). Personally, I do not believe that one’s sexuality is a matter of choice. Cf. WOLFSON, *supra* note 33, at 174 (noting that “few people can point to a day when they woke up and made a choice to be, or not to be, gay”). However, I do not address this issue of “choice” in this Essay, as it is beyond the scope of my argument.

35. Odeana R. Neal, *supra* note 33, at 681.

36. 139 CONG. REC. 13, 520 (1993) (statement of Senator Bachus quoting Joint Chiefs of Staff Colin Powell).

37. *Id.*; see also LEGIS. REFERENCE BUREAU, STATE OF HAW., REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW 2 (1995), available at <http://www.hawaii.gov/lrb/rpts95/sol/cpt5a.html> (“Race and gender are immutable characteristics. Clearly, sexual orientation is not in the same category—sexual orientation is known to change and is, to a large extent, behavioral. . . . Homosexual marital rights are simply not civil rights.”); 1994 JOURNAL OF THE SENATE OF THE SEVENTEENTH LEGISLATURE OF THE STATE OF HAWAII 450 (“This is not an issue about civil rights. Black’s [sic] and minorities have suffered economic hardship. They’ve been treated as second class—in the back of the bus, separate bathrooms. None of this applies here in this case. There is no discrimination of that sort. . . . There is no lack of opportunity. In fact, their incomes exceed the median income of Hawaii and the rest of the nation.”) (quoting Senator Stan Koki).

38. See Aaron, *supra* note 33; Tobias Barrington Wolff, *Different Battle, Same Struggle*, L.A. TIMES, Mar. 16, 2005, at B13 (describing the offense that many Blacks take “when people draw parallels between gay rights and the issue of race in the United States”).

unions, ranging from the need to protect traditional marriage for minorities, who often find themselves on the outside of conforming to the model of the nuclear family, to a mere desire to avoid confusion in defining marriage.³⁹ For those who reject the analogy between gay marriage and interracial marriage for one of these reasons, the proposition that one can choose whether to expose one's sexuality enables them to draw what they see as a key distinction between sexuality and race. If the expression of one's sexuality is a voluntary choice, the argument goes, gays, lesbians, and bisexuals can avoid discrimination by never coming out of the closet.⁴⁰ As Portland minister T. Allen Bethel recently asserted, unlike Blacks, gays, lesbians, and bisexuals "can stay [in the closet] their entire lives."⁴¹ Because phenotype or skin color is not a choice, on the other hand, Blacks usually cannot conceal their racial identity and thus cannot avoid the consequences of their second-class status.⁴² The idea is that while gays and lesbians, even when coupled, can pass as straight, Blacks and other minorities cannot pass because their race is visible to all.⁴³ In other words, because gays and

39. See Darryl Fears, *Gay Blacks Feeling Strained Church Ties*, WASH. POST, Nov. 2, 2004, at A3 ("As an African American whose people have not yet recovered from a form of slavery that was based upon destruction of the family . . . I believe we do not need any more confusion about what a marriage is and what a family is."). Yet, as a number of scholars have pointed out, the concept of family, for Blacks, has not historically been limited to the white, heteronormative model of family that includes only mother, father, and children. For many Blacks, the definition of family is broader, incorporating other family members and "othermothers" both within and outside of the blood line. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 178-79 (2d ed. 2000); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1247, 1290-93 (2005); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 901-10 (2003) (explaining the importance of multi-generational households in childrearing in black and Latino communities).

40. 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 (2001) [hereinafter Fajer, *A Better Analogy*] (noting that many have argued "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"); St. George Crosse, *A Disaster for American People; Homosexuals Aren't Disadvantaged; The Supreme Court and Gay Rights*, BALT. SUN, June 2, 1996, at 6F ("All you have to do is look at me to know that I am black. I cannot tell your sexual orientation by looking at you.").

41. Ferguson, *supra* note 10.

42. See *id.* In the novel *Strange Brother*, by Blair Niles, one of the characters expresses this view about the "involuntariness" of blackness, or rather the discrimination that Blacks must face. He says: "If you're black, everybody's got to know it. Can't wash yourself white, nor powder yourself white either. Even if you're light complected, somewhere there'll be something to give you away, Maybe behind your ears, or maybe the color of your fingernails." LISA WALKER, *LOOKING LIKE WHAT YOU ARE: SEXUAL STYLE, RACE, AND LESBIAN IDENTITY* xv-xvi (2001) (quoting BLAIR NILES, *STRANGE BROTHER* 28 (1991)). Of course, such arguments are faulty, because they assume that no Blacks are gay and that gays, lesbians, and bisexuals who are black are not authentically so. Carbado, *supra* note 7, at 1473-1514; cf. Fears, *supra* note 39 (asserting that the "long-standing 'don't ask, don't tell' relationship between [gay Blacks] and their churches is coming under greater strain").

43. Fears, *supra* note 39; cf. Kim Forde-Mazrui, *Live and Let Love: Self-Determination in Matters of Intimacy and Identity*, 101 MICH. L. REV. 2185, 2199-2200 (2003) (reviewing KENNEDY,

lesbians can walk down the street together without revealing their sexuality (or, as critics contend, their behavior), they do not need the same legal protections that Blacks, including those in interracial relationships, need. The argument goes: in one situation, the discrimination is avoidable; in the other, it cannot be escaped.⁴⁴

This passing/no passing distinction between race and sexuality has gained significant force over the past few years precisely because of the role that black religious leaders have played in arguing against same-sex marriage.⁴⁵ Unlike their white counterparts, these religious leaders can more freely criticize parallels drawn between gay and black civil rights without being accused of bigotry, thereby adding a certain legitimacy to conservative opposition to gay marital unions and fueling acceptance of the distinction between race as immutable and sexuality as concealable.⁴⁶ My question is: is this distinction based on the idea of concealment legitimate? An exploration of the ways in which identity is culturally constructed and performed will better enable us to answer this question. The next section, Part II, utilizes social constructionist theories of race and sex to examine the ways in which racial identity may be performed by individual Blacks and sexual identity may be performed by individual gays, lesbians, and bisexuals, both inside and outside their respective groups,⁴⁷ in order to enable passing or deception about these identities. This idea of identity performance destroys the legitimacy of the distinction some Blacks have drawn between interracial marriage and same-sex marriage, because Blacks pass just as frequently as gays, lesbians, and bisexuals.

INTIMACIES, *supra* note 1) (highlighting that much like same-sex relationships today, interracial relationships were considered unnatural and the product of mental defect).

44. As the next Part demonstrates, however, what these critics fail to see is that both situations involve discrimination, whether it be discrimination based on visible skin color or discrimination based on the way in which one visibly performs his or her identity. Additionally, they fail to acknowledge the fact that the interracial couple can pass, too; they can also simply pretend to be friends in public, although admittedly less effectively than the gay or lesbian couple because of presumed heterosexuality and the way in which people normally do not interact with each other in public across both racial and sex lines.

45. *Cf.* Coolidge, *supra* note 12, at 216, 238 (asserting that the *Loving* analogy provides the greatest rhetorical punch because it likens opponents of same-sex marriage to racial bigots).

46. See David D. Kirkpatrick, *Black Pastors Backing Bush Are Rarities, But Not Alone*, N.Y. TIMES, Oct. 5, 2005, at 15 (citing Black pastor Ken Hutcherson, who explained that “he could make statements, including criticism of gay rights, that white pastors sometimes shied away from [because] [m]ost other people are afraid to speak out because they will be called bigots”).

47. Again, I note that the two groups I am comparing—gays, lesbians, and bisexuals and Blacks—are not mutually exclusive. My comparison is in no way intended to suggest that there are no black gays, lesbians, or bisexuals or that “true” Blacks are not gay, lesbian, or bisexual. See Carbado, *supra* note 7, at 1469 (noting that “black antiracism and white gay and lesbian civil rights advocacy continues to reflect essentialized notions of black and gay identity”) (footnote omitted).

II

IM/MUTABILITY AND THE SOCIAL CONSTRUCTION OF IDENTITY

It's funny about "passing." We disapprove of it and at the same time condone it. It excites our contempt and yet we rather admire it. We shy away from it with an odd kind of revulsion, but we protect it.

-Nella Larsen⁴⁸

Identity politics have taught us that protected categories are fluid.⁴⁹ They are designed according to social meaning as well as physical attributes.⁵⁰ For example, the protected category of race, while often signaled by phenotype, is not biologically defined.⁵¹ As Professor Ian Haney López has highlighted, "There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites."⁵² Instead, race is socially constructed;⁵³ it is formed through human interactions and commonly held notions of what it means to be a person of a certain race.⁵⁴

Society imposes identities on people, either through positive and negative stereotypes that are attached to them as a result of physical appearance or the identities that they "choose" to perform in order to avoid negative treatment from others.⁵⁵ For example, Professor Frank Rudy

48. NELLA LARSEN, *PASSING* 56 (Thadious M. Davis ed., Penguin Books 1997).

49. Carolyn Tyjewski, *Ghosts in the Machine: Civil Rights Laws and the Hybrid "Invisible Other,"* in *CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY AND LAW* (Devlin & Potheir eds.) (2006) ("None of these categories [race, gender, sex, and sexuality] is fixed, and anyone can become disabled, raced, gendered, sexed, or sexualized depending on the time, space, place, and moment of any given experience."); Sharon Elizabeth Rush, *Equal Protection Analogies: Identity and "Passing": Race and Sexual Orientation*, 13 *HARV. BLACKLETTER L.J.* 65, 78 (1997) ("Race and sexual orientation are elusive concepts. . ."); cf. JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* 2 (1995) ("Because I am a black American who is often mistaken for white, my very existence demonstrates that there is slippage between the seemingly discrete categories 'black' and 'white.'").

50. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 *WISC. L. REV.* 1283, 1295-1312.

51. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 55 (2d ed. 1994) (introducing racial formation theory, which refers to the "sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed").

52. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 11 (1994).

53. See *id.* at 11, 27-28.

54. See OMI & WINANT, *supra* note 51, at 55-60 (analyzing how race is an evolving set of social meanings that are formed and transformed under a constantly shifting society); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 *CALIF. L. REV.* 741, 774 (1994) ("[R]ace' is neither a natural fact simply there in 'reality,' nor a wrong idea, eradicable by an act of will.").

55. See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 *MICH. L. REV.* 946, 947-50 (2002) [hereinafter Carbado, *(E)racing*] (describing how Carbado, a British-Jamaican immigrant, became "Americanized" when negative stereotypes that had developed about Blacks in the United States were imposed upon him); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 *J.*

Cooper explicates that the bind of choosing between the socially constructed concepts of “The Good Black 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.⁵⁶ For example, these identity performances reinforce status positions that place black men above black women or heterosexual black men above heterosexual black women.⁵⁷ As Professor Cooper details, middle-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.⁵⁸ As Professor Kenji Yoshino has asserted, outsiders tend to cover what is perceived as their differences to make insiders feel comfortable.⁵⁹ Likewise, Professor Yoshino has described how societal disapproval of same-sex *intimacy* has led to gay couples’ congruent response of “covering,” or what is commonly referred as not flaunting, but is actually not publicly displaying their affection for one another.⁶⁰ As Professor

CONTEMP. LEGAL ISSUES 701, 719-28 (2001) [hereinafter Carbado & Gulati, *Fifth Black Woman*] (analyzing the various ways in which people may present their difference or work their identity to avoid discrimination).

56. Frank Rudy Cooper, *Against Bipolar Masculinity*, 38 U.C. DAVIS L. REV. 853, 859-70, 874-88 (2006).

57. See *id.* at 874-88, 899-900; see also Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76, 78 (2000) [hereinafter Carbado, *Straight out of the Closet*] (“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 which disadvantage other(ed) people.”) (footnote omitted).

58. Cooper, *supra* note 56, at 885-86.

59. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002). “Covering,” is distinct from passing in that, when passing, an individual is hiding the identity that makes him or her an outsider, whereas covering means that an individual’s “underlying identity is neither altered nor hidden, but is [instead] downplayed.” *Id.*

60. *Id.* Yoshino identifies these and one other mode of assimilation:

Conversion occurs when a lesbian changes her orientation to become straight. Passing means the underlying identity is not altered, but hidden. Passing occurs when a lesbian presents herself to the world as straight. Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.

Id. In other words, a covering man, in company that knows he is gay, may simply choose not to discuss issues of importance to him that are perceived as gay issues. He would downplay what are perceived as his differences from the norm. According to Professor Yoshino’s definition of passing, a gay man who passes would present himself as straight to those who are unaware of his sexuality. My definition of passing adds another layer of definition in that it also encompasses that person who may find himself between these definitions of passing and covering. For example, I would consider the gay male who is not working to hide his sexuality, does not evidence stereotypical gay mannerisms, and does not mention his orientation unless asked to be a passing individual. Here, this person is not working to present himself as someone he is not because he would tell the truth if he were asked, nor is he downplaying his identity; he is just being himself, which does not fit within stereotypical assumptions. He, much like myself when I in-group pass, is merely not correcting others’ assumptions unless he is directly asked or unless at some point he decides that it is appropriate to “come out.” His behavior is a slightly different form of passing than a complete effort to hide himself, and also seems to be outside of the definition of covering.

Yoshino explicates, much as a black woman might cover to succeed at work by not wearing braids or cornrows⁶¹ or a minority professor might cover by not writing scholarship that addresses race,⁶² a lesbian might cover by conforming to traditional gender norms even while openly avowing her sexual identity.⁶³

In the post-Civil Rights era, racially palatable⁶⁴ Blacks can become honorary Whites.⁶⁵ Covering gays and lesbians can become honorary heterosexuals.⁶⁶ Assertive women who “play the game” by rejecting feminine qualities or roles can become one of “the Boys.”⁶⁷ Interestingly, progressive Whites with the “right” politics can become honorary Blacks, and therefore suffer discrimination that is usually reserved for minorities.⁶⁸

Identity, or rather the categorization that society imposes upon us, is not fixed.⁶⁹ We move in and out of categories of race and other identities based upon what society expects our identities to be and how and whether

61. See *id.* at 779-80; see generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991) (analyzing incidents in which black women have suffered adverse employment treatment, including termination, because they wore hairstyles such as braids).

62. See Richard Delgado, *Commentary, The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984) (explaining that Delgado was advised not to write on ethnic issues before receiving tenure).

63. Yoshino, *supra* note 59, at 844-45 (reporting that gays and lesbians sometimes engage in “straight-acting” by, for example, performing the part of the “butch gay man” or “lipstick lesbian”).

64. Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1658 (2004) [hereinafter Carbado & Gulati, *Race to the Top*] (“A person is racially palatable if she is perceived to be peripherally or unsterotypically nonwhite; she is racially salient if she is perceived to be centrally or stereotypically nonwhite.”).

65. Onwuachi-Willig & Barnes, *supra* note 50, at 1303-04 (noting that “good Blacks” who perform their identity in a racially palatable way can achieve honorary status as Whites); Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 225, 236 (1996) (discussing how African-Americans who are accorded the status of honorary whites have a type of racial invisibility).

66. Yoshino, *supra* note 59, at 844-45.

67. Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 78 n.211 (1994) (describing how token females may become honorary men by identifying with them). A woman who displays traditional male qualities is, of course, also likely to be chastised for not being womanly. Yoshino, *supra* note 59, at 910 (“To succeed as a woman, one must have the correctly titrated balance of masculine and feminine traits. One must be ‘authoritative’ and ‘formidable,’ but remain an ‘appealing lady.’”); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1189 (1988) (“In male-dominated cultures, women are subject to criticism for being ‘too feminine’ and not ‘feminine enough.’”).

68. Emily M.S. Houh, *Critical Race Realism: Re-claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 472-73 (2005) (describing a hypothetical in which a junior white male heterosexual professor was marked as an outsider—a “sort of ‘race [and gender] traitor’”—because he openly supported the advancement of women, people of color, and sexual minorities in politics and society).

69. Coombs, *supra* note 2, at 223 (“Identity is not fixed or absolute; rather, it is determined by particular persons for particular purposes at particular times in a process in which the person identified participates with varying degrees of freedom.”).

we choose to perform those expected roles.⁷⁰ In choosing the identities we perform, some of us engage in what I refer to in this Essay as “passing”—both in-group and out-group.

For the reasons described above, the fact that I sometimes in-group pass as black should no longer perplex. Like other identities, blackness itself is socially defined not only by appearances but also by performance. The non-physical aspects of the category of blackness are made apparent through the analysis of the common practice of racial passing, which allows very fair-skinned Blacks to out-group pass as white.⁷¹ These Blacks (if we accept the rule of hypodescendancy⁷²) descend from at least one ancestor with black blood, but their status in society is not solely determined by their genetics, but rather by their racial performance. They perform as their appearance socially allows them to, accepting the social privileges of whiteness, but rejecting the social boundaries of racially defined genetics. Their race is not determined by their blood line, but by their social performance of what whiteness is and blackness is not. In this sense, blackness is defined—as it so often is—in opposition to whiteness, not only in terms of color, but also in terms of other factors such as class, geography, and politics.⁷³ Blackness is a product of social history, created in this country by slavery and maintained by institutionalized oppression that divides people into racial categories only in part by morphology.⁷⁴ Because of this oppositional definition of blackness in comparison to whiteness, life choices

70. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279-1308 (2000) [hereinafter Carbado & Gulati, *Working Identity*] (explaining that women and people of color attempt to alter their perceived racial identities in order to prevent discrimination and preempt stereotyping in the workplace). Professors Carbado and Gulati claim that “the social meaning of, for example, a black person’s racial identity is a function of the way in which that person performs (presents) her blackness” such that Blacks can choose to accept or reject societal expectations of behaving “conventionally,” or act in accordance with predominant stereotypes. Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1771-72 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)) [hereinafter Carbado & Gulati, *Law and Economics*].

71. Cf. Thadious M. Davis, *Introduction to LARSEN*, *supra* note 48, at viii (defining “passing” as “the movement of a person who is legally or socially designated black into a white racial category or white social identity”).

72. SCALES-TRENT, *supra* note 49, at 4 (explaining that hypodescent “means that racially mixed people are assigned the status of the subordinate group”); Coombs, *supra* note 2, at 224-25 (explaining the significance of the “one-drop” rule, which constructed blackness by defining any person with one drop of black blood as Black).

73. See Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 49 SETON HALL L. REV. 1261, 1267-74 (2005); see also OMI & WINANT, *supra* note 51, at 59 (“We expect people to act out their apparent racial identities; indeed we become disoriented when they do not.”); cf. RENEE C. ROMANO, RACE MIXING, BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 220 (2003) (“Personal acts such as dressing, listening to music, speaking, and dating were politicized as markers of black identity.”).

74. Bridgeman, *supra* note 73, at 1273-74; Haney López, *supra* note 52, at 37; see also Forde-Mazrui, *supra* note 43, at 2199 (asserting that “much of the significance of race is socially constructed, but that construction has been built upon a physiological reality of pigmentation and physiognomy”).

can “de-black” an individual by aligning him or her more closely with Whites or whiteness.⁷⁵ For example, one can become an honorary White by choosing a residence in a mostly white neighborhood or marrying a non-black spouse.⁷⁶

In the following subparts, I more fully explore the ways in which people may, based on fluid social categories, adopt certain roles to deceive others within the identity groups to which they belong about who they are or, as I have defined earlier, to in-group pass. First, I address the various ways in which dark-skinned people of “black” genetic composition in-group pass as black due to their politics, residence, marriage, or sexuality. Thereafter, although their conduct is different than in-group passing in the sense that it looks more like traditional attempts to be presumed as members of a dominant group, I survey the ways in which gays, lesbians, and bisexuals may similarly pass as heterosexual in society, which is an example of what I call “out-group passing.”

A. *Passing as Black*

Racial passing can occur in many forms. It occurs, as Professor Cheryl Harris explained, in the traditional sense of Blacks choosing to temporarily or permanently out-group pass as white to obtain jobs that were usually foreclosed to Blacks, as her grandmother did in order to obtain a desirable job in a department store.⁷⁷ It occurs socially through an individual’s performance of their identity; for example, Professor Randall Kennedy described his mother’s strategy of changing her voice on the phone to out-group pass as white to receive proper treatment,⁷⁸ and Professor John Baugh showed in his study of responses to various dialects—such as African American Vernacular English, Chicano English, and Standard American English—that qualified black and Chicano renters have an incentive to pass through dialect because they are discriminated against on the rental market based on voice in certain white residential

75. See Kimberly Jade Norwood, *The Virulence of Blackthink and How Its Threat of Ostracism Threatens Those Not Deemed Black Enough*, 93 KY. L.J. 147-50 (2005).

76. See HENRY LOUIS GATES, JR., *LOOSE CANNONS: NOTES ON THE CULTURE WARS* 101 (1992) (stating that “[o]ne must learn to be ‘black’ in this society, precisely because ‘blackness’ is a socially produced category”); see also Coombs, *supra* note 2, at 226. As Coombs notes:

Insofar as race is conceived of as a cultural phenomenon or an ethnicity, ancestry and appearance become less significant in classifying a person as black or white. Instead, a person would more likely be deemed black in proportion to his experiences of racial subordination, his knowledge of and participation in African-American culture, or his commitment to that community.

Id. (footnote omitted).

77. Harris, *supra* note 2, at 1711.

78. KENNEDY, *INTIMACIES*, *supra* note 1, at 290 (describing how his mother would “pass” over the phone because listeners imagined she was white).

areas.⁷⁹ This subpart focuses, however, on in-group passing by Blacks, or passing through displays of stereotypical “black” traits or beliefs, such as through choice of politics, residence, marriage, or sexuality.

1. *Unbecoming Tom*

Because authentic blackness has been socially constructed as including progressive or liberal political ideology,⁸⁰ conservative Blacks, such as black Republicans, are often de-blackened in the eyes of the black community by their political ideology.⁸¹ For example, many Blacks and Whites perceive Supreme Court Justice Clarence Thomas, a dark-skinned Black who identifies himself as a black person, as non-black, a sellout, an Uncle Tom, precisely because of his staunch political conservatism.⁸² The constructed assumption on which these perceptions are based is that true Blacks are not conservative, do not vote Republican, and do not oppose affirmative action.⁸³ As a consequence, Blacks like Justice Thomas, who do not perform their racial identity as expected, are considered “barely black under the criteria of culture and politics.”⁸⁴ As many black leaders, including Professor Derrick Bell, have declared, Justice Thomas “looks black,” but “thinks white.”⁸⁵ Blackness, or even black perspective, and

79. Thomas Purnell et al., *Perpetual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCHOL. 10, 11, 22 (1999) (explaining the findings of a study that measured the impact of Chicano English, African American Vernacular English, and Standard American English dialects on access to rental housing in four San Francisco and Bay Area communities).

80. See Bridgeman, *supra* note 73, at 1266 (asserting that authentic blackness “is characterized by an anti-conservative bent”).

81. Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1904-05 (1996) (arguing that “the war against white hegemony demands that certain self-appointed field marshals clear the colored columns of potential defectors,” such as Justice Thomas and Ward Connerly).

82. See Bridgeman, *supra* note 73, at 1265-70 (discussing how Justice Thomas is perceived as a sellout despite his identification as a black southern man); Jayne Chong-Soon Lee, Book Note, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 769 (1994) (reviewing KWAME ANTHONY APPIAH, *IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* (1992)). But see Angela Onwuachi-Willig, *Just Another Brother on the SCT? What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 978-1000 (2005) (demonstrating that Justice Thomas’s jurisprudence on certain issues is steeped in black conservative thought, which has a history and foundation distinct from white conservatism); Mark Tushnet, *Clarence Thomas’s Black Nationalism*, 47 HOW. L.J. 323, 323-30, 333-39 (2004) (arguing that traces of black nationalism exist in Justice Thomas’s opinions).

83. See Norwood, *supra* note 75, at 147 (“Blackthink is a form of prejudice. It assumes and demands that all Black people think a certain way. It presumes that all Blacks are unquestionably liberal, pro-affirmative action, pro-choice, pro-gay rights, pro-welfare, and most definitely anti-Republican.”).

84. Coombs, *supra* note 2, at 227.

85. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 457 n.98 (2002) (quoting Derrick Bell); Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 787 (2005) (noting that Justice Thomas has been accused of “looking black, but thinking white” by other Blacks).

conservatism are wrongfully viewed as mutually exclusive, which destabilizes the black identity of those who openly identify as conservative.⁸⁶

To avoid this de-blackening effect on one's identity, a black conservative may find it most convenient to hide her political viewpoints in order to in-group pass as black—at least as far as blackness is socially defined by politics. Such in-group passing occurs in various forms, including where Blacks avoid political discussions altogether so as not to “out” their viewpoints or choose to express their politics only in circles in which their views will not be taken as proof of being a race traitor, such as in the presence of other conservatives of all races. So long as this silencing occurs, true or authentic blackness (much like heterosexuality), will be assumed.

2. *Blacklining*

One may also de-black himself or herself through his or her choice of residence. Blacks who live in almost exclusively white neighborhoods are often viewed by other Blacks as wannabes—people who want to be white.⁸⁷ After all, who else would want to live in a community where they are surrounded by whiteness, where their children are the only black children, and where they do not see themselves mirrored in their own neighbors?⁸⁸

A few years ago, a black friend of mine wrote an opinion-editorial on race and hip-hop culture for the local newspaper of a segregated city with a significant black population and signed the editorial with his name and place of residence—a suburb widely known as white and upper class. A few days later, there was a response from another black resident, chastising my friend for his comments and questioning his blackness based on his residence. My friend's comments would have been far more credible in the eyes of the responding reader (and perhaps many others) had he chosen to in-group pass as black by excluding his address. Much like with Blacks who are openly conservative, Blacks who reside in “white areas” and choose to reveal their addresses destabilize their racial identity as authentically black citizens. However, they, too, may in-group pass as black by not identifying their communities to maintain their credibility within the black

86. See Jerome McCristal Culp, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 *LOYOLA L. REV.* 61, 65-66 (1992) (describing Justice Thomas as speaking with a black voice but not from a black perspective, meaning one that is “opposed to racial oppression”).

87. See Norwood, *supra* note 75, at 172.

88. See ROMANO, *supra* note 73, at 221. As Romano notes:

But in the post-civil rights era, . . . cultural markers of identity became even more important. If a black person grew up in a predominantly white neighborhood, went to a predominantly white school, and ended up working at a predominantly white corporation, how could his or her allegiance to the race be determined? . . . “Real” blacks supported black neighborhoods, black businesses, black political power . . .

Id.

community. They could go even further by choosing to forego their desired place of residence in order to assert their authenticity as Blacks by living in communities that many Blacks generally deem politically appropriate for race-conscious black people—people who are concerned with and working toward improving the status of the race.

3. *Sleeping with the Enemy*

Additionally, one risks destabilizing his or her racial identity as a black person by marrying a non-Black, especially a White. As Lawrence Otis Graham described in his book, *Member of the Club: Reflections on Life in a Racially Polarized World*, Blacks who out-marry are often viewed as race traitors—those who are disloyal to their race.⁸⁹ According to Graham, “[W]e [Blacks] look for what we consider the final determinant of this person’s black identity—that thing that will allow us to bestow our unqualified appreciation. We look for the litmus test of loyalty to the race: the photo of the person’s spouse or significant other.”⁹⁰

It is in this sense that I *occasionally* have taken actions to pass as black.⁹¹ At times, I find myself sitting quietly when discussions about interracial couples ensue in black circles, passing as a member of what others assume to be a monoracial couple until I know that I am in a safe enough space to “break the news” of my destabilized blackness—of my identity as a “seemingly black” woman married to a white man. When I do break the news, the response is usually the same: “You’re married to a white man! I never would have guessed. You don’t seem like the kind of person who would marry a white person.”⁹² To them, my liberal politics and appearance initially identify me as one who is authentically black, but my choice in a life partner,⁹³ which indicates my willingness to be placed in deliberate proximity to whiteness, somehow destabilizes my racial identity.

89. LAWRENCE OTIS GRAHAM, *MEMBER OF THE CLUB: REFLECTIONS ON LIFE IN A RACIALLY POLARIZED WORLD* 41 (1995) (describing how the race of one’s spouse may label a black individual as a sellout); see also Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 85 TEX. L. REV. 739, 760 (2006) [hereinafter Johnson, *Legacy of Jim Crow*] (“Marrying outside of one’s own race can be viewed as racial betrayal and the internalization of the belief in black inferiority.”).

90. GRAHAM, *supra* note 89, at 41.

91. See Randall Kennedy, “Sellout”: *The Problem of Betrayal in African American History* (manuscript at 12, on file with the author) [hereinafter Kennedy, “Sellout”] (noting that “Blacks who have married whites have been labeled as sellouts”); see also Coombs, *supra* note 2, at 226 (“A person’s black identity might be called into question by his socio-cultural association with whiteness.”).

92. See Coombs, *supra* note 2, at 235 (“Coming out, the flip side of passing, is a never-ending process for the individual and the community.”). Of course, such comments are intended as compliments, much like the comment that many professional Blacks have heard from white acquaintances: “I don’t even think you of as black.” See *id.* at 226 n.21.

93. I do not intend to suggest that my choice in my life partner is solely personal with no political consequences. I acknowledge that marriage itself, or even the act of getting married, can express a political viewpoint. See Carbado, *Straight Out of the Closet*, *supra* note 57, at 78 (noting that choices about the people with whom and how we associate are both personal and political in nature).

For many white readers, my in-group passing, or rather the resulting comments when I “out” myself, may be surprising. After all, the U.S. Supreme Court decided *Loving v. Virginia*, which struck down Virginia’s ban on interracial marriage, nearly forty years ago.⁹⁴ In my Family Law class, the vast majority of students are shocked to learn that prejudice against interracial couples still exists—to learn that 20% of white Americans still desire to illegalize interracial marriages,⁹⁵ that only 44% of all white Americans approve of black-white interracial marriage,⁹⁶ that interracial couples still face a significant risk of violent abuse,⁹⁷ that while the percentage of Blacks who marry Whites has increased since the 1960s,⁹⁸ it lags behind the percentage of Latinos, Asian-Americans, and Native Americans, who marry Whites by as much as 48%,⁹⁹ that such

94. 388 U.S. 1, 11-12 (1967). When the Supreme Court issued *Loving*, sixteen states still had anti-miscegenation statutes. Only eight states—Alaska, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, Vermont, and Wisconsin—and Washington, D.C., had never enacted such statutes. See KENNEDY, *INTIMACIES*, *supra* note 1, at 219. Prior to *Loving*, the California Supreme Court struck down California’s anti-miscegenation statute as unconstitutional. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948). For a discussion of *Perez*, see RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 84-87 (2001); Kevin R. Johnson & Kristina L. Burrows, *Struck by Lightning? Interracial Intimacy and Racial Justice*, 25 HUM. RTS. Q. 528 (2003) (reviewing MORAN, *supra*).

95. See Kennedy, *How Are We Doing?*, *supra* note 5, at 820; see generally Johnson, *Legacy of Jim Crow*, *supra* note 89, at 755-61 (describing the taboo on black-white relationships). Indeed, Alabama was the last state to remove anti-miscegenation provisions from its constitution, eliminating a clause that prohibited the legislature from authorizing interracial marriage just six years ago. See KENNEDY, *INTIMACIES*, *supra* note 1, at 279-80. Even then, 40% of those voting wanted to retain the anti-miscegenation provision. See *id.* at 280; see also Kevin R. Johnson, *Race in America: Strom Thurmond’s Daughter and the Enduring Taboo on Black/White Marriages*, S.F. CHRON., Jan. 4, 2004, at D5 [hereinafter Johnson, *Race in America*]. But see Kevin Merida, *In Defense of Love Beyond Race*, WASH. POST, Dec. 14, 1997, at F01 (noting that in 1997 a poll showed that 57% of American teenagers had dated interracially).

96. See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1164 n.10 (1997).

97. See Kennedy, *How Are We Doing?*, *supra* note 5, at 820; see also Johnson, *Race in America*, *supra* note 95 (describing an incident in which a white supremacist in a Missouri restaurant stabbed a black man with a white significant other); Merida, *supra* note 95 (describing an incident in 1995 in which four skinheads firebombed the mobile home of an interracial couple in Mississippi).

98. From 1960 to 1990, the percentage of Blacks who married Whites grew from 1.7% to 5.9%. See Kennedy, *How Are We Doing?*, *supra* note 5, at 818 (citing Douglas J. Besharov & Timothy S. Sullivan, *One Flesh*, THE NEW DEMOCRAT, July/Aug. 1996, at 21). Data shows that from 1970 to 1992, the number of black-white couples in the United States increased from 65,000 to 246,000. See Hickman, *supra* note 96, at 1164 n.8. The rates of interracial marriages involving Blacks are greater in places with very few black residents. For example, between 1967 and 1970, Blacks married across racial lines at a rate of 30% in Maine, 47% in Vermont, 28% in South Dakota, and 27% in Hawaii. See PAUL R. SPICKARD, *MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA* 306 (1989). Overall, interracial marriages of any kind constitute a miniscule percentage of the married population, making up approximately 0.6% of all marriages. See KENNEDY, *INTIMACIES*, *supra* note 1, at 127.

99. See Kennedy, *How Are We Doing?*, *supra* note 5, at 818. For example, as of 1997, the black interracial marriage rate was at approximately 7%, while the interracial marriage rate for Japanese-Americans and Chinese-Americans with Whites was at 55 and 40%, respectively. See Hickman, *supra* note 96, at 1164 n.10. More than 93% of Whites and Blacks marry intracacially, while only 70% of

percentages signal “the uniquely encumbered and peculiarly isolated status of [Blacks]”;¹⁰⁰ and, most of all, that Blacks often view other Blacks who intermarry with deep suspicion.¹⁰¹ These prejudices are very real, often resulting in in-group passing when those, such as myself, temporarily “game” the system to remain on the inside of an outsider group.

4. *Straight-Up Black*

The final form of black in-group passing that I discuss is, ironically, the performance of heterosexuality. As Professor Devon Carbado explained, a frequently articulated conception in the black community is that homosexuality is not black.¹⁰² As he contends, “being out as a black gay or lesbian in the black community is race negating.”¹⁰³ In the black

Asians and Latinos and less than 33% of Native Americans marry intracially. See MORAN, *supra* note 94, at 6, 103; see also KENNEDY, *INTIMACIES*, *supra* note 1, at 127. Although past state laws often prohibited interracial unions between Whites and Blacks, Asian-Americans, and Native Americans, none ever officially banned Latino-white unions “because treaty protections formally accorded former Spanish and Mexican citizens the status of white persons.” MORAN, *supra* note 94, at 17.

100. Kennedy, *How Are We Doing?*, *supra* note 5, at 819 (contending that interracial marriages help to lessen the subordination of oppressed groups because “when people intermarry and produce children of mixed race, racial identifications, racial loyalties, and racial kinships blur” and that Blacks are disadvantaged in this respect because of their low outmarriage rates); see also ROMANO, *supra* note 73, at 8 (asserting that “in many ways the regulation of black-white relationships and the taboo against them are unique”). The suspicions may vary depending upon the gender of the person. Because black men outmarry at a significantly higher rate than black women, black women who outmarry are viewed with less suspicion, as their choice to outmarry may be viewed more as one borne of necessity than choice because of the disproportionate percentage of available black men to black women, whose marriage potential has been diminished by factors such as the mass incarceration of black men. See ROMANO, *supra* note 73, at 218 (noting that at one point, of all black-white marriages, 73% involved black men and white women).

101. See Johnson, *Legacy of Jim Crow*, *supra* note 89, at 760; Kennedy, *How Are We Doing?*, *supra* note 5, at 820. *But see* Hickman, *supra* note 96, at 1164 n.10 (noting that 71% of black Americans approve of interracial marriage as opposed to 44% of white Americans). As I relate to my students, I need look no further than myself to see these prejudices. I hold some internalized prejudices against Blacks who date or marry interracially, as though such action automatically makes their blackness suspect. Like Lawrence Otis Graham, I instinctively wonder whether “intermarriage [is] a means to disassociate themselves from the black race.” GRAHAM, *supra* note 89, at 30 (expressing his perspective on this issue in his book chapter titled, “I Never Dated a White Girl: Why Some Blacks Still Oppose Interracial Marriage”). As Graham explains, this learned belief, which I have not completely unlearned, is the source of one of the black community’s tests for whether a black person truly believes in the black race. The avoidance of interracial relationships in the black community is unlike typical white opposition to interracial marriage, which is usually based on a belief in Blacks’ inferiority. Blacks’ opposition to interracial marriage is often grounded in the hope that other Blacks have not bought into the belief of black inferiority such that they believe it is better to marry a white person than a black person. Similarly, some Blacks are concerned that the image of many well-accomplished Blacks marrying Whites will send the wrong message to black children. *Id.* at 40-67. This phenomenon also illustrates the political nature of marriage decisions. See *supra* note 93.

102. Carbado, *Rights*, *supra* note 7, at 1473.

103. *Id.* at 1478. Marlon T. Riggs, a producer and director famous for *Tongues Untied*, proclaimed, “Because of my sexuality, I cannot be black. A strong, proud, ‘Afrocentric’ black man is resolutely heterosexual, not *even* bisexual. . . . I cannot be a black gay man because, by the tenets of black macho, a black gay man is a triple negation.” Marlon T. Riggs, *Black Macho*

community, identification as gay or lesbian is historically viewed as a “product largely of . . . Europeanized society.”¹⁰⁴

To avoid such race-negating results, a black lesbian must display femininity to avoid being perceived as a lesbian, and a gay black male must exhibit masculinity to dodge being perceived as gay, or both must at least not publicly highlight the fact that they are gay.¹⁰⁵ For example, civil rights activist Bayard Rustin, a gay black man and one of the primary organizers of the 1963 March on Washington, essentially was kept out of public roles in the Civil Rights Movement and forced to downplay his sexuality, even though he was out, for the sake of the movement.¹⁰⁶ More recently, the phenomenon of in-group passing as black is commonly seen in the way in which black men who regularly sleep with other men routinely perform heterosexual identity through marriage, dress, interest in sports, and other stereotypically male events—a phenomenon that is now described as being on the “down low.”¹⁰⁷ These men insist on identifying themselves as heterosexual,¹⁰⁸ in large part because such labels do not fit within conceptions of maleness in the black community.¹⁰⁹ Even when caught in the act of

Revisited Reflections of a SNAP! Queen, in *BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN* 253, 254 (Essez Hemphill & Dorothy Beam, eds., 1991).

104. Carbado, *Rights*, *supra* note 7, at 1474 (quotations omitted).

105. *Cf.* Cooper, *supra* note 56, at 898-99 (describing the ways in which heterosexual black men are incentivized to avoid being perceived as gay to maintain their place above black women and gay black men); Carbado, *Straight Out of the Closet*, *supra* note 57, at 110-11 (explaining that many black men remain closeted to avoid “black gay ma[le] . . . triple negation” (quoting Riggs, *supra* note 103, at 254)); Robin Farmer, *At 22, He’s a Virgin by Choice, Sex Can Wait for Waymon Sullivan, Regardless of Societal Expectations*, *RICHMOND-TIMES DISPATCH*, Nov. 6, 2005, at A1 (noting that “[e]ffeminate. . . men are often the targets of abuse by a cross-section of the black community, from gay-bashing rappers to moralizing ministers”).

106. Carbado, *Rights*, *supra* note 7, at 1474-75; *see also* Henry Louis Gates, *Backlash?*, *NEW YORKER*, May 17, 1993, at 44 (describing how Rustin, despite organizing the 1963 march, was prevented from being named its director).

107. Christina M. Woods, *Blacks Hope Truth Will Limit HIV’s Reach*, *WICHITA EAGLE*, Aug. 18, 2005, at 1B. Being on the “down low” refers to the way in which black men who are perceived by the public as heterosexual and present themselves to the public as heterosexual keep their sexual activities with other men a secret or “on the down low.” *See* Adrienne T. Washington, *District’s AIDS Epidemic Deserves Public Debate*, *WASH. TIMES*, Aug. 12, 2005, at B02 (“For the uninformed, a ‘DL,’ or ‘down-low’ man is a dishonest man who occasionally has sexual relations with men but claims he’s not a homosexual because his primary relationship is with either his wife or his girlfriend.”).

108. *See* Washington, *supra* note 107, at B1. The manner in which discussions of men on the “down low” has become the primary focus in debates about the spread of HIV in the black community demonstrates how maleness is constructed as heterosexual, and homosexuality is constructed as deviance, one which is causing problems within the community. Rather than also discussing how homophobia may be affecting black men who are on the “down low” by keeping their sexual relationships with other men in the closet, the discussion usually centers around how these lying, deceitful men are creating the rapid spread of AIDS within the community.

109. Author J.L. King described his sexuality as follows:

The act of the sex is homosexuality, but I don’t want to get caught up in the whole gay culture, because the media and people look at gay people as being less than a man [in the black community]. . . . The greatest taboo is to be black and homosexual, and I refuse to be labeled and classified that folks will look at me as something different. I am a man.

sleeping with other men, these men, such as J.L. King, author of *On the Down Low: A Journey Into the Lives of Straight Black Men Who Sleep with Men*,¹¹⁰ still refuse to define themselves as anything other than heterosexual.

B. *Passing as Straight*

Much like a black person can pass as “black” by performing the socially constructed in-group black identity or pass as “white” by performing out-group white identity,¹¹¹ a gay person can in-group pass as gay by performing expected “gay” traits or can pass as straight by performing a normatively heterosexual identity. Like racial identity, sexual identity is socially constructed. From an early age, boys are taught how to behave like “men” and girls are taught how to behave like “women”; both men and women are, of course, presumed to be heterosexual.¹¹² Similar to racial passing, acts of in- or out-group passing in the context of sexuality occur in a variety of forms. This subpart focuses on passing through one’s performance of choices regarding politics or residence and the denial of one’s attraction to people of the same sex.

I. *In-group Passing*

In the same way that a black person sometimes feels compelled to perform his or her identity in a certain way to maintain credibility as a member of his or her in-group, which is itself an outsider group, gays, lesbians, and bisexuals feel similar pressures to conform to socially

The Oprah Winfrey Show, *Sex, Lies and Double Lives*, http://www.oprah.com/tows/pastshows/200404/tows_past_20040416_c.jhtml/ (last visited Jan. 21, 2006).

110. See generally J.L. KING, *ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF STRAIGHT BLACK MEN WHO SLEEP WITH MEN* (2004).

111. See *supra* notes 55-65 and accompanying text. As discussed, Blacks participate in out-group passing through their appearance, their performance of identity, or a combination of both in a way that makes them honorary Whites. In addition, a black person may also lose his or her authenticity as a black person simply by achieving mainstream success. See Kennedy, “*Sellout*,” *supra* note 91 (manuscript at 24) (“Henry Louis Gates, Jr., William Julius Wilson, and even Cornel West are among those who have been subjected to allegations of selling out on the basis of little more than that they have won acclaim from elite, predominantly white institutions.”); GRAHAM, *supra* note 89, at xiii (“The black community, which is primarily *not* professional and *not* middle or upper class, looks at us [black professionals] as sellouts who have abandoned the black agenda.”); Bridgeman, *supra* note 73, at 1275 (highlighting the problems with defining blackness in opposition to whiteness as long as “whites are viewed as rich, industrious, intelligent, well-educated, and articulate”). One’s job may invoke claims of being a sellout, as it did for Christopher Darden when he served on the prosecution team in the O.J. Simpson case. See *id.* at 1267-68 (quoting Darden, who said, “I was branded an Uncle Tom, a traitor used by the Man”).

112. See KAROL L. JENSEN, *LESBIAN EPIPHANIES: WOMEN COMING OUT LATER IN LIFE* viii, 47-63 (1999) (discussing how girls are socialized into ignoring “their own experiences of self . . . in favor of socially encouraged concepts of womanhood” that exclude lesbian and bisexual women); *cf.* Carbado, *Straight out of the Closet*, *supra* note 57, at 93-94 (“One must learn to be a man in this society because manhood is a socially produced category. Manhood is a performance. A script.”) (footnotes omitted)).

constructed concepts of gay identities within their communities.¹¹³ For example, lesbians sometimes believe that they have to perform their identities in ways that fit within the stereotype of a butch lesbian to be perceived by their in-group as a real lesbian. As Lisa Walker explained about her identity as a femme lesbian and the pressures to conform to certain identities, butch lesbians

often regard us as liable to run from “the life” into the sheltering arms of normalcy at any minute. . . . [They] do not know what it feels like to have other lesbians assume that [they] are straight, or even if they know better, to assume that [they] are not as real, to assume that at any minute [they] might turn “traitor” and leave [their] woman for a man; to assume that [they] are not strong and could not possibly be smart because [they] paint [their] nails instead of playing softball.¹¹⁴

When Walker first began to express her identity as a lesbian, she tried to dress in the “look more expected of lesbians”—“the uniform of hiking boots, jeans, and untucked flannel shirts”—but she eventually had to concede that she “felt like [she] was in drag” in this uniform.¹¹⁵ For similar reasons, a bisexual person may feel compelled to hide his attraction to both men and women to avoid losing his or her credibility as part of the gay rights movement or for fear of being perceived as merely going through a phase rather than being a legitimate part of the gay community.¹¹⁶

2. *Straightening Out*

Gays, lesbians, and bisexuals also participate in out-group passing, which is the type of passing that anti-same-sex marriage advocates invoke to reject the analogy between the past ban on interracial marriages and the current ban on gay marriages in most states. Because prejudice against gays, lesbians, and bisexuals is more readily accepted today than openly hostile prejudice against Blacks, the most logical analogy to draw in order to compare passing in the black community to passing in the gay

113. Yoshino, *Covering*, *supra* note 59, at 909 (noting that “members of the groups themselves may make such demands as when ‘queers’ ask gays to be ‘more gay’”).

114. WALKER, *supra* note 42, at xv-xvi.
115. *Id.* at 183.

116. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 399 (2000) [hereinafter Yoshino, *Epistemic Contract*] (citation and quotations omitted) (noting that bisexuals are often perceived by gays and lesbians as “fence-sitters, traitors, cop-outs, closet cases, people whose primary goal in life is to retain ‘heterosexual privilege,’ [or] power-hungry seducers who use and discard their same-sex lovers.”); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 536 (1992) [hereinafter Fajer, *Storytelling*] (“Many lesbians and gay men view self-professed bisexuals as untrustworthy because they can always present themselves as non-gay, avoiding the stigma and risks of open gay life.”); Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN’S L.J. 98, 116-17 (1995) (noting the same perception in the lesbian community).

community is that between in-group passing for Blacks and out-group passing for gays, lesbians, and bisexuals. In other words, Blacks' performances of their identities in ways that are meant to define themselves as authentically black, and therefore to avoid being seen as traitors to their cultural identity, are, in addition to resembling acts by certain Blacks in passing as white, similar to gays, lesbians, and bisexuals' performances of stereotypical heterosexual behavior. Gay in-group passing is intended to avoid being labeled as cultural dissenters by being seen as part of an outsider group.¹¹⁷ In all situations, individuals are working to gain acceptance within a group they want to include them, whether it be their own identity group or an identity group to which they do not belong. In each case, what is at force are attempts by individuals to fit within roles that society has constructed as appropriate for them. All are defined in relation to the supremacy of the dominant group. For example, gays, lesbians, and bisexuals are expected not to "flaunt" their sexuality by dominant heterosexual culture, and Blacks are expected to act or think a certain way, which is so often socially defined in opposition to whiteness.

So just as a black person can out-group pass as white if their skin color and features are "white enough" or can in-group pass by engaging in what Professor Kimberly Jade Norwood refers to as blackthink,¹¹⁸ most gays, lesbians, and bisexuals can out-group pass as heterosexual if they wish.¹¹⁹ Most people generally assume that those around them are heterosexual whether or not they identify themselves as straight and so long as

117. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 566 (2001) (arguing that it is important for the law to bar the exclusion of individuals who seek both to retain cultural membership and to pursue freedom from discrimination and repression within their cultural communities).

118. See Norwood, *supra* note 75, at 147-50.

119. Like Blacks who physically appear to be white, passing may be involuntarily imposed upon gay, lesbian, and bisexual individuals; for example, a femme lesbian who performs the same role in the gay, lesbian, and bisexual community as well as the straight community might be labeled as heterosexual by either community due to that performance. The following passage by Professor Chai Feldblum explains how her performance of her femme lesbian identity could be perceived as normatively heterosexual when in fact it is a part of her lesbian sexual-orientation identity:

As a femme, I think it was hard for me to conceptualize my femininity as being part of my sexual orientation. For that reason, I also resisted characterizing a lesbian's butchness as being part of her sexual orientation. In my mind, one's masculine and feminine characteristics were simply irrelevant to the issue of one's sexual orientation—that is, irrelevant to the question of the gender of the person one seeks to have sex with. But, interestingly enough, my resistance to conceptualizing femininity as part of sexual orientation may well have been related to the fact that society does not view lesbianism and femininity as compatible. By contrast, a majority of the public does presume that masculine features and expression are co-extensive with lesbianism. Hence, a judge or a jury would probably more easily accept that a lesbian's butchness is part of her sexual orientation. Yet, the reality is that my femininity is an aspect of my sexual orientation: one of the reasons I like to "look like a woman" is my intuition that that will make me more attractive to butch lesbians.

Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y. L. SCH. J. HUM. RTS. 623, 634 n.21 (2000).

they do not act in a way that is perceived as stereotypically gay.¹²⁰ Because of the strong, knee-jerk presumption of heterosexuality, “people who self-identify as lesbian or gay can avoid possible negative consequences by not raising the issue of sexual orientation and, in some cases, refusing to correct explicitly stated incorrect assumptions by employers, interviewers, and employees of businesses they patronize.”¹²¹ As Professor Fajer explains, the pressure to out-group pass as heterosexual is strong because for many gays, lesbians, and bisexuals, “acceptance is contingent on their keeping quiet about who they are.”¹²²

Out-group passing as straight, much like in-group passing as black, is performed in variety of ways based on identifiers such as politics and even dating and marriage.¹²³ For example, as Professor Fajer has indicated, many “[g]ay men brought ‘beards’—women whom they seemed to be dating—to public functions to suggest that they were heterosexual.”¹²⁴ Likewise, as Professor Yoshino indicated, out-group passing can include

acting straight by feigning an interest in sports, by creating a fictitious girlfriend, by laughing at the right jokes. It is repressing traits or behaviors that might code as gay, such as an interest in theater, an expression of concern for a dying colleague, or resistance to a homophobic comment.”¹²⁵

Out-group passing also occurs in the form of displaying conservative political beliefs or openly favoring the status quo in discussions about society or politics. As Professor Fajer also explains, many conservative gays, lesbians, and bisexuals believe that “all les/bi/gay people would be better off if more activists tried harder to fit into mainstream society.”¹²⁶

As this Essay has demonstrated, there are many similarities between passing by people involved in interracial relationships and passing by people involved in same-sex relationships. As shown above, these similarities include the ways in which social prejudice has produced similar behavioral patterns in interracial and same-sex couples, whereby individuals seeking to fit within socially constructed definitions of sexuality or authentic

120. Tyjewski, *supra* note 49 (manuscript at 4, on file with the author) (“Most people are presumed to be heterosexual . . . unless one bears some stereotypical characteristic, such as . . . having a ‘limp wrist.’”); Fajer, *Storytelling*, *supra* note 116, at 592 (same).

121. Fajer, *A Better Analogy*, *supra* note 40, at 39.

122. *Id.* at 45 (noting that “[a] common complaint is that ‘everybody knows so-and-so is gay, but why does he have to keep rubbing our noses in it?’”).

123. Fajer, *Storytelling*, *supra* note 116, at 592-95.

124. Fajer, *A Better Analogy*, *supra* note 40, at 46.

125. Yoshino, *Covering*, *supra* note 59, at 813 (footnote omitted); *see also* Fajer, *Storytelling*, *supra* note 116, at 593.

126. Fajer, *A Better Analogy*, *supra* note 40, at 47 (“More conservative gay individuals call for toning down public displays of sexuality and cross-gender behavior. They eschew participation in progressive political coalitions, arguing that being gay does not require adoption of positions supporting, for example, affirmative action and abortion.”) (footnote omitted).

blackness choose to conceal their choices of partners.¹²⁷ The question remains, however: What do such behaviors indicate about the validity of playing the *Loving* card in the effort to support the legalization of gay marriage?

III

PASSING, LOVING, AND SAME-SEX MARRIAGE

[It] isn't that there's simply no comparison; it's that there's no *simple* comparison.

-Henry Louis Gates¹²⁸

Although there are certainly many historical and current distinctions between discrimination against Blacks and discrimination against gays, lesbians, and bisexuals, there are also a number of important similarities. Today, those who oppose legalizing gay marriages raise objections similar to objections to the repeal of anti-miscegenation laws.¹²⁹ For example,

127. See Kevin R. Johnson, *Racial Mixture, Identity Choice, and Civil Rights*, 3 C.R.J. 44, 45 (1998) [hereinafter Johnson, *Racial Mixture*] (reviewing JANE LAZARRE, *BEYOND THE WHITENESS OF WHITENESS: MEMOIR OF A WHITE MOTHER OF BLACK SONS* (1996); JAMES MCBRIDE, *THE COLOR OF WATER: A BLACK MAN'S TRIBUTE TO HIS WHITE MOTHER* (1996); LISE FUNDERBURG, *BLACK, WHITE, OTHER: BIRACIAL AMERICANS TALK ABOUT RACE AND IDENTITY* (1994)) (indicating that partner choice is an important part of the identity formation process).

128. WOLFSON, *supra* note 33, at 171 (quoting Gates, *supra* note 106, at 42).

129. Ross, *Sexualization of Difference*, *supra* note 31, at 275-79. Historically, the legal regulation of interracial relationships focused, in many ways, on regulating true intimacy rather than mere sexual conduct or, in most instances, sexual misconduct—in particular the rape of black women by white men. In other words, it was not necessarily interracial sex, mainly rape, between black women and white men that Whites found offensive, but rather true interracial intimacy, which marriage certainly signaled. Scholars like Professor Kim Forde-Mazrui thus have argued that notwithstanding the status-conduct distinction some have drawn between race and sexuality, the struggles for race-based and sexuality-based freedom to be intimate are similar. See Forde-Mazrui, *supra* note 43. During the antebellum period, although a few white slavemasters were actually engaged in sincere, intimate relationships with their slaves, many of them forced their black female slaves to have sex, which perversely resulted in profits for the slavemasters, who would often enslave their own children or sell them on the slave market. See KENNEDY, *INTIMACIES*, *supra* note 1, at 42-46 (describing the sexual assault of black women by their slavemasters); Kate Manning, *Crossing the Color Line: Interracial Intimacies*, L.A. TIMES, Mar. 30, 2003, at R3 (reviewing KENNEDY, *INTIMACIES*, *supra* note 1; ROMANO, *supra* note 73; SUZANNE BOST, *MULLATAS AND MESTIZAS: REPRESENTING MIXED IDENTITIES IN THE AMERICAS, 1850-2000* (2003); STEPHAN TALTY, *MULATTO AMERICA: AT THE CROSSROADS OF BLACK AND WHITE CULTURE* (2003)) (“Rape—white men forcing themselves on black women—was an open secret during the age of slavery.”); see also MORAN, *supra* note 94, at 27 (noting that black women were even more vulnerable to sexual assault after emancipation and “[a]s a result, the number of mulatto offspring increased”); ROBERT P. McNAMARA ET AL., *CROSSING THE LINE: INTERRACIAL COUPLES IN THE SOUTH 24* (1999) (explaining that black women were vulnerable to rape during the antebellum period). True intimacy between Blacks and Whites—in particular, marriage—threatened prevailing racial hierarchies by suggesting “that the two parties were equal in status and social standing,” whereas the sexual violence that was widely accepted posed no such challenges to social hierarchy predicated on white dominance. See MORAN, *supra* note 94, at 19 (“If whites could share their emotional lives and economic fortunes with blacks, how could blacks be anything less than full persons?”); SPICKARD, *supra* note 98, at 244-45 (asserting that Whites were firmly opposed to interracial sex that revolved

claims that interracial marriage was unnatural and immoral parallel contemporary claims that gay marriage is bestial and against the word of God.¹³⁰ Likewise, much as the purported best interests of children have been used to object to interracial marriage, the need to promote procreation is frequently asserted as a basis for denying gays and lesbians the right to marry.¹³¹

The commonalities between out-group passing by Blacks and by gays, lesbians, and bisexuals in various contexts are striking. Historically, parallels exist between attempts by Blacks and gays, lesbians, and bisexuals to escape discrimination by out-group passing, respectively, as white and as straight. As this Essay has discussed, much like many gays, lesbians, and bisexuals have out-group passed as straight to avoid rampant discrimination,¹³² Blacks who were light enough to out-group pass as white often did so and still do so to escape discriminatory treatment.¹³³ Furthermore, people still attempt to “out” closeted gays, lesbians, and bisexuals to mark them as deviants, just as people used to vigilantly “out” racial passers to protect the white race from taint and preserve white supremacy; outings of black individuals often resulted in brutally violent consequences for passers who were discovered,¹³⁴ just as outed gays have been attacked in more recent years.¹³⁵

around true intimacy and that marriage “reflected an assumption that the two parties were social equals; this the slave regime could not tolerate”); see also McNAMARA ET AL., *supra*.

130. See Forde-Mazrui, *supra* note 43, at 2187-88.

131. See *id.* at 2200-02 (noting that anti-miscegenation statutes were among the most widespread and tenacious of segregationist laws, just as anti-gay marriage laws are widespread, existing in nearly every state, and explaining that the view of procreation as the primary purpose of marriage and the social prejudice that children who are part of same-sex or interracial households may face were and are frequently cited as reasons for prohibiting interracial and same-sex marriages).

132. See Joy S. Whitman et al., *Lesbian Identity Management at Various Stages of the Coming Out Process: A Qualitative Study*, 5 INT’L J. SEXUALITY & GENDER STUD. 3, 4-5 (2000) (describing how some lesbians view remaining closeted as being best for economic and societal survival).

133. Much like out-group passing by gays, lesbians, and bisexuals as heterosexual, racial passing by fair-skinned Blacks in the past was, in many instances, practiced as a means of avoiding or entirely escaping the social and economic restrictions placed on Blacks in society. See Forde-Mazrui, *supra* note 43, at 2195-96 (stating that the most prevalent reason for racial out-group passing by Blacks was “to gain the rights and benefits of being perceived as white” and that, “[i]n the sexual-orientation context, gays and lesbians often ‘closet’ their sexual orientation to guard against legal and social sanction, or otherwise to experience the rights and privileges of heterosexual supremacy”). Some people of color, however, out-group pass involuntarily, such as Professor Judy Scales-Trent, who describes herself as a “a black woman who is often mistaken for white.” See SCALES-TRENT, *supra* note 49, at 2, 17 (“There is no way around it. I am passing all the time as I walk through the world. . . . And I feel like a fraud. And I hate it.”); see also Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259, 1304 (1997) [hereinafter Johnson, “Melting Pot”] (describing the pain suffered by mixed race people thought to be white).

134. See, e.g., KENNEDY, *INTIMACIES*, *supra* note 1, at 314.

135. See Forde-Mazrui, *supra* note 43, at 2201. Professor Kim Forde-Mazrui explained:

Animosity toward same-sex intimacy is also characterized by a visceral emotionality and tendency to violence. Illustrated most infamously by the murder of Matthew Shepherd,

Moreover, much like some individuals out-group pass as white or straight to escape stigma and discrimination, members of interracial and gay couples frequently conceal the composition of their intimate relationships to avoid societal disapproval of their unions and resulting discrimination,¹³⁶ such as discharge from employment or even violence.¹³⁷ In the past and currently, individuals in gay relationships have out-group passed, individuals in interracial relationships have in-group passed, and both continue to pass, even if only temporarily, as members of “normal relationships,” or as singles on the market for significant others.

The fact that some Blacks used to out-group pass as white to avoid anti-miscegenation laws, some continue to out-group pass as white to avoid discriminatory treatment, and some in-group pass as black today to avoid intragroup discrimination negates the argument that gays, lesbians, and bisexuals’ ability to out-group pass as straight makes *Loving*-based analogies between interracial and same-sex marriage inappropriate. Importantly, it also indirectly nullifies the notion implicit in black anti-gay marriage advocates’ arguments that the only harm that could result from passing lies in the possibility of being outed. Whether one passes because of one’s physical appearance or through one’s performance of socially constructed norms, doing so compromises one’s identity in order to ensure others’ comfort or acceptance. Individuals who must pass or cover suffer damaging psychological effects from denying or hiding a part of themselves in order to avoid wrongful discrimination.¹³⁸

Such psychologically harmful passing began in cases of interracial couples during the antebellum period, a period during which many white men simultaneously maintained both a white family and a black family.¹³⁹ Social pressures at that time and up until the mid-1970s made it difficult for individuals in intimate interracial relationships to openly express their love for one another in public, regardless of how powerful they were in

condemnation of those who would seek intimacy with people of the same sex has involved a degree of hatred and cruelty expressed through torture, mutilation, and castration, the brutality of which is matched only by the lynching of blacks that produced the “strange fruit” of the South. There is something about sex and intimacy in violation of accepted norms, whether across racial or within sexual lines, that provokes the deepest fears and violent rage.

Id.

136. See, e.g., Whitman et al., *supra* note 132, at 8 (“Passive hiding [among lesbians] involved not bringing up the topic of homosexuality in conversation, remaining silent when it did arise, or not offering personal information about themselves.”).

137. See KENNEDY, *INTIMACIES*, *supra* note 1, at 91 (describing instances in which people lost their jobs after discovery of their interracial marriage); see Tobias Barrington Wolff, *Political Representation and Accountability Under Don’t Ask, Don’t Tell*, 89 IOWA L. REV. 1633, 1649-51, 1655-69 (2004) (explaining that gay and lesbian members of the armed forces often lose their positions when their sexuality is discovered).

138. Fajer, *Storytelling*, *supra* 116, at 596 (“The pressure to maintain a concealed identity can be extremely stressful.”).

139. See KENNEDY, *INTIMACIES* *supra* note 1, at 76.

society.¹⁴⁰ For example, for years former President Thomas Jefferson concealed his relationship with his slave and lover, Sally Hemmings, so effectively that members of his own family were ignorant of their relationship (despite the striking similarity between Hemmings' children and Jefferson).¹⁴¹ In fact, Jefferson publicly expressed disgust at the idea of miscegenation—probably partly to ensure that his relationship with Hemmings remained secret—claiming that interracial relations “produce[] a degradation to which no lover of his country, no lover of excellence in the human character, can innocently consent.”¹⁴² This action illustrates one way in which Whites, even very powerful ones, sometimes engage in forms of passing themselves.

As in Jefferson and Hemmings' situation, societal disapproval has encouraged many same-sex couples to conceal their relationships by passing as either single or as coupled with persons of a different sex. It has forced gays, lesbians, and bisexuals to present themselves as straight in public to avoid blatant harassment and more subtle forms of discrimination, as well as to protect loved ones from embarrassment.¹⁴³ For example, Professor Fajer has chronicled several instances in which gay and lesbian couples lived apart to avoid being outed, and described one instance where a couple “that lived together installed a timer for the lights in the unused bedroom ‘so [their] neighbors, should they look, would see that two bedrooms appeared to be in use.’”¹⁴⁴

In many of these situations, the primary motivation for concealing the gay or interracial relationships was the fear that such relationships could result in individuals being ostracized from their families.¹⁴⁵ The psychological consequences of passing for any reason are extremely damaging to those who must hide an integral part of themselves, their partner. Many individuals in interracial and gay couples who succeed at passing have lost

140. See *id.* at 77 (quoting Professor Dollard's assertion that social pressures during the 1930s and 1940s “tend[ed] to force any genuine love affair between [a] white man and Negro woman under ground, since being lovers openly would tend to legitimate their relationship and would thus challenge caste arrangements”).

141. See *id.* at 51, 54.

142. *Id.* at 56 (quoting Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814) in THOMAS JEFFERSON: WRITINGS 1343 (Merrill D. Peterson ed., 1984) (explaining how Jefferson could believe Blacks to be inferior to Whites and still hold intimate feelings toward Hemmings)).

143. See Fajer, *A Better Analogy*, *supra* note 40, at 45 (“Punishing self-identification has the obvious and intended effect of deterring people from ‘coming out.’”); Ross, *Sexualization of Difference*, *supra* note 31, at 276-78.

144. Fajer, *Storytelling*, *supra* note 116, at 594 (citation omitted).

145. Several studies have found, however, that black families are more accepting of family members' interracial relationships and marriages than white families. Such feelings, however, are tied more to an understanding that banning interracial marriages is a means of continuing white superiority and less to true support of intimacy between people of different races. See PAUL C. ROSENBLATT ET AL., *MULTIRACIAL COUPLES: BLACK & WHITE VOICES* 101-02 (1995); Dan K. Hibbler & Kimberly J. Shinew, *Interracial Couples' Experience of Leisure: A Social Network Approach*, 34 J. LEISURE RES. 135 (2002).

all contact with their families.¹⁴⁶ In other situations, individuals act in ways that hurt and humiliate their lovers and themselves in order to avoid being outed. For example, one white woman went as far as to ask her black husband to pose as her chauffeur so that he could accompany her to her mother's funeral.¹⁴⁷ For two years Gail Mathabane, a white South African, hid from her father her relationship with Mark Mathabane, the black author of *Kaffir Boy*,¹⁴⁸ a book on the South African apartheid regime.¹⁴⁹

Today, continued prejudice and discrimination against both interracial and gay couples makes passing for members of such couples convenient in some instances¹⁵⁰ and necessary in others, especially in cases of potential violence.¹⁵¹ In fact, polls demonstrate widespread intolerance for both types of non-traditional marriage, indicating that 20% of white Americans believe interracial marriage should be illegal¹⁵² and that 59% of Americans disapprove of gay and lesbian relationships.¹⁵³ Such prevalent hostility forces many gays, lesbians, and bisexuals to conceal their sexuality in public, including in the workplace, to ensure professional and emotional

146. See KENNEDY, *INTIMACIES*, *supra* note I, at 90 (quoting the explanation offered by one white woman who vanished from her family's world after marrying a black man: "I'd much rather they didn't know where I am than know the truth"). In some cases, children of interracial couples practice passing, too, pretending to be from a monoracial family by publicly rejecting the parent who physically resembles them the least. See McNAMARA ET AL., *supra* note 129, at I05 (describing the story of a self-identified black daughter of a white woman who did not tell her friends that her mother was white).

147. See KENNEDY, *INTIMACIES*, *supra* note 1, at 89.

148. See MARK MATHABANE, *KAFFIR BOY* (1986).

149. See GAIL MATHABANE & MARK MATHABANE, *LOVE IN BLACK AND WHITE: THE TRIUMPH OF LOVE OVER PREJUDICE AND TABOO* 65-78 (1992).

150. See Forde-Maztzi, *supra* note 43, at 2185-86 (acknowledging "America's historical and continuing aversion to intimacy between people of different races"). In some instances, the couples simply withdraw, "passing" in the most extreme manner by avoiding going out in public spaces together. See McNAMARA ET AL., *supra* note 129, at 112 (discussing the "hiding" that interracial couples engage in); ROMANO, *supra* note 73, at 86 (describing how many interracial couples "avoided public displays of affection . . . because it was dangerous for them to openly express their affection"); ROSENBLATT ET AL., *supra* note 145, at 168; Hibbler & Shinew, *supra* note 145, at 135; see also Yoshino, *Covering*, *supra* note 59, at 843 (noting that gays and lesbians also "cover by avoiding public displays of same-sex affection").

151. See McNAMARA ET AL., *supra* note 129, at 101 (describing acts of violence against interracial couples); *Interracial Pair Report Assault*, AUGUSTA CHRON., Apr. 28, 2003, at B3 (detailing the attack of a black man by three white men who were offended by the fact that he was out with his white girlfriend); see also ROSENBLATT ET AL., *supra* note 145, at 170-71 (noting how interracial couples develop a sixth sense about safe places to go). In fact, recently actor Taye Diggs, who is black, and his wife Idina Menzel, who is white, received violent threats because of their interracial marriage. See Diggs, *Menzel Targeted with Racist Threats*, http://www.usatoday.com/life/people/2004-12-06-diggs-menzel_x.htm. Some couples however, have employed passing techniques to their advantage, at times, shopping for items such as automobiles separately to see what kind of reaction and price they get. See ROSENBLATT ET AL., *supra* note 145, at 122.

152. See Kennedy, *How Are We Doing?*, *supra* note 5, at 820.

153. See Sharon Cohen, *Taking Sides in America, Nation Remains Divided Over a Host of Issues*, FT. WAYNE J. GAZETTE, Dec. 30, 2003, at 1D (noting that the percentage of people opposing gay marriage increased from 53% to 59% in just 3 months); Judith Graham, *Gay Marriage, a Longstanding Debate*, ST. PAUL PIONEER PRESS, Aug. 3, 2003, at 24A (citing disapproval of gay marriage at 53%).

survival. Professor Yoshino described a gay corporate professional who out-group passed as straight when interacting with his colleagues; for example, he attended company singles' nights, spoke about past girlfriends, and even laughed at homophobic jokes.¹⁵⁴ A lesbian explained her method of out-group passing, noting:

I got by for years with made-up boyfriends. I had to have something to tell the women I worked with. Finally, after they kept pressing [me] to meet this fabulous guy, I invented a fiancé in the war in Vietnam to keep them off my back. On the day I split with my lover I couldn't hide my heartbreak from my co-workers. I told them my fiancé had been killed in the war. That got me by for about a year.¹⁵⁵

Likewise, famous actor Rock Hudson lived as if he were straight for years, appearing "to carry on affairs and marriages with women."¹⁵⁶

Social pressures to live up to racial identity norms encourage the same type of damaging conduct among interracial couples, even though they are not as openly condemned by the public as gays, lesbians, and bisexuals. Some fear outing an interracial relationship with a racial other so intensely that they have taken their secrets to the grave. For instance, only after former segregationist Strom Thurmond's death did his black daughter, Essie Mae Washington-Williams, reveal her father's identity.¹⁵⁷ Although he provided some financial assistance to his daughter, Thurmond explicitly denied rumors that he had a black daughter.¹⁵⁸ One author noted that Thurmond's death finally freed Washington-Williams to embrace her full identity as a biracial woman born from very the type of sexual relationship her own father condemned.¹⁵⁹

154. Yoshino, *Covering*, *supra* note 59, at 811-13; cf. McNAMARA ET AL., *supra* note 129, at 63 (quoting a white female lawyer who asserted that she did not "want [her] relationship with [her black husband] to adversely affect [her] chance to make partner," but that "[k]eep[ing] him in a closet for the next seven years" was not a possibility either).

155. Fajer, *Storytelling*, *supra* note 116, at 593 (citation omitted).

156. Fajer, *A Better Analogy*, *supra* note 40, at 46.

157. See Johnson, *Legacy of Jim Crow*, *supra* note 89, at 744-47 (reviewing, along with another book, ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, *DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND* (2005)); see also Osagie K. Obasogie, *Anything But a Hypocrite* (unpublished manuscript at 6-7, on file with author) (raising the question of why Thurmond's relationship with Essie May Washington's mother was "understood as hypocritical rather than criminal" and not viewed as a "reflection of the sexual exploitation prevalent among Black women at the time").

158. See Johnson, *Race in America*, *supra* note 95, at D5 (noting the irony of the fact that Thurmond, a staunch segregationist, concealed the existence of his black daughter for so many years and explaining what such concealment signifies about the legacy of the ban on interracial relationships); see also KENNEDY, *INTIMACIES*, *supra* note 1, at 57.

159. Johnson, *Race in America*, *supra* note 95, at D5. But see Obasogie, *supra* note 157 (manuscript at 28-30, on file with author) (questioning if it was an interracial relationship that Thurmond would have condemned, meaning one that was not consensual).

The emotional and psychological damage that results from passing may be even more severe in more complex situations, such as those in which persons are selective about when they pass, coming in and out of the closet at varying times—choosing, for example, “to be open to pro-gay audiences while remaining closeted to anti-gay ones.”¹⁶⁰ Social pressures to conform to race norms also compel individuals who are proud of their black heritage, viewed by many as “race people,” and clearly black in terms of their appearance to temporarily in-group pass by concealing the parts of themselves that do not neatly fit into social constructions of black identity.¹⁶¹ Blacks in interracial marriages frequently deceive others into believing that they are married to Blacks, because many Blacks view interracial marriages as signs of disloyalty and selling out.¹⁶² For instance, one black woman kept her relationship with her white boyfriend secret for three years because of her fear of the black community’s disapproval—she even socialized with her white boyfriend and his friends in public without revealing her true feelings for him.¹⁶³ Indeed, even Lena Horne hid her marriage to her white husband for three years, fearing that it would only confirm Blacks’ suspicions that she was a “white Negro.”¹⁶⁴ Several decades later in South Africa, Mark Mathabane discouraged his wife Gail from attending his lectures when he was on the circuit discussing his best-selling book *Kaffir Boy*, choosing to hide their marriage because of the anger and

160. Yoshino, *Covering*, *supra* note 59, at 820.

161. I recognize and acknowledge that this form of in-group passing becomes more difficult for those who are perceived as different or not authentically black along numerous factors. In essence, it is easier for someone like me to singly in-group pass by concealing the identity of my partner to fit within definitions of blackness and black perspective by the black community than it would be for a black gay male Republican with a white lover to in-group pass along the three factors of politics, sexuality, and identity of partner.

162. See KENNEDY, *INTIMACIES*, *supra* note 1, at 110 (finding that some Blacks disapprove of black-white marriages because they “constitutc[] an expression of racial disloyalty[.] . . . impede[] the perpetuation of black culture[, and] weaken[] the African American marriage market”); see also ROMANO, *supra* note 73, at 88 (asserting that marrying a white person is sometimes perceived within the black community as a denial of black racial identity); *id.* at 99 (quotations omitted) (describing the consequences for Blacks, such as Walter White (who held a prominent position in the NAACP), who intermarried and subsequently learned that “thousands of blacks . . . actually feel it is a crime for black people to marry out of their race”); McNAMARA ET AL., *supra* note 129, at 4, 14 (noting that people involved in interracial relationships are often viewed as “traitors of their own race,” especially if they are black men with white women). Within the black community, relationships between black men and white women are viewed with more disdain than relationships between black women and white men. For many, a black woman’s decision to marry outside of her race is excusable because of what is perceived as a shortage of “marriageable” black men. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-74 (2004); see also Jody David Armour, *Bring the Noise*, 40 B.C. L. REV. 733, 734 (1999) (noting that nearly half of all prison inmates are black men).

163. See ROMANO, *supra* note 73, at 86 (asserting that the white boyfriend proclaimed that “[t]he ‘prejudice of [his girlfriend’s] race’ doomed him to a life of loneliness”).

164. See *id.* at 88; see also ROSENBLATT ET AL., *supra* note 145, at 180-84 (“Partnership with a white can threaten an African American’s credibility in the black community and, as a consequence, threaten personal identity.”).

accusations of betrayal that he feared it would elicit from the black community.¹⁶⁵ Perhaps the most disturbing story of passing comes, however, from a white woman who married a black man in the early 1970s, only to pretend to be single and childless to the rest of her family and home community until 1991.¹⁶⁶

In sum, the fact that gays, lesbians, and bisexuals can hide their sexuality should no more serve as an excuse for opposing gay marriage than the fact that interracial couples can conceal their relationships should justify banning interracial marriage. In both situations, passers' actions reveal the fluidity of social constructions of racial and sexual identity. Their forced concealments are extremely dangerous, though, because they only solidify the second-class status of the groups to which they belong.¹⁶⁷ In other words, although the various ways in which people perform their identities to pass indicate that categories of race and sexuality are not fixed, passing actually reifies existing hierarchies. Passing to conceal individuals' true racial or sexual identities requires individuals to deny parts of themselves that are not viewed as authentic or natural parts of their identity, or to deny who they are. Socially constructed definitions of blackness and acceptable sexuality work to reify the positions of Blacks below Whites in a white supremacist racial society and gays, lesbians, and bisexuals below heterosexuals in a heterosupremacist hierarchy. Similarly, the statutes that were struck down in *Loving*, as the Supreme Court highlighted, defined and drew lines around boundaries of acceptable love—notably that of Whites with Whites and non-Whites with each other, but never with Whites—in order to maintain the place of Whites at the top of the social hierarchy. By continuing to enforce social definitions of identity and creating pressures to pass, whether in-group or out-group, we punish those in our society who challenge those hierarchies through the existence of their relationships, and ensure that such supremacies will never be defeated.

CONCLUSION

The similarities between the experiences of members of same-sex and interracial couples who pass uncover the frailties of the argument against “playing the *Loving* card” to support the legalization of gay marriage—at

165. See MATHABANE & MATHABANE, *supra* note 149, at 194. Indeed, some authors have even described how, during the Black Power Movement in the 1960s, even having white friends (or those mistakenly perceived as white) could strip a person of their blackness. See ROMANO, *supra* note 73, at 223 (“Blacks were not even supposed to speak to white people, let alone date them.”); GLENN LOURY, ONE BY ONE FROM THE INSIDE OUT 3-5 (1995) (describing his painful failure to “vouch” for his friend, who merely looked white and was challenged by other black radical students as a “white boy,” even though the friend was of African ancestry and identified as black because it “would have challenged [Loury’s] own chance of being received among [black radicals] as a genuine colleague”).

166. See ROMANO, *supra* note 73, at 268.

167. MORAN, *supra* note 94, at 48 (“By treating blackness as a damaging secret, those who passed actually showed that their racial identity was an inescapably inferior status.”).

least as far as the argument relies on the fact that gays, lesbians, and bisexuals can out-group pass as straight. This argument mistakenly assumes that persons in interracial relationships never pass and relies on strictly biological definitions of race and traditional definitions of sexuality, rather than understanding that race and sexuality are socially constructed categories. Factors other than skin color can define one's race, including life choices such as deciding where to live or whom to marry. Likewise, one's sexuality encompasses far more than one's apparent sex. Moreover, similar to the *Loving* Court's analysis of how the state of Virginia used anti-miscegenation statutes to maintain the inferior status of Blacks and the superior status of Whites, society has constructed categories of race and sexuality in a manner designed to perpetuate hierarchies based on the privileged status of heterosexuals and Whites.

Even outsider categories, such as blackness and gay, lesbian, and bisexual identity, are defined in ways that strengthen boundaries that prevent breaking down the status quo. Just as people may out-group pass by physically hiding their race and sexuality, they may also in-group pass by misrepresenting or omitting an aspect of their life, such as the race of their partner, to ensure acceptance in a subordinated group or to maintain the advantages of a privileged one.¹⁶⁸ Regardless of the reasons why individuals in same-sex or interracial relationships pass, or the extent to which they can, one fact is clear: negative attitudes toward both types of relationships still abound. Institutional and societal disapproval of such relationships denies the freedom of persons in both groups to be themselves, because of the perceived failure of these undercover others to be authentically black, male, or female—to love who they truly are instead of constantly switching their many masks to appease everyone surrounding them.

168. See Forde-Mazrui, *supra* note 43, at 2195 (noting that motives for passing “may, but need not, involve a desire to be white or to reject blackness”).