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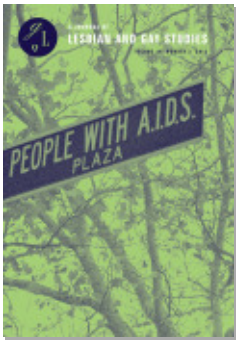
GLQ: A Journal of Lesbian and Gay Studies, Volume 11, Number 3, 2005, pp. 335-370 (Article)

Published by Duke University Press



QUEER *LOVING*

Siobhan B. Somerville

In the past decade, popular and juridical debates about lesbian and gay civil rights in the United States have been driven primarily by a liberal discourse of inclusion, framed by the assumption that lesbians and gay men constitute one of the last groups of excluded "minorities" to be denied full citizenship under the law. Such a view tends to rely on an optimistic reading of the history of civil rights in the twentieth-century United States, a reading that moves gradually from discrimination against minority groups toward the fulfillment of an idealized democracy, in which all individuals have equal opportunities to inhabit the roles, rights, and responsibilities of citizens. This narrative of progress also creates and maintains comparisons among different historically excluded groups, such that the rights gained by one group establish a precedent for another group's entitlement to the same rights.[1] Although many critics have argued that identity categories are intersecting, not parallel, categories of analysis, our knowledge still tends to be organized through analogies naturalized in the context of identity politics, including the notion that sexual identity is in most ways, or at least in the most salient ways, like race.[2]

One version of this analogy, sometimes referred to as the "miscegenation analogy," has become increasingly visible in recent public debates about same-sex marriage. In a December 14, 2003, opinion piece for the *New York Times*, for instance, David E. Rosenbaum states that "as a political, legal and social issue, same-sex marriage seems to be now where interracial marriage was about 50 years ago."[3] Likewise, Gail Mathabane asserts in *USA Today* that "interracial couples were [once] in the same boat that same-sex couples are in today. They were vilified, persecuted and forbidden to marry. Interracial marriage was considered a felony punishable by five years in a state penitentiary." Naturalizing a progressive teleology of rights, Mathabane continues, "Like interracial marriages, same-sex marriages are bound to become legal sooner or later, especially since the U.S.

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Supreme Court struck down state same-sex sodomy laws [in *Lawrence v. Texas* (2003)]."[4]

In legal argumentation the analogy between same-sex and interracial couples has played a significant role for as long as the constitutional right to same-sex marriage has been argued before the courts.[5] From *Baker v. Nelson* (1971), the first case in which same-sex marriage was presented (unsuccessfully) to a U.S. state court, to more recent challenges to state marriage regulations, advocates have argued that the strongest precedent for a constitutional right to same-sex marriage can be found in earlier decisions on interracial marriage.[6] The two cases most consistently invoked are *Loving v. Virginia* (1967), the landmark U.S. Supreme Court decision that unanimously struck down state laws prohibiting interracial marriage, and, to a lesser extent, *Perez v. Sharp* (1948), in which the California Supreme Court became the first state court to rule that antimiscegenation statutes violated the equal protection clause of the Fourteenth Amendment.[7]

The miscegenation analogy seems to have widespread appeal, but whatever its rhetorical power, it has obscured the complicated ways in which race and sexual orientation have been intertwined in U.S. law. Too often the history of interracial heterosexuality in the United States is narrated as if it had nothing to do with the history of homosexuality—except as a precedent.[8] In fact, the current use of the miscegenation analogy enacts a kind of amnesia about how U.S. legal discourse historically has produced narratives of homosexuality in relation to race. This amnesia results in part from the methods by which precedent is produced by lawyers and judges, who, as active interpreters of the law, often creatively and oppositionally isolate fragments of past decisions to support their present cases. While precedent is usually understood, at its best, as a process of creative remembering, it is also a powerful form of forgetting. Establishing precedent involves extracting a legal principle from its historical contexts and recontextualizing it, shorn of the particularizing details of any single case, in the present. As a method of judicial reasoning, the production of precedent is often an enabling (though not uncontested) argumentative tool; as a method of historical thinking, however, it entails inevitable loss through its tendency to discard the contexts that yielded a legal principle in the first place.

Rather than take the legal history of race, particularly of interracial marriage, out of its original context and insert it into current debates about gay and lesbian civil rights, I focus in this essay on what has been largely ignored in that process: how constructions of homosexuality (and heterosexuality) were intertwined with key congressional legislation and court decisions about race during the 1950s and 1960s. Instead of assuming that an earlier politics of race set a

precedent for a later politics of sexual identity, I explore how these two categories were imagined in relation to one another during the same moment, roughly the two decades following World War II, a period defined by civil rights challenges to a legal system that had openly sanctioned racial segregation and discrimination in the United States. I examine two turning points in the legal history of homosexuality during this period, both concerning immigration and naturalization, to show how shifts in federal juridical constructions of homosexuality coincided with major changes in the legal discourse of race. Thus, rather than posit a consecutive relationship (i.e., precedent) between the legal history of race and that of sexual orientation, I look "sideways" to consider how these categories were produced simultaneously.

I focus on the two decades between *Perez* and *Loving* because during this period the legal status of interracial (heterosexual) marriage changed from widely prohibited to constitutionally protected, a change that we might tentatively map as a shift from "queer" to "normative," at least within the sphere of law.[9] This shift coincided with the increasing visibility and overt criminalization of homosexuality in U.S. laws. Noticing the simultaneity of these shifts makes possible a key argument that I trace in this essay: that the legal construction of interracial heterosexuality is as much a part of the history of (homo)sexuality as it is a part of the history of race. The legal history of interracial heterosexuality is relevant to that of homosexuality not only because of its role in establishing precedent but also because it helps us understand the extent to which the very production of prohibited forms of sexuality in legal discourse has been embedded in discourses of race. I do not necessarily want to eliminate analogies between race and sexual orientation, or between interracial and same-sex desire, but I do want to make it more difficult to assume them. By recognizing the cultural and historical production of these analogies, I insist on the necessity of imagining other ways to narrate the relationship between race and sexual orientation both in law and in the broader context of civil rights.[10]

Historicizing the Miscegenation Analogy

In legal argumentation, the miscegenation analogy is often used in ways that conflate two comparisons: first, between certain types of historically prohibited sexual acts (e.g., sex between two people of the same sex is like sex between two people of different races); and second, between two types of historically prohibited forms of marriage (e.g., same-sex marriage is like interracial marriage). Because both involve the use of identity to determine the legality or criminality of a relationship

between two consenting adults, these two comparisons tend to be collapsed under the single label of the miscegenation analogy.

The first kind of analogy, based on sexual acts, primarily concerns laws regulating sexual conduct that falls outside the private (protected) sphere of marriage. What has been at issue is whether race, gender, or sexual orientation may be used to differentiate the degrees of criminality attached to particular acts. Laws singling out voluntary interracial sex for punishment were passed as early as 1662, when Virginia enacted a law that punished interracial fornication with a fine double that imposed for fornication between people of the same race.[11] Historically, however, laws specifically regulating nonmarital interracial sex (including fornication, concubinage, cohabitation, and adultery) have been less widespread than laws against interracial marriage.[12] As Randall Kennedy notes, "The same officials who insisted that interracial marriage posed a dire threat to white civilization resisted attempts to prevent sexual relations across the race line, especially when the trespassing involved white men."[13] Renee C. Romano usefully discusses how this tendency reinforced hierarchies of gender as well as of race:

> Marriages between blacks and whites challenged the racial status quo in a way that the mere fact of interracial sex did not. Most interracial sexual relationships involved white men and black women; these relationships were often a manifestation of white male privilege. Sexual relationships between blacks and whites could produce children, but these children would not be considered the legitimate heirs of their white kin. Sexual relationships could be long-standing, but the nonwhite partner would have none of the legal protections accorded to legitimate spouses. States accordingly expended much more effort to prevent interracial marriages than interracial sex per se. In 1940 thirty-one states had laws prohibiting interracial marriage, yet only six states barred interracial fornication.[14]

It was not until 1964, in *McLaughlin v. Florida*, that the U.S. Supreme Court unanimously overturned laws against nonmarital interracial sex. At issue was a Florida law, enacted in 1881, that made it a criminal offense for "any negro man and white woman, or any white man and negro woman, who are not married to each other [to] habitually live in and occupy in the nighttime the same room." Interestingly, by indicating the gender of each participant, the law assumed that potential offenders were heterosexual; likewise it relied on an assumption that any domestic relationship between two people of different races and genders must be sexual. Carefully avoiding the question of marriage, the Supreme Court ruled in

McLaughlin that the Florida cohabitation law violated the equal protection clause: "There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race." In a separate concurrence, Justices Potter Stewart and William O. Douglas added: "It is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se*."[15]

Compared with laws against interracial sex and cohabitation, laws that differentiate explicitly between homosexual and heterosexual sex acts have been even less prevalent; in fact, they are a relatively recent phenomenon in the United States. For most of U.S. history, laws against sodomy criminalized a range of "unnatural" or "deviate" sex acts performed between men, between men and women, and between men and animals. In the 1970s a number of states repealed these laws but simultaneously began to target same-sex sodomy explicitly for the first time. As a number of historians have noted, "This legislation had no historical precedent, but resulted from a uniquely twentieth-century form of animus directed at homosexuals."[16] Such laws were finally deemed unconstitutional in the landmark Supreme Court decision *Lawrence v. Texas* (2003), which struck down a Texas law stipulating that "a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[17] John Geddes Lawrence and Tyron Garner were arrested on sodomy charges in September 1998 when Houston police, responding to a false report of a "weapons disturbance," entered Lawrence's unlocked apartment and found the two men having consensual sex. Outlining the constitutional issue in question, the majority opinion in *Lawrence v. Texas* stated that the plaintiffs' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[18] Significantly, the analogy between interracial (heterosexual) sex and same-sex sodomy did not play a major part in the Supreme Court's majority opinion in *Lawrence*, which focused on due process and the right to privacy, not on equal protection.[19] The *Lawrence* decision nowhere mentioned *McLaughlin v. Florida* as precedent, even though laws against interracial cohabitation could be considered the closest analogy to laws against same-sex sodomy.[20]

While the first version of the miscegenation analogy—the comparison between same-sex and interracial sex—has been invoked relatively infrequently in legal battles, the second version, the comparison between same-sex and interracial marriage, remains at the forefront of public debate, legislative action, and

potential Supreme Court rulings. Laws prohibiting interracial marriage were first enacted in the American colonies in 1664 and were at one time or another codified in all but thirteen states and the District of Columbia.[21] While marriage is traditionally a matter of state, not federal, jurisdiction, laws prohibiting interracial marriage have regularly been a concern at the federal level, particularly during periods when racialized boundaries have been perceived as unstable. "Between 1909 and 1921," Romano notes, "when the migration of blacks out of the South nationalized the race problem, twenty-one laws to prohibit interracial relationships were introduced into the U.S. Congress, even though Congress had long taken the position that states, not the federal government, should have responsibility for regulating marriage."[22] Until the mid-twentieth century state laws prohibiting interracial marriage were left intact by the Supreme Court, even after other segregationist laws had been struck down.[23]

The first successful challenge to state antimiscegenation laws in the twentieth century took place in 1948, when the California Supreme Court decided the case of *Perez v. Sharp*.[24] Andrea Perez, a white woman, and Sylvester Davis, an African American man, were denied a marriage license because of a California statute stipulating that "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race" and that all such marriages were illegal and void.[25] The history of the law itself demonstrated the uneven production of racialized categories in the law: when enacted in 1872, the law had applied only to marriages between white people and "negroes" or "mulattoes," but it had been amended twice, first in 1901, with the addition of "Mongolians" (intended to target those of Chinese ancestry) and again in 1933, with the addition of "the Malay race" (intended to target Filipinos).[26] In the 4–3 *Perez* decision, the California court ruled that the law's provisions "are not only too vague and uncertain to be enforceable regulations of a fundamental right, but . . . they violate the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."[27]

During the next two decades other states followed California's lead: while thirty states had interracial marriage laws in 1948, only sixteen states still had them in 1967. In that year, almost twenty years after *Perez* (and three years after *McLaughlin* had rendered laws against interracial cohabitation unconstitutional), the U.S. Supreme Court finally struck down laws against interracial marriage in *Loving v. Virginia*. The case had originated in 1958, when Mildred Jeter, an African American woman, and Richard Loving, a white man, were married in the District of Columbia. Soon after their wedding, the Lovings moved to Virginia, where

both had been raised but where marriage between African Americans and whites was prohibited by the 1924 "Act to Preserve Racial Integrity," which made it a felony for "any white person" to "marry any save a white person" and declared void any such marriage. The Lovings were arrested in their home in Caroline County, Virginia, and were indicted by a grand jury in October 1958 for violating that law. After a series of appeals, in 1967 the case reached the Supreme Court, which ruled unanimously that laws against interracial marriage violated the equal protection and due process clauses, adding that "the fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." Further, *Loving* unambiguously confirmed that marriage was a fundamental right: "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," and "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."[28] By constituting the space of interracial marriage as a protected private sphere, the ruling was thus a significant victory in a series of decisions that attempted to dismantle the legitimacy of white supremacy in the law.

Laws explicitly limiting marriage to heterosexual couples (or prohibiting same-sex marriage) have a much shorter history than laws against interracial marriage. For most of U.S. history, state marriage laws have been assumed to apply only to heterosexual couples. Efforts to legalize same-sex marriage began in the 1970s, when a number of cases challenged marriage laws in state courts, including those of Minnesota, Kentucky, and Wisconsin.[29] Some of these cases, such as *Baker v. Nelson*, invoked *Loving* as a precedent, without success.[30] The issue did not reach the forefront of national public debate about gay and lesbian rights, however, until two decades later, when the Hawaii case *Baehr v. Lewin* (1993) initiated a "second wave" of same-sex-marriage lawsuits.[31] In the amicus brief submitted in 1992 to the Hawaii Supreme Court by the Lambda Legal Defense and Education Fund, Kirk Cashmere and Evan Wolfson argued that the "opposite sex" requirement of marriage law burdened "gay people's right to choose our life partners, like the analogous racial restriction in *Loving*."[32] However, the judge saw the issue not in terms of discrimination against gay and lesbian people but in terms of sex discrimination: "[The law in question] regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex." The interpretation of the case as turning on "a sex-based classification" had special significance in Hawaii, whose constitution (unlike the U.S. Constitution) explicitly prohibits discrimination on the basis of sex.[33] Under the state's equal protec-

tion laws, sex-based classifications are assumed to be unconstitutional unless the government can prove that they achieve a compelling state interest. The analogy between race and sex (rather than sexual orientation) was the most readily available in *Baehr* because, as William N. Eskridge Jr. explains,

> the analytical structure of part one of *Loving* supported the argument that same-sex marriage bars are sex discrimination: the state's different treatment of white-black and black-black couples is race-based discrimination, because the regulatory variable, the item that changes the legal treatment, is the *race* of one of the partners; similarly, the state's different treatment of female-female and female-male couples is sex-based discrimination, because the regulatory variable, the item that change[s] the legal treatment, is the *sex* of one of the partners.[34]

As the opinion in *Baehr* stated, "Substitution of 'sex' for 'race' . . . yields the precise case before us." This novel argument detached same-sex marriage from the question of sexual orientation altogether, a move that some have criticized for erasing the question of lesbian and gay rights. In fact, the *Baehr* court insisted that "it is immaterial whether the plaintiffs, or any of them, are homosexuals."[35]

More recently, in *Goodridge et al. v. Department of Public Health* (2003), the Massachusetts Supreme Judicial Court has taken a different approach by invoking the more familiar analogy between race and sexual orientation in its ruling that the exclusion of same-sex couples from the institution of civil marriage violated that state's constitution. *Goodridge* explicitly cited cases about interracial marriage as precedents for same-sex marriage: "In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here." The judge's opinion turned on the argument that "the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."[36]

As *Baehr* and *Goodridge* demonstrate, invoking the analogy between same-sex marriage and interracial marriage can produce quite different legal strategies, depending on the local context. While the judge in *Baehr* found the argument based on sex discrimination compatible with Hawaii's state constitution, the judge in *Goodridge* crafted an argument that likened sexual orientation to race because it was supported by the Massachusetts state constitution. In the next section, I shift my attention to the federal constitutional questions at stake in these various instantiations of the miscegenation analogy.

"Like Race" Arguments

These two versions of the miscegenation analogy—one comparing prohibited sexual acts, the other comparing historically contested forms of marriage—participate in a more general reliance on analogies to race in civil rights cases. In an important consideration of the possibilities for moving beyond identity-based strategies, legal scholar Janet E. Halley examines the prevalence of "like race" arguments, emphasizing the extent to which such analogies have been taken for granted in legal challenges on behalf of any number of historically subordinated groups, including gay men and lesbians. In Halley's words, "Asking the advocates of gay, women's, or disabled peoples' rights to give up 'like race' similes would be like asking them to write their speeches and briefs without using the word 'the.'" Halley is wary of the ease with which such analogies are made, primarily because she sees contemporary sexual orientation and sexuality movements as distinct from other identity movements "in harboring an unforgivingly corrosive critique of identity itself." Nevertheless, she admits that such analogies may be inevitable: "'Like race' arguments are so intrinsically woven into American discourses of equal justice that they can never be entirely forgone. Indeed, analogies are probably an inescapable mode of human inquiry and are certainly so deeply ingrained in the logics of American adjudication that any proposal to do without them altogether would be boldly utopian." Building on queer approaches, Halley ultimately urges her readers to move beyond identity-based frameworks altogether, to foreground not "who we are but how we are thought," but she also acknowledges the stubborn and seemingly intractable persistence of analogous thinking in the American legal system, and perhaps in American culture more broadly.[37]

Historian Peggy Pascoe also usefully attends to the choices that legal advocates and political activists have made in arguing for the right to same-sex marriage. Like Halley, Pascoe notes the unmistakable prevalence of analogies to race rather than to other categories of identity, such as sex/gender. Pascoe observes that "what is even more striking than the consistency with which lesbian and gay activists have resorted to comparisons to discrimination on the basis of race was the reluctance they initially showed to connecting gay rights issues to categorization by sex."[38] But it is important to recognize that "like race" comparisons are more appealing because of the distinctive argumentative power of race in federal constitutional reasoning. "Like race" arguments are so prominent primarily because of the key role of the Fourteenth Amendment as the authority for equal protection. Because the Fourteenth Amendment was created in 1868 on behalf of a specific racialized group, previously enslaved African Americans, "like race" arguments implicitly refer to

this constitutional apparatus for challenging identity-based discrimination. As Mary Eaton notes, "A fairly entrenched notion in constitutional jurisprudence is that entitlement to equal protection can be determined by comparing the situation of those seeking inclusion to that of African-Americans, the original suspect class."[39]

Race thus remains one of the most powerful categories in constitutional law because, along with ethnicity and national origin, it triggers the highest level of judicial review, known as "strict scrutiny," in questions of equal protection. According to this standard, a law that applies only to "suspect classifications"—race, ethnicity, or national origin—will be declared unconstitutional unless that law is "narrowly tailored" to accomplish "a compelling state purpose."[40] In other words, when a law includes an explicit reference to race, it is presumed to be unconstitutional and the government must prove that a compelling state interest makes the racial classification necessary. The standard of strict scrutiny arose out of a concern that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[41] To be considered a suspect class, a group must "1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless."[42] Significantly, gender, unlike race, is not automatically considered a suspect classification and instead receives "intermediate" scrutiny, a lower standard of judicial review. Under this standard, a law discriminating on the basis of gender "must serve important governmental objectives and must be substantially related to achievement of those objectives."[43] Stephen Clark points out that, according to Supreme Court interpretations of the Constitution, "classifications based on sex are not inherently suspect, which leaves open the possibility that non-stigmatizing, 'mirror image restrictions,' such as sex-segregated restrooms, do not trigger skeptical scrutiny under current sex equality law."[44] Finally, sexual orientation has not been subject historically to either intermediate or strict scrutiny, only to the "rational basis" test, the weakest and default standard of judicial review. Under the rational basis test, judges typically defer to the legislative branch: "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Even if the Court disagrees with such a law, it tends to leave it in place because "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes," rather than by the judicial branch.[45]

Thus the Supreme Court has historically construed race, gender, and sexual orientation as having different levels of status in terms of constitutional doc-

trine. Far from being parallel categories of difference and power, race, gender, and sexual orientation are arranged in a three-tiered hierarchical relationship. That is, as Evan Gerstmann explains, "the courts apply different standards to different laws depending on what group is affected by those laws. . . . So, for example, one law banning African Americans from the military, another law banning women, and another banning gays and lesbians would all be subject to different levels of judicial review."[46] This hierarchical arrangement among categories of identity may strike those working outside legal studies as strange, since it has become axiomatic in many fields that neither gender nor race can be considered a more fundamental category of oppression. In doctrinal terms, legal advocates for same-sex marriage are attempting to rearrange the formal relationship among these variations of identity-based discrimination, elevating sexual orientation to the level of judicial review, strict scrutiny, that race currently receives.

This effort to forge a theoretical parallel between race and sexual orientation in interpretations of the Fourteenth Amendment is, then, a formidable goal with potentially wide-ranging consequences in many areas of law, not just marriage law. Most legal scholars agree that the analogy to *Loving*—or some variation of it—offers the strongest argument for same-sex marriage.[47] While conceding its power, however, a number of critics have pointed to various problems with the analogy. One of the most useful lines of criticism has been pursued by scholars who argue for intersectional approaches to questions of identity.[48] Extending Kimberlé Crenshaw's pioneering work on race and sex in antidiscrimination doctrine to the intersection of race and sexual orientation, Eaton, for instance, observes that one effect of attempting to establish race and sexual orientation as parallel categories of discrimination is that, in practice, they tend to be seen as mutually exclusive; indeed, they are rarely discussed together in the same case. "Strikingly," Eaton notes, "in the mass of [federal] judicial opinions concerning the equality rights of homosexuals, almost none refer to the race of the parties involved."[49] She locates only two cases in which the plaintiff's race is explicitly mentioned: *Williamson v. A. G. Edwards and Sons Inc.* and *Watkins v. U.S. Army* (both 1989). Through close readings of these cases Eaton shows that even though the plaintiffs were African American gay men, the issue of race was virtually erased because of the court's reliance on analogous thinking:

> Through its preservation of difference, analogical reasoning inserts a space between the things analogized that may be narrowed according to degrees of logical correspondence, but remains ultimately unbridgeable. The effect of this is plain: The possibility of cross-identification or consubstantial

> oppression is utterly unintelligible in a mode of reasoning that depends upon a separation between identities or oppressions. "Black homosexual" is therefore an oxymoron in an analogical comparison of blacks and homosexuals.[50]

As Eaton shows, one of the most debilitating effects of such thinking is the erasure of those who might be subject to discrimination on the basis of both race and sexual orientation, or what Devon Carbado terms "compound discrimination."[51]

Lawrence v. Texas is a case in point. The racial identities of Tyron Garner, who is African American, and John Lawrence, who is white, are unmarked in the official documents related to the Supreme Court decision. Most people were not aware of the interracial aspect of the case until photographs of the pair were published in news accounts of the decision.[52] But race may have played a significant role in the incident that precipitated the case. Accounts of the circumstances under which police were summoned to Lawrence's apartment are sketchy, in part because neither the arresting officer nor Lawrence and Garner themselves have been willing to discuss the details publicly. According to most news reports, the caller who had alerted the police had complained of a disturbance caused by someone armed, often described as "a crazy man with a gun."[53] But some reports, especially early ones, suggested that the caller had referred to Garner's race. The Associated Press, for instance, reported that "a neighbor tricked police with a false report of a black man 'going crazy' in John Geddes Lawrence's apartment."[54] While this "weapons disturbance" was later proved false, it set the conditions for the lawful entry of the police into Lawrence's apartment. If we frame this incident in a way that does not detach the history of racism in the United States from that of sodomy and homosexuality, it is possible to see that the racialization of Garner may have played a significant factor in eliciting the police's scrutiny. That is, while the case has been interpreted as one in which the police enforced a sodomy law to punish two gay men, it is just as plausible that without the presence of an African American man (who also happened to be gay) in a white man's apartment, the police might have chosen a different response (or none at all). As the Harris County sheriff's spokesman noted, there was no record of the sodomy law's ever having been invoked to arrest anyone in a private home prior to this case: "In all candor, I don't believe we've ever made an arrest before under those circumstances."[55]

This method—focusing on the rare instances in which race and sexual orientation are found in the same case—is one useful strategy for contesting legal thinking that, through the logic of analogy, isolates the two from each other. In

larger theoretical terms, as Eaton notes, analogous thinking also sustains the fiction that heterosexuality and homosexuality are binary opposites: "If racial erasure is as crucial to the survival of the homo/het divide and the continued containment of homosexuality as an outsider category within it, then reracializing the homosexual body is equally necessary to a strategic disruption."[56] Eaton insists that racializing homosexuality is a necessary step in destabilizing this binary, which sustains homophobic laws. While this method of locating sites in which "compound discrimination" may have been at work is crucial, it is only a starting point for exploring the intersections of race and sexual orientation in U.S. law.[57]

In the next section I propose another method for moving beyond analogous thinking, one that does not depend on locating individual cases in which race and sexual orientation are both explicitly mentioned together.[58] Instead, my method looks across different cases from the same Supreme Court docket. By doing so, I move in a direction compatible with Halley's call for a shift in focus "from persons to discourses, from coherentist identity politics to critical theory."[59] I show that even though specific cases about homosexuality may seem to have nothing to do with race, we can still ask about and discover the extent to which juridical constructions of homosexuality have shaped and been shaped by juridical discourses of race by looking at them simultaneously. To deepen this analysis, I take a genealogical approach to the cases themselves, with an eye to the legislative production of the law in question, as well as to its interpretation by the judicial branch. I thus look at the unacknowledged logic—located in the language, metaphors, and narrative structure used to render laws and rulings—that ties constructions of race and homosexuality together within the same legal history.

Race, Sexuality, and Cold War Immigration Policy

In 1967, three weeks before the Supreme Court decided the *Loving* case, it was busy deliberating on sexual matters of another kind in *Boutilier v. Immigration Service*, which challenged the constitutionality of a federal law that excluded homosexuals from eligibility for immigration and naturalization. In 1963 Clive Michael Boutilier, a native of Canada, applied to become a naturalized U.S. citizen. Boutilier had immigrated into the United States with his family in 1955, when he was twenty-one years old. As a regular part of the naturalization process, he was asked about his sexual history both before and after entry into the United States, and he answered truthfully that he had engaged in sexual activity with both men and women from the age of fourteen, information that he had not disclosed when he had initially entered the United States. After reviewing Boutilier's sexual his-

tory, the U.S. Public Health Service determined that he was affected with "a class A condition, namely, psychopathic personality, sexual deviate," a class excluded from immigration into the United States at the time. The government immediately began deportation proceedings, which Boutilier and his lawyers challenged all the way to the Supreme Court. In a 6–3 decision, however, the Court in 1967 upheld the constitutionality of the law, and Boutilier was deported. Boutilier's life after the ruling has not been well documented, but according to historian Marc Stein, he faced very difficult circumstances: "Presumably distraught about the Court's decision . . . , Boutilier attempted suicide before leaving New York, survived a month-long coma that left him brain-damaged with permanent disabilities, and moved to southern Ontario with his parents, who took on the task of caring for him for more than 20 years."[60] He died in 2003.

At the heart of the *Boutilier* case lay a challenge to a law that had been passed fifteen years earlier as part of the 1952 Immigration and Nationality Act (INA; also known as the McCarran-Walter Act). The congressional proceedings that led to the passage of this act marked the first time that the language of homosexuality had explicitly entered U.S. policy making on naturalization.[61] The INA itself does not name "homosexuals" per se, but excludes "persons afflicted with psychopathic personality," a designation that, according to the Public Health Service, would be "sufficiently broad to provide for the exclusion of homosexuals and sex perverts."[62] Boutilier's case challenged the logic of this legislation by asserting that homosexuality in and of itself was not a mental disease.[63] Boutilier's doctors confirmed that he was a homosexual yet insisted that he did not exhibit a "psychopathic personality." The Supreme Court dismissed their authority, however, and concluded that "the Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."[64] This interpretation was supported by the fact that in 1965, while Boutilier's challenge was moving through the courts, Congress had amended the law by adding the term *sexual deviation* so that there would be no mistake about its intent to exclude homosexuals.[65] In *Boutilier* "the Court had to lay bare that Congress was not concerned with the facts about homosexuality as such; that antipathy toward homosexuals as a group rather than a more general concern for the mental health of the nation was the motivating factor for the exclusion," as Arthur S. Leonard has noted.[66]

In addition to excluding homosexuals (under the "psychopathic personality" heading), the INA also explicitly named adultery as one of many prohibited acts that automatically disqualified one from naturalization. But the exclusion of sexual suspect classes such as adulterers and homosexuals was certainly not

the only or the most acclaimed effect of the INA, which was the first legislation to organize all the existing provisions governing immigration and naturalization into a single, comprehensive law.[67] In ideological terms, the INA is perhaps best known for its strident anticommunism, instantiated through its sweeping provisions against "subversives," which reflected the Cold War characterization of communism as an "alien movement."[68] The legislation is also understood to represent a watershed shift in the deployment of race in U.S. policy on immigration and naturalization. The language of race had been a primary mechanism for determining the eligibility of migrants to enter the United States and/or to become U.S. citizens since 1790, when the first federal law on naturalization restricted this privilege to "free white persons." The INA of 1952, however, removed the explicit language of race from provisions on both immigration and naturalization, substituting "national" origin as the basis for excluding immigrants and stating that "the right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex."[69]

The simultaneous production of the provisions concerning race and sexuality in the INA suggests a larger shift in federal discourses of marriage, family, and citizenship that would become visible in the coincidence between *Loving* and *Boutilier* in the Supreme Court docket of 1967. Although these new provisions—on the one hand effacing race, on the other foregrounding sexual acts and identities—were not explicitly linked either in the text of the INA or in the proceedings that led to its enactment, they were bound together in at least two important ways. First, the concurrent appearance of provisions on homosexuality and adultery in this law was not arbitrary. When read together, these provisions suggest that lawmakers brought closer scrutiny—and the power of the state—to bear on sexual acts and identities that seemed to threaten the normative status of monogamous heterosexual marriage.[70] Second, although this new level of scrutiny may seem to indicate that sexuality had "replaced" race as one of the primary principles of exclusion, it was in fact inseparable from the ongoing contestation over race in U.S. immigration and naturalization policy during this period.

In the congressional debates on immigration and naturalization that led to the passage of the INA, legislators apparently imagined adultery and homosexuality in very different ways and demonstrated varying degrees of concern about the need for these new categories of exclusion. Adultery was newly enumerated as an act prohibited by the "good moral character" requirement, which had been in place since the first naturalization statutes of the 1790s but which had remained undefined in the law itself.[71] The report of the Senate subcommittee that drafted the INA did not explain the changes that introduced adultery into the law; it stated only that

"more uniform regulations should be employed by the [Immigration and Naturalization] Service and adopted by the court, to the end that a higher general standard of good morals and personal and political conduct are [*sic*] established."[72]

While adultery was considered a transgression of morality, homosexuality was constructed as a medical pathology.[73] The subcommittee's discussions focused on the obscure language of the Immigration Act of 1917, which had listed "persons of constitutional psychopathic inferiority" as one category of "physically and mentally defective individuals" who were excluded.[74] The term *constitutional psychopathic inferiority* had been used by nineteenth-century psychiatrists to describe criminals who were of "normal" mental ability but exhibited abnormal social behavior. In psychiatric usage, as Estelle B. Freedman notes, it came to be associated primarily with sexual crimes only in the 1920s and 1930s.[75] In the 1950 Senate report that preceded the passage of the INA, the subcommittee acknowledged the lack of standard measures for diagnosing this condition and quoted an officer of the Public Health Service, who remarked that "we have certain mechanical aids in evaluating intelligence, and we are attempting to get definite yardsticks for establishing the diagnosis of constitutional psychopathic inferiority."[76] Further, the report admitted that even though the "constitutional psychopathic inferiority" exclusion had not been widely enforced, within the immigration and naturalization system it had been one of the law's most controversial provisions:

> Perhaps because of the difficulty of diagnosis and definition, there have been numerous protests over continuation of this exclusion clause. A number of the appeals to the Immigration and Naturalization Service have been aimed at the diagnosis of "constitutional psychopathic inferiority" by the examining medical officers. The arguments before the subcommittee centered about two points of attack against the provision: (1) that it placed excessive and arbitrary powers in the hands of officials, and (2) [that] the term is vague, undefined, and has not served any useful purpose.[77]

Dismissing these arguments, however, the subcommittee decided that the exclusion was not "unduly harsh or restrictive." Instead, it altered the terminology slightly and provided a more specific explanation of its intent: "The purpose of the provision . . . will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,'" and "the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts."[78]

For reasons that remain unclear, this explicit reference to "homosexuals and other sex perverts" was dropped when the final bill was drafted, leaving

only the vague term *psychopathic personality*. To dispel any perception that this term signaled an intent to ease the provisions, a new Senate report insisted that "this change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."[79] Legal scholars offer various explanations for the omission of the more explicit language of "homosexuality," "sex perverts," and "sexual deviates" from the final version of the legislation. Noting that the acting surgeon general had stated on record that "considerable difficulty may be encountered in substantiating a diagnosis of homosexuality," Robert J. Foss suggests that the Public Health Service "wanted to avoid the enactment of a specific statutory exclusion that would make them responsible for trying to figure out who was a homosexual and who was not." Foss also notes that it may simply have been an example of the persistent legal tradition of treating homosexuality as the *crimen innominatum*, a crime presumed to be so horrible that it was not to be mentioned in English. Whatever its original reasoning, after two Supreme Court cases had challenged the law in the late 1950s and early 1960s, Congress did amend it in 1965 by adding the term *sexual deviation* to the list of excludable traits and citing the Senate report reaffirming the exclusion of homosexuals.[80]

The vagueness of the term *psychopathic personality* in the 1952 INA may account for the apparent lack of public knowledge of or interest in the exclusion based on homosexuality. The National Archives hold approximately 140 letters commenting on the INA, from individuals and groups such as the Daughters of the American Revolution, the Jewish Community Relations Council, and the Association of Immigration and Nationality Lawyers. Most of these letters concern the anticommunist or racial implications of the law; none of them refers directly to the exclusion of homosexuals (or to adultery, for that matter). Anxieties about gender and sexuality do surface obliquely in a few letters addressing the anticommunist aspects of the law. Contemplating the potential repeal of the INA, one woman from Wisconsin, for instance, feared that "emasculation of this Act is given the highest priority by the Communist Party!"[81] Most of the letter writers, however, seem unaware of the sexual exclusions; if they did know about them, they tacitly agreed with the policies or shared Congress's reticence about speaking directly about homosexuality on public record.

As the letter from Wisconsin suggests, anticommunist discourse may have been more readily available to articulate anxieties attached to the figure of the homosexual. On the surface, the new attention to homosexuality in the legislative history of the INA was consistent with the Cold War association between homosexuality and communism as twin threats to national security.[82] In fact, as David K. Johnson has extensively documented, it was an era in which "many people in

postwar America saw . . . an intrinsic link between homosexuals and Communists. Both groups seemed to comprise hidden subcultures, with their own meeting places, literature, cultural codes, and bonds of loyalty."[83] Not coincidentally, the same Senate had recently generated another report, *Employment of Homosexuals and Other Sex Perverts in the U.S. Government*, which concluded that "homosexuals and other sex perverts are not proper persons to be employed in Government for two reasons; first, they are generally unsuitable" because they "are law violators," social "outcasts," and frequent victims of blackmailers; and "second, they constitute security risks" because their "lack of emotional stability" and "weakness of . . . moral fiber . . . makes [*sic*] them susceptible to the blandishments of the foreign espionage agent."[84]

Like much Cold War rhetoric, then, the INA implicitly linked communism and homosexuality as characteristics of "undesirable" immigrants, even as it appeared to rewrite the ways that race was deployed in U.S. immigration and naturalization policy.[85] By removing exclusions based on race, the INA might seem, on its surface, to have been part of the challenge to racial discrimination that continued through the civil rights era and that was perhaps most clearly articulated in the Supreme Court ruling in *Brown v. Board of Education* in 1954 and in the Civil Rights Act of 1964. World War II had helped force this reconsideration of the ways that racism had structured U.S. naturalization law, with critics pointing out that the only other country in the world that observed overt racial discrimination in immigration and naturalization policy was Nazi Germany.[86] Indeed, the Senate subcommittee that drafted the INA noted that the "denial of naturalization based solely on race is an outmoded and un-American concept and should be eliminated from our statutes."[87] Such comments illustrate the significant role that constructions of race played in the U.S. government's Cold War policies aimed at containing communism.[88] In this context, the repeal of exclusions based on race was considered by many to be a shrewd advancement of foreign policy concerns. As one immigration officer commented in testimony presented to the Senate subcommittee, "With the United States assuming a position of political, economic, and diplomatic prominence in the world, such statutes [on racial ineligibility] tend to raise doubts in the minds of the affected groups as to the true nature of a democracy and obviously provide a propaganda theme for those countries with designs of ultimately imposing their peculiar political philosophies upon other countries of the world."[89] Using this barely veiled reference to communism, the officer deployed a now familiar liberal vision of a "color-blind" democracy as part of the anticommunist ideologies that shaped Cold War culture. To continue explicitly racist immi-

gration and naturalization policies left the United States vulnerable, by this logic, to communist "propaganda" that exposed American racial inequalities and thus undermined the legitimacy of U.S. "democratic" projects in foreign policy.

Yet as a number of scholars have argued, we should be deeply skeptical about placing the INA within a civil rights trajectory. The removal of the explicit language of racial prerequisites from the 1952 law did not mean that race had suddenly become irrelevant to U.S. policies on immigration and naturalization. On the contrary, by mobilizing national origin as the basis of the quota system, the INA continued to have profoundly racist effects on immigration policy.[90] Despite some legislators' claims, the INA was "permeated with the doctrine of racial superiority."[91] As Rachel Buff notes, "Although the law did eliminate restrictions against the naturalization of Asians as citizens, it implemented national-origins quotas that applied the 1920s 'Nordic race theory' of immigration restriction. In accordance with Nordic race theory, this law gave preference to immigrants of northern European backgrounds."[92] Even at the time of its passage, the INA's racist implications were widely acknowledged. In a minority report, for instance, some members of the Senate Judiciary Committee contested the claim that the new legislation did away with racial discrimination. They asserted that the "sources of our national strength rest squarely on the guiding idea of our form of government, the idea that every race and every creed among us is equally entitled to the protection of the American flag." The new legislation did not uphold these goals, they argued, pointing out that quotas based on national origin constituted de facto "racial discrimination against Eurasians and colonial natives [of the West Indies], and national ancestry discriminations against Italians, Poles, and Greeks."[93] In addition, President Harry S. Truman vetoed the bill because he objected to the "unfair and discriminatory" system of national origins quotas (his veto was overridden).[94] Likewise, the *New York Times* strongly criticized the bill as "racist, restrictionist, and reactionary."[95] The INA's removal of racial categories of exclusion, then, indicated not the end of racialized and racist immigration and naturalization policies but the recognition that the explicit *language* of race was losing legitimacy in official constructions of American citizenship.

How might we account for the simultaneous disappearance of the overt language of race and the new appearance of "outlawed" sexual formations, such as homosexuality and adultery, in the INA? The exclusions based on homosexuality and adultery were profoundly entangled with the narrative that Congress was writing about the relationship between race and nation in the INA. There is nothing in the record to indicate a conscious link between the removal of the explicit

language of race and the articulation of exclusions based on prohibited sexual categories. Their very coincidence, however, suggests an underlying logic that connects these two aspects of the law, one structured by cultural assumptions that are reflected in the language and imagery used by legislators and judges. Uncovering that logic requires different interpretive practices and forms of analysis that give credence to the unspoken associations and historical residue embedded in the discursive aspects of these legal texts.

One clue to how these concepts worked in tandem surfaces in the 1950 Senate report on immigration that laid the groundwork of the act. In its discussion of the proposed changes, the Senate subcommittee noted that the original purpose of the "constitutional psychopathic inferiority" clause in 1917 was "to keep out 'tainted blood,' that is, 'persons who have medical traits which would harm the people of the United States if those traits were introduced into this country, or if those possessing those traits were added to those in this country who unfortunately are so afflicted.' "[96] In constructing homosexuality through the metaphor of "tainted blood," the subcommittee tacitly reinforced an earlier discourse of eugenics; to exclude homosexuals was to invoke the logic of national purification.[97] Adultery was also linked, albeit less overtly, to a history of eugenics and models of national belonging in which citizenship was transferred through bloodlines. The term *adultery* refers, after all, to "pollution, contamination, a 'base admixture,' a wrong combination."[98] To adulterate is "to render spurious or counterfeit; to falsify, corrupt, debase, esp. by the admixture of baser ingredients."[99] (Not coincidentally, these meanings are also associated with the term *queer*, one meaning of which is "counterfeit; forged.")[100] If monogamous marriage was assumed to produce an unadulterated line of descent, adultery was imagined as the potential pollution of bloodlines through extramarital reproduction, thus scrambling the inheritance of property relationships and status. Further, as Ursula Vogel has pointed out, the legal history of adultery is thoroughly embedded in essentialist and asymmetrical understandings of gender. Because women's bodies were the site of literal reproduction as well as of the transmission of family bloodlines, a wife's extramarital sex might adulterate that lineage, while a husband's could not. In the original laws on adultery, "only a wife was capable of committing adultery. . . . The very same act on the part of her husband had no name in the language of the law, as long as he did not violate the marriage of another man."[101]

Although this double standard had long ago disappeared from the law itself, the underlying anxieties about property and pollution were embedded in the metaphors that legislators drew on when drafting the 1952 act. Just as the provi-

sions regarding homosexuality apparently responded to eugenic concerns about "tainted blood," the naming of adultery registered anxieties over paternity and the transmission of property. Not coincidentally, it echoed anxieties over the distribution of property that had also historically been elicited by interracial sex and marriage, the prohibition of which helped shore up social and economic boundaries.[102] Thus, while the INA removed overt references to race from the requirements for American citizenship, Congress maintained a logic of blood purification by invoking the sexualized figures of the adulterer and the homosexual.[103] When the explicit language of race disappeared, the underlying fantasy of national purification—an unadulterated Americanness—was articulated instead through the discourse of sexuality. Even though the law appeared "race-neutral" on its surface, the INA's new provisions on prohibited sexual categories, along with those on "national origins," reinforced rather than replaced the racist logic that had anchored U.S. immigration and naturalization policy from its earliest instantiation.

The exclusions based on adultery and homosexuality were short-lived compared to the prohibitions against other sexualized figures, such as polygamists and prostitutes. By 1979, following the American Psychiatric Association's 1973 decision to remove homosexuality from its list of mental disorders, the surgeon general announced that the Public Health Service would no longer issue the medical certificates needed for the Immigration and Naturalization Service (INS) to exclude aliens solely on the basis of homosexuality.[104] Without the participation of the Public Health Service, the existing policy was difficult to enforce. The reference to homosexuality was finally removed in 1990, when Congress undertook another sweeping reform of all immigration legislation; at that time, it deleted any reference to "persons of psychopathic personality" from the law. (In the meantime, however, Congress added infection with "the etiologic agent for acquired immune deficiency syndrome [AIDS]" to the list of medical exclusions, in effect denying many gay men and immigrants of color from entry into the United States.)[105] Similarly, in 1981 Congress removed any explicit mention of adultery from the list of disqualifications from naturalization. (Since the removal of adultery from the letter of the law, however, the INS has been known to exclude those with a history of adultery under the "good moral character" provision.)[106]

More recently, the underlying blood logic that organized earlier exclusions has been articulated instead through the policy of "family reunification," whose explicit purpose is "to principally reunite nuclear families."[107] This policy, a central feature of the 1965 immigration and naturalization reforms, is tied to the somewhat obvious ideological goals of privileging and reproducing a model of

the nuclear family. The policy allowed the law to appear color-blind even as it was designed to achieve racialized effects, specifically to maintain the existing racial makeup of incoming immigrant groups. The racial dimensions of family reunification were not lost on those who designed and supported the policy, such as Representative Emmanuel Celler, chair of the House Judiciary Committee at the time. In discussions leading to the passage of the Immigration Act of 1965, Celler reassured Congress that the immigrant pool would remain largely European: "There will not be, comparatively, many Asians or Africans entering this country. . . . Since the people of Africa and Asia have very few relatives here, comparatively few could immigrate from those countries because they have no family ties in the U.S."[108] This statement is astonishing and ironic, not least because it denies the state's own history of using the technologies of slavery to destroy structures of kinship that might directly tie the United States to Africa. Celler's predictions were also proved incorrect by the significant increase in the number of immigrants from Asia, South America, and the Caribbean basin in subsequent decades. But the policy did have profound effects in another way: it placed heterosexual family structures even more squarely at the center of patterns of legal immigration and naturalization. Indeed, when compared with U.S.-born populations of the same age, recent immigrants are more likely to be married and less likely to be divorced, separated, or widowed. In 1995, for instance, familial relationships accounted for two-thirds of all admissions.[109]

The policy of family reunification has brought to the surface many of the ideological goals implicit in the INA while masking the continuing salience of race to U.S. immigration and naturalization policy. Although the legislators who designed the 1952 law did not explicitly link homosexuality and adultery as similar types of prohibited status and conduct, these exclusions fit coherently into a national narrative about normative sexuality: both exclusions reinforced the state's investment in constructing potential citizens as monogamous, heterosexual, and married (or marriageable). The emphasis on monogamy and heterosexuality in immigration and naturalization law can be understood as part of a broad cultural and political emphasis on sexual discipline and the promotion of the nuclear family after World War II, an ideological vision that had economic consequences, since the nuclear family played a necessary role in restructuring the postwar economy.[110]

Loving after *Boutilier*

Having provided a genealogy of the *Boutilier* decision and the INA, I now return to the Supreme Court docket of 1967. How do we account for the fact that the apparent deracialization of marriage law in *Loving v. Virginia* was accompanied by a hardening of defenses against the homosexual in *Boutilier v. Immigration Service*? As I have argued, *Boutilier* challenged a deep history of normative citizenship that had sometimes been articulated through a discourse of race and sometimes through a discourse of sexuality. When seen in the context of federal immigration policy of the same period, *Loving* takes on a new significance. In the eye of the law, the interracial couple was imagined as having a legitimate claim on the state at the same time that the nation was defensively constituted as heterosexual, incapable of incorporating the sexually suspect body. That the Supreme Court had reaffirmed the exclusion of homosexuals from citizenship only three weeks earlier makes it particularly ironic that *Loving* is currently read as a precursor to gay and lesbian rights.

Those who make the analogy between interracial marriage and same-sex marriage often cite a crucial passage from the *Loving* decision: "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." But it is a mistake to think that *Loving* was simply a case about race; instead, *Loving* was part of a crucial reconfiguration of sexual as well as racial citizenship. The right to marry was of course not unconditional but granted on the implicit condition that the subject to which the right accrued was heterosexual, regardless of race. To represent *Loving* only as an expansion of marriage rights is misleading; I would insist instead that while *Loving* did expand rights to marriage, it also effectively consolidated heterosexuality as a privileged prerequisite for recognition by the state as a national subject and citizen. An alternative lesson of *Loving*, in fact, is that "free men" may be identified by any race, but their entitlement to that claim is based on their presumed heterosexuality. What activists fail to see when using *Loving* as a precedent for same-sex-marriage rights is that the case is not parallel to a history of homosexuality, as it is represented in the law; rather, it is embedded in the same history of sexuality that has determined the status of gay men and lesbians as excluded others. By establishing a fundamental right to marriage regardless of race, the federal state in effect shored up the privileges of heterosexuality through a logic that was on the surface antiracist and anti–white supremacist. *Loving* was decided, after all, at a moment when marriage as an institution was being widely questioned in the United States. During the early 1960s the general population began to marry later, divorce more frequently,

or choose to stay unmarried.[111] The legal system responded to such pressures by reconfiguring the parameters of legitimate marriage. As Pascoe has noted, in *Loving* "the U.S. Supreme Court allowed interracial couples to redefine as legitimate marriages relationships that courts had long stigmatized as 'illicit sex.'"[112] Thus the citizen-subject privileged by marriage was consolidated all the more vigorously as heterosexual when racial distinctions dropped out of the equation.

The point of my analysis is not to argue that *Loving* was wrong or misguided. Instead, I am suggesting that advocates of gay marriage who use *Loving* as a precedent obscure its limitations, since its emancipatory claim of freedom to marry rests on the assumption that the homosexual is excluded from the category of legitimate citizen-subject and the protections that accrue to it. As *Boutilier* made clear, Congress unambiguously intended to deny gay men and lesbians access to full citizenship and, with the aid of the Supreme Court, constituted the legitimate American citizen as heterosexual and monogamous.

Loving, *Boutilier*, and the INA tell a powerful story about how sexual and racial ideologies were enlisted in the state's production of citizens during the Cold War era. In the decades during which exclusions based on adultery and homosexuality were an explicit part of immigration and naturalization policy, they served a specific purpose for lawmakers by providing an unspoken logic of blood purification in the absence of the explicit language of race. It is important, however, to clarify the kinds of claims that can be based on these juridical texts. We cannot necessarily conclude that they were representative of understandings of race and sexual orientation in American culture more broadly. Further, these changes in federal law did not necessarily reflect the formation of sexual or racial subjectivity, nor do they tell us how these laws were negotiated, at times oppositionally, by those who enforced or were subjected to them. These texts do, however, mark key shifts in official discourses about what constituted an embodied American citizenry and what language was available for representing it. Although the explicit language of race was losing legitimacy in the eye of the law as a means of excluding potential citizens, the language of sexual pathology and pollution became increasingly available for circumscribing the characteristics of the ideal citizen.

The use of *Loving* in current emancipatory narratives of gay and lesbian civil rights would seem to depend on a willful amnesia about the ways that the legitimacy of interracial marriage in the law has been accomplished in relation to its thorough heterosexualization. What happens if we allow ourselves to consider the troubling possibility that interracial marriage achieved normative status (in federal law, at least) at the very moment that the homosexual was rendered unambiguously and often quite literally un-American? In drawing attention to this

possibility, I have indicated some of the ways that the intertwined narratives of interracial desire and same-sex desire have been produced, and, most optimistically, I would like to think that being self-conscious about their production might lead to their transformation. In the broadest terms, I hope that my reading shows the need for an approach that historicizes the juridical production of racial and sexual formations simultaneously and that can account for the ways that ideologies of race and sexual orientation have been mutually constituted in U.S. law and policy making.

Notes

I am grateful for the generous comments that I have received on various parts of this essay from audiences at the conference "Sexuality, Migration, and the Contested Boundaries of U.S. Citizenship," Bowling Green State University, February 28–March 1, 2002; "The Future of the Queer Past: A Transnational History Conference," University of Chicago, September 14–17, 2000; "Cultural Citizenship," Thirty-second Conference in Modern Literature, Michigan State University, October 21–23, 1999; the Queer Folk/Colored Folk lecture series, Northwestern University, April 11, 2003; the Cultural Studies Colloquium, George Mason University, April 18, 2002; the Illuminations Lecture Series, Purdue University, March 26, 2002; the Millennium Approached: Queer Literary Studies in the Twenty-first Century lecture series, Pennsylvania State University, February 26, 2002; the Social Science History Association Conference, Chicago, November 15–16, 2001; and the Annual Meeting of the American Studies Association, Washington, DC, November 10, 2001. I also thank Regina Kunzel, Lisa Cohen, Kristin Bergen, and Elizabeth Pleck for their careful readings and astute comments. I am especially grateful to Trish Loughran for her encouragement and willingness to read and comment on multiple drafts.

1. Jane S. Schacter calls this logic the "discourse of equivalents" ("The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents," *Harvard Civil Rights–Civil Liberties Law Review* 29 [1993]: 283–317).
2. By now there is a voluminous body of work that uses "intersectional" approaches, which in legal studies were pioneered by Kimberlé Crenshaw in "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," *University of Chicago Legal Forum* 4 (1989): 139–67; and Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43 (1991): 1241–99. I have explored the imbrication of race and sexual orientation in Siobhan B. Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (Durham: Duke University Press, 2000).

3. David E. Rosenbaum, "Race, Sex, and Forbidden Unions," *New York Times*, December 14, 2003. The term *miscegenation* was coined by David Goodman Croly and George Wakeman in their anonymous 1863 pamphlet *Miscegenation: The Theory of the Blending of the Races, Applied to the White Man and the Negro*. See Sidney Kaplan, "The Miscegenation Issue in the Election of 1864," *Journal of Negro History* 34 (1949): 274–343; and David R. Roedinger, *The Wages of Whiteness: Race and the Making of the American Working Class* (New York: Verso, 1991), 155–56.
4. Gail Mathabane, "Gays Face Same Battle Interracial Couples Fought," *USA Today*, January 25, 2004. Mathabane is author (with Mark Mathabane) of *Love in Black and White: The Triumph of Love over Prejudice and Taboo* (New York: HarperPerennial, 1993).
5. For an example of a published opinion about same-sex marriage that predates *Loving v. Virginia* (1967) see E. B. Saunders, *ONE*, August 1953, 10–12. I am grateful to Stephanie Foote for bringing this article to my attention.
6. Andrew Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination," *Yale Law Journal* 98 (1988): 145–64; Stephen Clark, "Same-Sex but Equal: Reformulating the Miscegenation Analogy," *Rutgers Law Journal* 34 (2002): 107–85; Marc S. Spindelman, "Reorienting *Bowers v. Hardwick*," *North Carolina Law Review* 79 (2001): 359–491. Although her focus is the use of sex discrimination arguments in same-sex-marriage cases, Peggy Pascoe provides helpful historical background on the miscegenation analogy in "Sex, Gender, and Same-Sex Marriage," in *Is Academic Feminism Dead? Theory in Practice*, ed. Social Justice Group at the Center for Advanced Feminist Studies (New York: New York University Press, 2000), 86–129.
7. *Perez v. Sharp* is sometimes referred to as *Perez v. Lippold* and *Perez v. Moroney* (reflecting the names of employees of the Los Angeles County clerk's office). The final decision was rendered under the name *Perez v. Lippold*. Section 1 of the Fourteenth Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
8. Otherwise useful studies of interracial marriage that reproduce this tendency include Werner Sollors, ed., *Interracialism: Black-White Intermarriage in American History, Literature, and Law* (New York: Oxford University Press, 2000); Renee C. Romano, *Race Mixing: Black-White Marriage in Postwar America* (Cambridge, MA: Harvard University Press, 2003); Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* (New York: Pantheon, 2003); and Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* (Chicago: University of Chicago Press, 2001). Sollors acknowledges his neglect of homosexuality, only to dismiss it:

"The thrust of the historical prohibitions of interracial marriage justifies a concentrated discussion of the forbidden heterosexual couple on the following pages: the homosexual couple was generally prohibited, regardless of race. . . . The heterosexual couple, however, was designated as legitimate or criminal *only* according to the racial sameness or difference of the contractants" (*Interracialism*, 4).

9. My argument and method draw from and contribute to the efforts of scholars and activists who have insisted that queer theory must move beyond a narrow emphasis on sexuality. Cathy J. Cohen, for instance, has criticized the tendency in queer politics and theory to generate and reinforce a simple opposition between queer and heterosexual, a binary that relies on "an uncomplicated understanding of power as it is encoded in sexual categories: all heterosexuals are represented as dominant and controlling and all queers are understood as marginalized and invisible" ("Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ* 3 [1997]: 440). This tendency both depends on and perpetuates a confusion between heterosexuality and heteronormativity, erasing the fact that not all heterosexualities are bound to heteronormativity. Instead, Cohen calls for work that historicizes various heterosexualities, particularly those that are made nonnormative—or are "queered"—through the discourse of race. "If we pay attention," she notes, "to both historical and current examples of heterosexual relationships which have been prohibited, stigmatized, and generally repressed we may begin to identify those spaces of shared or similar oppression and resistance that provide a basis for radical coalition work" (453).
10. In pursuing this analysis, I want to emphasize that my goal is not to argue for or against same-sex marriage but to interrogate the analogous relationship presumed to exist between race and sexual orientation. It may be clear, however, that I am suspicious of the privileged place that marriage currently occupies on gay and lesbian political horizons. As Eric O. Clarke, Lisa Duggan, Paula L. Ettelbrick, and Michael Warner, among others, have demonstrated, questions of sexual citizenship may be posed in much more productive ways if one refuses to reinforce marriage as the privileged site of sexual rights. Clarke, for one, has usefully asked, "Can there be a right to sex or a sexual citizen other than through marriage?" (*Virtuous Vice: Homoeroticism and the Public Sphere* [Durham: Duke University Press, 2000], 123). See also Duggan, "Holy Matrimony!" *Nation*, March 15, 2004, 14–16, 18–19; Ettelbrick, "Since When Is Marriage a Path to Liberation?" *Outlook* 2, no. 9 (1989): 14–17; and Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 2000).
11. Act XII, 2 Laws of Va. 170, quoted in A. Leon Higginbotham Jr. and Barbara K. Kopytoff, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," in Sollors, *Interracialism*, 106–7. By the eighteenth century antifornication laws in Virginia did not differentiate between interracial and intraracial sex: all sex outside marriage was punished. See Joshua D. Rothman, *Notorious in the Neighbor-*

hood: Sex and Families across the Color Line in Virginia, 1787–1861 (Chapel Hill: University of North Carolina Press, 2003), 259n3.

12. According to Peggy Pascoe, "Of the 41 colonies and states that prohibited interracial marriage, 22 also prohibited some form of interracial sex. One additional jurisdiction (New York) prohibited interracial sex but not interracial marriage; it is not clear how long this 1638 statute was in effect" ("Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *Journal of American History* 83 [1996]: 50n15).
13. Kennedy, *Interracial Intimacies*, 217.
14. Romano, *Race Mixing*, 5. For individual state laws see Pauli Murray, *States' Laws on Race and Color* ([Cincinnati, OH]: Women's Division of Christian Service, 1951), 30, 38–39, 77, 172, 206, 266, 426, 438.
15. *McLaughlin v. Florida*, 379 U.S. 184 (1964) at 196, 198.
16. George Chauncey, "'What Gay Studies Taught the Court': The Historians' Amicus Brief in *Lawrence v. Texas*," *GLQ* 10 (2004): 518.
17. Tex. Penal Code Ann. §21.06(a) (2003).
18. *Lawrence v. Texas*, 539 U.S. 558 (2003) at 578. In a separate concurrence, Justice Sandra Day O'Connor argued that equal protection was the primary question at hand: "A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review" (*Lawrence v. Texas*, 539 U.S. 558 [2003] at 585).
19. In *Lawrence* the first version of the miscegenation analogy—the comparison between same-sex sodomy and interracial sex—has surprisingly little effect on the Supreme Court's reasoning; it emerges only indirectly, when Justice Anthony Kennedy, writing for the majority, quotes Justice John Paul Stevens's dissent in *Bowers*: "The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack" (*Lawrence v. Texas*, 539 U.S. 558 [2003] at 577–78). Stevens himself cites *Loving* (*Bowers v. Hardwick*, 478 U.S. 186 [1986] at 216n9). Even though the analogy played little part in the majority opinion, in his dissenting opinion in *Lawrence* Justice Antonin Scalia contested the appropriateness of the analogy between sodomy laws and antimiscegenation laws on the grounds that laws with racially discriminatory purposes require a different level of judicial review ("strict scrutiny") than other kinds of cases, which require only rational-basis review (*Lawrence v. Texas*, 539 U.S. 558 [2003] at 600).
20. Koppelman, "Miscegenation Analogy," 150–51, 158–61.
21. According to Paul R. Spickard, these states were Alaska, Connecticut, Hawaii, Illinois, Iowa, Kansas, Minnesota, New Hampshire, New Jersey, New York, Vermont,

Washington, and Wisconsin (*Mixed Blood: Intermarriage and Ethnic Identity in Twentieth-Century America* [Madison: University of Wisconsin Press, 1989], 374).

22. Romano, *Race Mixing*, 7.
23. See *Naim v. Naim*, 350 U.S. 891 (1955).
24. For detailed accounts of the case see Moran, *Interracial Intimacy*, 84–88; and Pascoe, "Miscegenation Law," 61–63. According to Spickard (*Mixed Blood*, 374), a number of states repealed their antimiscegenation statutes before 1900, including Pennsylvania (1780), Massachusetts (1843), Rhode Island (1881), Maine (1883), Michigan (1883), New Mexico (1886), and Ohio (1887).
25. Cal. Civ. Code §§60, 69 (1933).
26. For the history of this law see Leti Volpp, "American Mestizo: Filipinos and Antimiscegenation Laws in California," *University of California, Davis Law Review* 33 (2000): 795–835.
27. *Perez v. Lippold*, 198 P.2d 17 (1948) at 29.
28. *Loving v. Virginia*, 388 U.S. 1 (1967) at 11, 12. The Supreme Court had enumerated a number of rights guaranteed as "liberties" by the Fourteenth Amendment, including the right to marry, in *Meyer v. Nebraska*, 262 U.S. 390 (1923) at 399.
29. For a list of these cases see William N. Eskridge Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free, 1996), 232–33n24, 264–67.
30. The judge in *Baker* rejected the analogy, asserting that "in commonsense [*sic*] and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (*Baker v. Nelson*, 191 N.W.2d 185 [1971] at 187).
31. William N. Eskridge Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002), 3.
32. Brief of Amicus Curiae, Lambda Legal Defense and Education Fund Inc. at 1, 3, Baehr (Haw. 1992) (No. 15689), quoted in David Orgon Coolidge, "Playing the *Loving* Card: Same-Sex Marriage and the Politics of Analogy," *Brigham Young University Journal of Public Law* 12 (1998): 238n15.
33. *Baehr v. Lewin*, 852 P.2d 44 (1993) at 64, 67.
34. Eskridge, *Equality Practice*, 20.
35. *Baehr v. Lewin*, 852 P.2d 44 (1993) at 68, 53n14. For a critique of this logic see Evan Gerstmann, *Same-Sex Marriage and the Constitution* (New York: Cambridge University Press, 2004), 58–61.
36. *Goodridge et al. v. Department of Public Health*, 440 Mass. 309 (2003). Despite this apparent victory, the language in which this principle is rendered should give us pause, since the invocation of "skin color" signals a disturbingly biologized understanding of race and, one would assume, by analogy, of "sexual orientation." The judge seems to imagine that race is reducible to (or even represented by) a simple

matter of skin color, a fundamental misrecognition of race as a matter of physical characteristics rather than an ideological effect.

37. Janet E. Halley, "'Like Race' Arguments," in *What's Left of Theory? New Work on the Politics of Literary Theory*, ed. Judith Butler, John Guillory, and Kendall Thomas (New York: Routledge, 2000), 46, 42, 46, 67.
38. Pascoe, "Sex, Gender, and Same-Sex Marriage," 108.
39. Mary Eaton, "Homosexual Unmodified: Speculations on Law's Discourse, Race, and the Construction of Sexual Identity," in *Legal Inversions: Lesbians, Gay Men, and the Politics of Law*, ed. Didi Herman and Carl Stychin (Philadelphia: Temple University Press, 1995), 61.
40. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) at 274. For a helpful overview of these levels of scrutiny see Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (Chicago: University of Chicago Press, 1999), 19–56; and Gerstmann, *Same-Sex Marriage and the Constitution*, 14–19.
41. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) at 152n4.
42. *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir., 1990) at 573.
43. *Craig et al. v. Boren*, 429 U.S. 190 (1976) at 197.
44. Clark, "Same-Sex but Equal," 165–66.
45. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) at 440.
46. Gerstmann, *Constitutional Underclass*, 22.
47. Other cases have been suggested as more appropriate for the analogy. Andrew Koppelman, for example, offers a convincing argument for *McLaughlin* ("Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein," *UCLA Law Review* 49 [2001]: 519–38), while Clark argues that "it is *Perez*, not *Loving*, that provides the more doctrinally correct foundation for the miscegenation analogy" ("Same-Sex but Equal," 180).
48. See Crenshaw, "Demarginalizing the Intersection of Race and Sex."
49. Eaton, "Homosexual Unmodified," 48. In a similar argument Devon Carbado notes that "plaintiffs today have a hard time bringing compound discrimination claims—claims based on more than one aspect of a person's identity. . . . To the extent that compound discrimination claims are not cognizable, are restricted, or are difficult to establish, there is no strong incentive for lawyers bringing civil rights actions to interpret the facts of a particular discrimination case as arising—coconstitutively—from more than one identity category" ("Black Rights, Gay Rights, Civil Rights," *UCLA Law Review* 47 [2000]: 1467–1519). See also Darren Lenard Hutchinson, "Out yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse," *Connecticut Law Review* 29 (1997): 561–645.

50. Eaton, "Homosexual Unmodified," 61–62.
51. Carbado, "Black Rights, Gay Rights, Civil Rights," 1519.
52. See, e.g., Peter Ededin, "In Changing the Law of the Land, Six Justices Turned to Its History," *New York Times*, July 20, 2003. In Web-based stories, photographs accompanied articles such as Jack Siu, "365Gay.com Newsmaker of 2003: John Lawrence and Tyron Garner," December 21, 2003, lgrl.sitestreet.com/news/article.asp?id=941; and Euan Bear, "Blind Justice? Supreme Court Revisits Landmark Rulings on Race and Sex; Lawrence and Garner Ruling May Overturn Legalized Discrimination," *Out in the Mountains*, April 4, 2003, www.mountainpridemedia.org/oitm/issues/2003/04apr2003/news01_blind.htm.
53. Frank J. Murray, "High Court to Rule on Sodomy Laws," *Washington Times*, December 2, 2002. See also "TX Sex Bust Sparks Challenge," *PlanetOut*, November 6, 1998, www.planetout.com/news/article.html?1998/11/06/2; Paul Duggan, "Texas Sodomy Arrest Opens Legal Battle for Gay Activists," *Washington Post*, November 29, 1998; and Deroy Murdock, "To Prison, for What?" *NationalReviewOnline*, May 13, 2003, www.nationalreview.com/murdock/murdock051303.asp.
54. "High Court Hears Texas Sodomy Case," *CNN.com*, March 26, 2003, www.cnn.com/2003/LAW/03/26/scotus.sodomy.ap. See also Robert Raketty, "U.S. Supreme Court Considers Striking Texas Sodomy Law," *Seattle Gay News Online*, www.sgn.org/2003/03/28/us.htm (accessed December 6, 2004).
55. Quoted in Duggan, "Texas Sodomy Arrest."
56. Eaton, "Homosexual Unmodified," 52.
57. As Halley notes, "We have become accustomed to thinking of the intersections between sexual orientation and race as instantiated in persons—the black gay man, the latina lesbian—who inhabit a subordinated position in two (or three) categorical systems and who are thus particularly affected by anything said about their interrelations." Such approaches are limited, because they "retain a strong ontological commitment to real identities" ("'Like Race' Arguments," 64, 65).
58. The following section expands on my earlier essay "Sexual Aliens and the Racialized State: A Queer Reading of the 1952 U.S. Immigration and Nationality Act," in *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings*, ed. Eithne Luibhéid and Lionel Cantú Jr. (Minneapolis: University of Minnesota Press, 2005), 75–91.
59. Halley, "'Like Race' Arguments," 65.
60. Marc Stein, "Forgetting and Remembering a Deported Alien," *History News Network*, November 3, 2003, hnn.us/articles/1769.html.
61. See Senate Committee on the Judiciary, *The Immigration and Naturalization System of the United States*, 81st Cong., 2d sess., 1950, S. Rep. 1515, 345. Less explicit means, such as the clause prohibiting those in danger of becoming a public charge, had sometimes been used to police immigrants suspected of homosexuality in the

early twentieth century, according to Margot Canaday, "The Property of Perversion: Degenerate Immigrants and the Public Charge Clause, 1900–1924" (paper presented at the "Sexual Worlds, Political Cultures" conference, Social Science Research Council, Washington, DC, October 2–5, 2003). See also Canaday, "The Straight State: Sexuality and American Citizenship, 1900–1969" (PhD diss., University of Minnesota, 2004).

62. Senate Committee of the Judiciary, *Revision of Immigration and Naturalization Laws*, 82d Cong., 2d sess., 1952, S. Rep. 1137, pt. 1, 9.
63. In 1973, six years after the *Boutilier* case, the American Psychiatric Association decided to delete the diagnosis of homosexuality from the forthcoming (i.e., the third) edition of the *Diagnostic and Statistical Manual of Mental Disorders*, which was published in 1980.
64. *Boutilier v. Immigration Service*, 387 U.S. 118 (1967) at 122. Dissenting were Justices William O. Douglas, Abe Fortas, and William J. Brennan Jr.
65. Arthur S. Leonard, *Sexuality and the Law: An Encyclopedia of Major Legal Cases* (New York: Garland, 1993), 648.
66. Ibid., 646.
67. While the act has been amended many times since 1952, its essential structure remains the same, and it still functions as the basic body of immigration law in the United States today.
68. Senate Committee, *Immigration and Naturalization System*, 787.
69. It was the 1790 "Act to establish an uniform Rule of Naturalization" that restricted naturalization to "free white persons" (Act of March 26, 1790, chap. 3, §1, 1 Stat. 103). It is important not to confuse the removal of the language of race from the INA with the end of racism in the law. The INA's provisions continued a racist logic of exclusion even though they avoided the language of race. As Lisa Lowe points out: "Quotas were not specified by national origin, but through racialized ethnic categories such as 'Chinese.' In other words, the McCarran-Walter Act provided that one hundred ethnic Chinese persons enter annually; these Chinese originated from diverse nations" (*Immigrant Acts: On Asian American Cultural Politics* [Durham: Duke University Press, 1996], 193n53).
70. During the nineteenth century Congress enacted other legislation linking citizenship to sexual status, including a law passed in 1855 that yoked citizenship to heterosexual marriage; the Page Act of 1875, which excluded women "imported for the purposes of prostitution" (and which was racialized in its emphasis on Asian women); and the Immigration Act of 1891, which excluded polygamists. The privileges and exclusions established with regard to sexual conduct by these laws endured through the twentieth century and, with minor changes, remain in force in immigration and naturalization law today. For more detailed discussions of these laws see my "Sexual Aliens and the Racialized State"; and Eithne Luibhéid, *Entry Denied: Controlling Sexuality at the Border* (Minneapolis: University of Minnesota Press, 2002), 31–54.

71. Act of March 26, 1790, chap. 3, §1, 1 Stat. 103; Act of January 29, 1795, chap. 20, §§1, 2, 1 Stat. 414. For an extensive discussion of this requirement see Steven L. Strange, "Private Consensual Sexual Conduct and the 'Good Moral Character' Requirement of the Immigration and Nationality Act," *Columbia Journal of Transnational Law* 14 (1975): 357–81.
72. Senate Committee, *Immigration and Naturalization System*, 701. Apparently, the courts had used adultery regularly as a bar to the establishment of good moral character, but without precisely defining the term, whose meaning varied from state to state. See Strange, "Private Consensual Sexual Conduct," 365–66.
73. However, the "good moral character" requirement has subsequently been used to exclude aliens who were homosexual. See Strange, "Private Consensual Sexual Conduct," 372.
74. Senate Committee, *Immigration and Naturalization System*, 337. Robert J. Foss notes that this provision has rarely been invoked to exclude aliens ("The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration," *Harvard Civil Rights–Civil Liberties Law Review* 29 [1994]: 447).
75. Estelle B. Freedman, "'Uncontrolled Desires': The Response to the Sexual Psychopath, 1920–1960," in *Passion and Power: Sexuality in History*, ed. Kathy Peiss and Christina Simmons, with Robert A. Padgug (Philadelphia: Temple University Press, 1989), 202. According to Freedman, the term *psychopathic personality* was first used by the German psychiatrist Emil Kraepelin in 1904 "to refer to criminals with unstable personalities, vagabonds, liars, or beggars . . . prostitutes and homosexuals" (202). The slight change in terminology in the INA reflects an earlier shift in psychiatric terminology: "During the 1920s and 1930s American usage shifted from 'constitutional psychopath' to 'psychopathic personality'" (217–18n8).
76. Senate Committee, *Immigration and Naturalization System*, 341.
77. Ibid., 343.
78. Ibid., 345.
79. Senate Committee, *Revision of Immigration and Naturalization Laws*, pt. 1, 9.
80. Foss, "Demise of the Homosexual Exclusion," 452, 445, 456.
81. Mrs. Gordon Robert Phelps Connor, Wausau, Wisconsin, to Hon. H. Brownell, December 7, 1955, RG 85, Acc. 58-A0734, file 56340/100, box 3344, 17WB, 14/3/01, pt. 1, National Archives and Records Administration, Washington, DC.
82. The Cold War association of communism with crises of masculinity and sexuality has been deftly examined by a number of scholars, most recently David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004). See also Lee Edelman, "Tea Rooms and Sympathy; or, The Epistemology of the Water Closet," in *The Lesbian and Gay Studies Reader*, ed. Henry Abelove, Michèle Aina Barale, and David M. Halperin (New York: Routledge, 1993), 553–74; Robert J. Corber, *Homosexuality in Cold War America: Resistance and the Crisis of Masculinity* (Durham: Duke University Press,

1997); and Michael Rogin, "Kiss Me Deadly: Communism, Motherhood, and Cold War Movies," *Representations*, no. 6 (1984): 1–36.

83. Johnson, *Lavender Scare*, 33.
84. Senate Subcommittee on Investigations, *Employment of Homosexuals and Other Sex Perverts in the U.S. Government*, interim report pursuant to S. Res. 280, 81st Cong., 2d sess., 1950, rpt. in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, ed. Mark Blasius and Shane Phelan (New York: Routledge, 1997), 243–44.
85. Race had been a central element of immigration law since the 1790 "Act to establish an uniform Rule of Naturalization," which restricted the right to "free white persons." While the precise meaning of *white* has never been stable in the enforcement of this law, the naturalization process has been embedded historically in an explicit policy of racial exclusion and in the logic of white supremacy. After the Civil War the "white person" restriction was challenged, but rather than do away with it completely, Congress simply modified it in 1870 by extending the right of naturalization to "persons of African nativity or African descent." In doing so, Congress recognized the citizen status of freed African American slaves, but it maintained discriminatory immigration and naturalization policies for other racial groups. In the period before World War II various groups were granted piecemeal exceptions, including immigrants from the Philippines, India, and China, as well as Asian brides of U.S. soldiers, but the basic language of racial exclusion remained in place until 1952. See Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996), 1, 43–44.
86. Ibid., 45.
87. Senate Committee, *Revision of Immigration and Naturalization Laws*, pt. 1, 40.
88. On the relationship between Cold War foreign policy and the domestic civil rights movements see Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).
89. Senate Committee, *Immigration and Naturalization System*, 371.
90. See David M. Reimers, *Still the Golden Door: The Third World Comes to America*, 2nd ed. (New York: Columbia University Press, 1992); and Lowe, *Immigrant Acts*, 193n53. On the persistence of policies of racial exclusion, even in the wake of the eventual repeal of national origins quotas, see Eithne Luibhéid, "The 1965 Immigration and Nationality Act: An 'End' to Exclusion?" *positions* 5 (1997): 501–22. On the "invention" of national origins and the implications of this policy for the deployment of race in immigration and naturalization law see Mae M. Ngai, "The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924," *Journal of American History* 86 (1999): 67–92.
91. C. L. R. James, *Mariners, Renegades, and Castaways: The Story of Herman Melville and the World We Live In* (Hanover, NH: Dartmouth College, 2001), 13. James wrote

this book while imprisoned on Ellis Island under the provisions of the INA; he was eventually deported.

92. Rachel Buff, "Internal Frontiers, Transnational Politics, 1945–65: Im/Migration Policy as World Domination," in *Postcolonial America*, ed. C. Richard King (Urbana: University of Illinois Press, 2000), 137. Buff takes an innovative and insightful approach to the INA, demonstrating not only how it furthered an isolationist foreign policy but also how it coincided with and reinforced a federal "termination policy" toward American Indian land claims within U.S. borders.
93. Senate Committee, *Revision of Immigration and Naturalization Laws*, pt. 2, 5.
94. "Revision of Laws Relating to Immigration, Naturalization, and Nationality—Veto Message," H. Doc. 520, 82d Cong., 2d sess., *Congressional Record* 98, pt. 6 (June 27, 1952): 8254.
95. "A Wise Veto," *New York Times*, June 26, 1952.
96. Senate Committee, *Immigration and Naturalization System*, 343. The 1917 law added restrictions barring "persons of constitutional psychopathic inferiority; persons with chronic alcoholism" and aliens with tuberculosis to existing provisions that denied entry to "all idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had more than one attack of insanity at any time previously" (Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States [1917], 39 Stat. 874, sec. 3).
97. Interestingly, the 1917 legislation had provided different rationales for exclusion depending on whether the medical condition was physical or mental, a distinction that revealed how eugenic policy trumped economic concerns. Originally, medical exclusions had been justified on the grounds that "physical defects" would interfere with the immigrant's ability to make a living. However, people considered to have mental defects were not excluded on the grounds that they would be unable to support themselves; rather, "the real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations, irrespective of the immediate effect thereof on earning capacity" (Senate Committee, *Regulation and Restriction of Naturalization*, 64th Cong., 1st sess., 1916, S. Rep. 352, 5).
98. Tony Tanner, *Adultery in the Novel: Contract and Transgression* (Baltimore: Johns Hopkins University Press, 1979), 12.
99. *Oxford English Dictionary*, 2nd ed. (1989), s.v. "adulterate, v.," 80-dictionary.oed.com.proxy2.library.uiuc.edu/cgi/entry/00003154.
100. *Oxford English Dictionary*, s.v. "queer, a.2," 80-dictionary.oed.com.proxy2.library.uiuc.edu/cgi/entry/00194687.
101. Ursula Vogel, "Whose Property? The Double Standard of Adultery in Nineteenth-Century Law," in *Regulating Womanhood: Historical Essays on Marriage, Motherhood, and Sexuality*, ed. Carol Smart (New York: Routledge, 1992), 148.

102. Eva Saks, "Representing Miscegenation Law," *Raritan* 8 (1988): 50.
103. My thinking about these issues has been enriched by discussions with Chantal Nadeau about the "hygienic nation" in a Canadian context, and particularly by her unpublished manuscript "*Droit de sang, droit de sexe*: Heredity and Queer Politics" (paper presented at the annual meeting of the American Studies Association, Washington, DC, November 10, 2002). See also Lauren Berlant's discussion of "hygienic governmentality" in *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham: Duke University Press, 1997), 175.
104. For excellent overviews of this history see Foss, "Demise of the Homosexual Exclusion."
105. The new provision was enacted in 1987 and was still in place at the time that this article was written; see 8 USC §1182 (a)(1)(A)(i).
106. As recently as 2001 an applicant for naturalization was rejected under the "good moral character" provision because of a (mistaken) finding of adultery in his past. See Jon Kamman, "Citizenship Denial Called Mix-up over Adultery Claim," *Arizona Republic*, April 27, 2001.
107. James P. Smith and Barry Edmonston, eds., *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* (Washington, DC: National Academy Press, 1997), 38.
108. *Congressional Record* 111-a (August 25, 1965): 21812, quoted in Reimers, *Still the Golden Door*, 74. As Reimers notes, some who opposed the policy also recognized its intent. The Japanese American Citizens League, for instance, noted that "although the immigration bill eliminated race as a matter of principle, in actual operation immigration will still be controlled by the now discredited national origins system and the general pattern of immigration which exists today will continue for many years yet to come" (*Congressional Record* 111-a [September 20, 1965]: 24503, quoted in Reimers, *Still the Golden Door*, 73).
109. Smith and Edmonston, *New Americans*, 56, 68.
110. For a detailed discussion of these shifts see Donald M. Lowe, *The Body in Late-Capitalist USA* (Durham: Duke University Press, 1995), 93–103.
111. Thomas J. Espenshade, "Marriage Trends in America: Estimates, Implications, and Underlying Causes," *Population and Development Review* 11 (1985): 209.
112. Pascoe, "Sex, Gender, and Same-Sex Marriage," 91.