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RACING THE CLOSET

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In the last few years, despite scant empirical support, the media have identified as a primary reason for high HIV rates among black women the phenomenon of black men who live on the “down low” (or DL). Such men are said to maintain primary romantic relationships with women while engaging in secret sexual liaisons with men. Drawing on a perpetrator-victim framework, this discourse pits “deviant” black men who have sex with men (MSM) against “respectable” black women and the broader black community. Yet such media discourse tends to erase structural components that produce high HIV rates and place the blame solely on individuals ripped from their broader social context. By contrast, this Article offers a structural analysis of the issue to reveal governmental and social mechanisms that marginalize black women and black MSM. First, government policies such as mass incarceration shrink the pool of black male partners for black women and black MSM, which impacts individual decision making. Second, black women and black MSM struggle against “romantic segregation,” which assumes that blacks must mate with blacks and fails to examine nonblack men’s relative disinterest in black women and black MSM. Third, the Centers for Disease Control’s early framing of HIV/AIDS as a “gay disease” disadvantaged many black women and nongay-identified black MSM who did not recognize that they were at risk.

Analyzing discourse on the DL is important because it may have implications for criminal and public health law. In response to fears that HIV-positive people recklessly spread disease, more than half the states have passed criminal laws aimed at HIV-positive people who expose sexual partners to a risk of HIV transmission. Like the DL discourse, these laws understand HIV transmission through a crude lens of perpetrators and victims. Actual dynamics in sexual relationships tend to be far more complex and resistant to regulation by

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the criminal law, which helps explain the minimal number of prosecutions brought under these laws. Instead of relying on a criminal law model to reduce HIV transmission, I call for structural solutions, which may channel individual sexual behavior in productive ways, without directly regulating it.

INTRODUCTION.....	1464
I. “DOWN LOW” DISCOURSE: THE DOMINANT STORY	1469
II. BLURRING THE PERPETRATOR/VICTIM DIVIDE.....	1478
A. <i>Not All Black Women Are Victims</i>	1478
1. <i>Some women know; some don’t care; some prefer bisexual men</i>	1478
2. <i>Women can live “down low”</i>	1483
B. <i>Black Men Can Be Victims Too</i>	1487
1. <i>Bisexuality is not an intelligible option</i>	1487
2. <i>The down low harms out black men</i>	1494
III. STRUCTURAL CONNECTIONS: WHAT BLACK WOMEN AND BLACK MSM HAVE IN COMMON.....	1500
A. <i>Governmental Policies Reduce the Number of Eligible Black Male Romantic Partners</i>	1500
B. <i>Romantic Segregation Limits Romantic Possibilities for Black Women and Black MSM</i>	1503
C. <i>The Branding of HIV as a Gay White Disease Disserved Black MSM and Black Women</i>	1511
IV. THE FAILURE OF HIV TRANSMISSION LAWS	1515
A. <i>Positive Perpetrators and Negative Victims</i>	1516
B. <i>Complexity and Culpability</i>	1520
C. <i>A Structural Approach to HIV Risk</i>	1525
CONCLUSION	1532

INTRODUCTION

Recently, the media have brought to light examples of ordinary black men who are said to live on the “down low” (or DL) in that they have primary romantic relationships with women while engaging in secret sex with men.¹ A central theme of this media coverage, which I will call “DL discourse,” is that DL men expose their unwitting female partners to HIV, which stems from their secret sex with men.² DL discourse warrants examination because it sits at the intersection of three important civil rights movements: (1) the gay rights movement, (2) the black anti-racist movement, and (3) AIDS activism. In this

1. See Chandra L. Ford et al., *Black Sexuality, Social Construction, and Research Targeting ‘The Down Low’ (‘The DL’)*, 17 ANNALS OF EPIDEMIOLOGY 209, 209 (2007) (“The DL gained considerable notoriety from publicity surrounding the publication of popular books and news features on the phenomenon.” (citation omitted)). Numerous media sources have covered the down low, including the *New York Times*, *Los Angeles Times*, *San Francisco Chronicle*, *Village Voice*, *Vibe*, and *Essence* magazines and *The Oprah Winfrey Show*. See, e.g., *infra* notes 19-32.

2. See Ford et al., *supra* note 1, at 209. Sixty-nine percent of women diagnosed with HIV/AIDS are black. *Id.* at 210.

Article, I critique DL discourse in order to reveal important lessons about media framing, gender schemas, and victimization, and the relationship of all three to law. DL discourse tends to conceal several relevant and interconnected groups, including nonblack men who engage in similar practices, down low women, and women whose sexual relationships are not monogamous or “respectable.” These erasures permit the media to boil the underlying issues down to a battle between two caricatures—dangerous black men and their innocent wives and girlfriends. However, a close analysis of this framing provides the opportunity to recognize complicating nuances and draw structural connections between black men who have sex with men, or “MSM,”³ and black women. I argue that both of these groups confront structural constraints that push them to the fringes of the black community and the broader society while limiting their romantic possibilities.

The media and the public have applied an insidious racialized double standard to black and white men who engage in similar conduct. The black men who are depicted as having secret sex behind their wives’ backs in DL discourse horrify us, yet we see Ennis and Jack, the star-crossed lovers in the Oscar-nominated, box office hit *Brokeback Mountain*, as victims of the closet.⁴ When Governor Jim McGreevey came out as a “gay American,” the empathy that the public felt for his wife Dina did not require casting Jim as a villain. Thus, an important point of this Article is that we attend to our tendency to frame black and white men through radically disparate lenses even when they engage in the same underlying conduct. Juxtaposing what I call “white men on the down low”⁵ against the stories of all-black depravity featured in DL discourse makes apparent that these media stories race the closet.

3. This term was first adopted by public health scholars and workers who recognized the significant community of men who have sex with men but do not identify as gay. See KEITH BOYKIN, *BEYOND THE DOWN LOW: SEX, LIES, AND DENIAL IN BLACK AMERICA* 80 (2005). I use “MSM” as an umbrella term for gay-identified men and men who have sex with men while declining to identify as gay. However, I also attend to salient differences between and among these two types of men.

4. See Richard N. Pitt, Jr., *Downlow Mountain?: De/Stigmatizing Bisexuality Through Pitying and Pejorative Discourses in Media*, 14 J. MEN’S STUD. 254, 255 (2006) (“Of 140 articles written about this movie in mainstream newspapers, none referred to the Jack and Ennis characters as bisexuals, let alone as men living on the down-low.”); *infra* text accompanying notes 77-79. Some may see the comparison to *Brokeback Mountain* as inapt. They might say that Jack and Ennis are fictional characters, while DL men are real. But as I describe more fully in the text, it remains unclear how many real DL men exist. Like the “welfare queen,” the DL man may loom large as a fictional boogeyman whose media representations are out of step with actual DL prevalence.

5. For other examples of white men on the DL, see BOYKIN, *supra* note 3, at 69-71 (discussing politicians Michael Huffington and Edward Schrock, and entertainment mogul David Geffen); David Amsden, *Married Man Seeks Same for Discreet Play*, N.Y. MAG., July 23, 2007, available at <http://nymag.com/news/features/34985/> (describing Wall Street professional men meeting other men for sex on Craigslist.org); James E. McGreevey, *The Making of a Gay American*, N.Y. MAG., Sept. 18, 2006, available at <http://nymag.com/news/politics/21340/> (describing a secret enclave of white married men

To say that the media race the closet is not to say that black and white MSM are identically situated vis-à-vis the closet. But the major differences may not be the ones suggested by the media, such as the association of DL with promiscuity.⁶ First, black men face not just homophobia but also racism, and these two oppressive forces intertwine in vexing ways. For instance, black men who identify as gay may face accusations that they have let down the black community, which often views “good black men” as an endangered species.⁷ Jim McGreevey can come out without anyone fretting about the white community lacking strong male leaders or linking such a problem to his sexual identity. To the extent that black men do not “come out” as frequently as white men, one explanation is that they face greater pressure to shun an additional stigmatizing identity. Importantly, this pressure arises not just from the black community and its purported greater homophobia,⁸ but also from white people. The very white gay men who bemoan the internalized homophobia of black

who meet for sex, including “power brokers and backroom operatives and future leaders of America”). More recently, Senator Larry Craig and Pastor Ted Haggard were caught living what appear to be down low lifestyles. *See* Eric Gorski, *Haggard Says He's Not Gay*, DENV. POST, Feb. 6, 2007, at A1; Dan Popkey, *More Gay Men Describe Sexual Encounters with U.S. Sen. Craig*, IDAHO STATESMAN, Dec. 3, 2007, available at <http://www.idahostatesman.com/eyepiece/story/226703.html>.

6. *See infra* note 36.

7. *See infra* note 50.

8. The view that blacks are more homophobic than whites appears to have become more widespread in the aftermath of California voters' decision to pass Proposition 8 to strip lesbian, gay, bisexual, and transgendered (LGBT) people of the right to marry. Several media commentators, including Dan Savage and Andrew Sullivan, blamed the success of Prop. 8 on the tiny percentage of black voters in the state and President Obama. *See, e.g.*, Posting of Dan Savage to The Slog, http://slog.thestranger.com/2008/11/black_homophobia (Nov. 5, 2008, 09:55 PST) (postelection commentary blaming blacks); The Daily Dish, http://andrewsullivan.theatlantic.com/the_daily_dish/2008/10/obamas-moment-o.html (Oct. 20, 2008, 10:11 EST) (preelection commentary demanding that Obama more forcefully oppose Prop. 8 and predicting that he would be to blame if Prop. 8 passed). Gregory Lewis's research shows that black views on homosexuality and LGBT rights are much more complex than whites like Savage and Sullivan think. *See* Gregory B. Lewis, *Black-White Differences in Attitudes Toward Homosexuality and Gay Rights*, 67 PUB. OPINION Q. 59, 66 (2003) (stating that “blacks appear to be more likely than whites both to see homosexuality as wrong and to favor gay rights laws”). The moral opposition to homosexuality in the black community seems to stem in large part from the influence of the black church. *See id.* at 66 (“Blacks are substantially more religious than whites, more likely to be fundamentalist Protestants, and more likely to believe in a God who sends misfortunes as punishments.”); *see also* BOYKIN, *supra* note 3, at 263 (“The church is the arbiter of moral decency in the black community.”). Although the media frequently cited an exit poll suggesting that 70% of black voters supported Prop. 8, *see, e.g.*, Karl Vick & Ashley Surdin, *Most of California's Black Voters Backed Gay Marriage Ban*, WASH. POST, Nov. 7, 2008, at A03, a subsequent study found that that poll was an outlier, *see* PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA'S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 9 (2009), http://www.thetaskforce.org/downloads/issues/egan_sherrill_prop8_1_6_09.pdf. The best evidence suggests that black support for Prop. 8 was about 58%. *See id.* at 3. Moreover, once the authors of the study controlled for religion, there were no significant racial differences. *See id.* at 11.

men and suggest that coming out is a cure-all often contribute to the closet that confines black men by excluding and marginalizing black MSM in gay spaces and public representations.⁹ As I describe below,¹⁰ white gay men have dominated public images of gay men, which makes it hard for many men of color contemplating coming out to understand where they would fit in. To the extent that black men see black gay images in the media, such representations are likely to be caricatures—like the DL—that fail to reflect how black men see themselves.

Although DL discourse has convinced many readers that the DL is a real and significant phenomenon in the black community, no one has ever proved the prevalence of this practice in black communities or elsewhere. Indeed, it may be impossible to do so since the very conception of the practice entails secrecy. Asking a man whether he is down low may not produce a reliable answer since DL men, by definition, are perceived as hiding their sexual relationships with men and denying the relevance of their involvement in such sex. Many media stories on the DL fail to quote any actual men on the DL beyond J.L. King, the one man who has built a career on acting as a media spokesperson for the group.¹¹ Thus, the media set up the DL as a “phenomenon” whose existence can neither be proved nor refuted. In my view, the blossoming of the DL story in major media outlets, despite the lack of identifiable DL men and minimal empirical evidence, speaks to the background stereotypes about black pathology that enable the story to bypass normal expectations of verification.

Despite these verification challenges, some public health scholars who have also been intrigued by the DL story as a possible explanation for high HIV rates among black women have attempted to study DL men. I report the results of some of these studies throughout this Article. Although these studies shed some light on men who fit at least some of the characteristics of the typical

9. I discuss below an empirical study of a popular MSM dating website. *See infra* text accompanying notes 249-52. This study documented that users of the website prefer white men over black and Asian men with identical profiles. Other manifestations of racial exclusion and fetishization include the use of the term “dinge queen” to apply to white men who date blacks, *see* DWIGHT MCBRIDE, *WHY I HATE ABERCROMBIE & FITCH* 122 (2005), and the embrace of Shirley Q. Liquor, a white gay man who dresses in drag and blackface and plays at gay venues. Shirley Q. serves up virtually every black female stereotype—she has many “baby daddies,” is obese, and is incapable of speaking proper English. *See* Shirley Q. Liquor, <http://www.shirleyqliquor.com/> (last visited Mar. 27, 2009); Chuck Knipp, WIKIPEDIA, http://en.wikipedia.org/wiki/Chuck_Knipp (last visited Mar. 27, 2009).

10. *See infra* text accompanying notes 242-46.

11. *See* BOYKIN, *supra* note 3, at 126-30 (characterizing King as ill-informed and self-serving). An exception is the *Oprah* episode on the DL, which I discuss below. *See infra* text accompanying notes 32-35. That episode featured two men said to be on the DL, but their identities were cloaked. It is questionable whether the show, which does not appear to abide by the standards of a network news program, confirmed that these men actually engage in the DL lifestyle.

media definition of down low,¹² they are subject to important limitations. First, it is possible that there is a group of DL men who would not talk to researchers, despite rigorous procedures intended to protect their identities.¹³ Such men are obviously not included in the studies I describe, although we do not know how many such men exist. Second, some studies select subjects by asking men whether they identify as “down low” and thus sweep in some men who do not sleep with women and men simultaneously, but nonetheless subscribe to DL identity for reasons that may include a rejection of the whiteness of gay identity and the view that DL is a trendier term for the closet.¹⁴ These limitations mean that the studies do not enable me to prove that the pervasive assumptions about DL men are correct or incorrect. They do, however, allow me to raise skepticism about assumptions which may amount to nothing more than stereotype.¹⁵

This Article begins in Part I where I describe the main themes of DL discourse, laying the foundation for Part II, which deconstructs the framing of this discourse. While the media tend to pit black MSM against black women, framing the former as perpetrators and the latter as passive victims, I reveal often ignored subgroups that destabilize the discourse’s simplistic binary. I also reveal that the victimization of black men is masked by the assumption that only women can be victims. Such frames conceal the common ground of marginalization that black MSM and black women share. In Part III, I examine several mechanisms that specifically harm black women and black MSM. These governmental policies and social norms include “romantic segregation,” mass incarceration, and the branding of HIV/AIDS as a disease of gay white

12. See *infra* text accompanying note 20.

13. See BOYKIN, *supra* note 3, at 100-01.

14. See *id.* at 15-16 (noting men adopt DL identity to reject the whiteness associated with the terms “gay” and “bisexual,” to assert their masculinity, and to indicate they are closeted).

15. For example, contrary to public health scholars’ assumption that coming out helps reduce HIV risk among white men, black MSM “who disclose their sexual orientation have a higher HIV prevalence (24% vs. 14%) and engage in more unprotected anal sex (41% vs. 32%) than nondisclosers.” David J. Malebranche, *Black Men Who Have Sex with Men and the HIV Epidemic: Next Steps for Public Health*, 93 AM. J. PUB. HEALTH 862, 863 (2003). Studies also suggest that DL-identified and nongay-identified men have fewer male sex partners than out men. See, e.g., Richard J. Wolitski et al., *Self-Identification as “Down Low” Among Men Who Have Sex with Men (MSM) from 12 US Cities*, 10 AIDS & BEHAV. 519, 522 (2006) (“DL-identified MSM were less likely than non-DL MSM to have had seven or more male partners in the past 30 days.”). In most other respects, the sexual practices of the DL-identified and non-DL-identified men in the Wolitski study were similar, but the former were more likely to report having had unprotected insertive sex (i.e., in the “top” role) with a partner whose HIV status they did not know. See *id.* at 524; see also Lisa Bond et al., *Black Men Who Have Sex with Men and the Association of Down-Low Identity with HIV Risk Behavior*, 99 AM. J. PUB. HEALTH SUPP. 1, 3 (2009) (finding that DL-identified black MSM were more likely than non-DL-identified men to report sex with women, but that the two groups engaged in unprotected sex with women at comparable rates).

men—not black men and their female partners. The increasingly black face of HIV today¹⁶ is in part a byproduct of the government's initial focus on gay white men to the exclusion of others affected by the virus.

One might expect HIV-specific transmission statutes, which were partly motivated by news reports of a black man infecting numerous white women, to offer a solution to the down low because such laws punish people who know they are HIV-positive and have sex with another without disclosure. Yet many DL men currently live beyond the reach of HIV transmission statutes and under the radar of the HIV testing regime because they do not see themselves as belonging to the risk group of gay men and thus do not know their HIV status. Instead of simply trying to identify individual perpetrators, an approach that has had minimal impact, the government could protect individuals by establishing regular HIV testing as a norm for *all* sexually active people, not just those who fit a flawed profile of those at risk. Studies show that most people who receive an HIV-positive diagnosis alter their behavior and engage in less unprotected sex with HIV-negative partners.

Although I attack media conceptions of black men on the “down low,” and their links to government policies, I do not mean to excuse or justify the behavior of a man (of any race) who lies to his wife or female partner about his sexual relationships with men and exposes her to HIV.¹⁷ While there surely are some men who fit the DL caricature, media discourse on the DL contains little of the complexity, personal struggle, and humanity apparent in the lives of many black men who have sex with men and women and refuse to identify as gay. It also tends to distract us from the structural forces that contribute to individual decision making. DL discourse fosters a new sexualized stigma for black men while ignoring the compelling questions of intersectionality and identity politics prompted by the DL.¹⁸

I. “DOWN LOW” DISCOURSE: THE DOMINANT STORY

In this Part, I describe the most common media narrative concerning the down low. Then in Part II, I show how conspicuous omissions in these stories perpetuate the perception that black MSM are enemies of black women, and I attempt to blur the perpetrator/victim divide delineated by the media. In

16. See, e.g., Ryan Lee, *Experts Debate the New Face of AIDS*, WASH. BLADE, Dec. 1, 2006, available at <http://www.washblade.com/2006/12-1/news/national/national.cfm>.

17. Further, to argue that some women know that their male partners are having sex with men, as I do below, is not to claim that such women deserve to become infected with HIV.

18. On intersectionality, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

describing DL discourse, I focus on the most widely distributed examples because they have wielded the most influence on public perceptions. I consider stories in the *New York Times* and two of the most popular magazines directed at black audiences, *Essence* and *Ebony*.¹⁹ In addition, I analyze an episode of *The Oprah Winfrey Show*, the top-rated daytime talk show, which uniquely influences the opinions of many black and nonblack viewers. Although I focus on these sources, my review of coverage in several other media sources suggests that these sources are representative of the general discourse in mainstream white- and black-controlled media.

What is the “down low”? Whether it is used in white-dominated media, such as the *New York Times*, or black-controlled media, such as *Essence*, the term “down low” typically refers to men who are “(1) Black, (2) not identifying as gay, (3) having sex with both men and women, (4) not disclosing their sexual behavior with men to female partners, and (5) never, or inconsistently, using condoms with males and females.”²⁰ Public health experts state that it is entirely unclear how many men satisfy this definition.²¹ Nor has it been established that the DL is more common among black men than men of other races or is a primary reason why HIV rates in black women are high.²² The term “down low” originated in the black community, but it did not initially refer to sex between men. Rather, the term emerged from R&B songs describing illicit heterosexual affairs, including those by female artists like TLC (“Creep”) and Salt-n-Pepa (“Whatta Man”).²³ A hit song from 1995 by singer R. Kelly provided perhaps the most prominent usage of the term in

19. See Lucia Moses, *MMR Studies Most-Read Mags by Race, Ethnicity*, MEDIAWEEK.COM, Feb. 21, 2007, http://www.mediaweek.com/mw/news/print/article_display.jsp?vnu_content_id=1003548288 (“African-Americans’ three most-read magazines were black-interest titles *Ebony*, *Jet* and *Essence*.”); Audit Bureau of Circulations, Newspaper, <http://abcas3.accessabc.com/ecirc/newsform.asp> (Sort by: “Daily—Descending”; then follow “Title Search” hyperlink) (last visited Sept. 30, 2008) (listing *New York Times* as having the widest circulation of city-based newspapers).

20. Wolitski et al., *supra* note 15, at 519 (citing news stories about DL MSM).

21. See, e.g., *id.*

22. See, e.g., Ford et al., *supra* note 1, at 210 (“More complete population-based information . . . is necessary . . . before the DL can be linked epidemiologically to HIV/AIDS racial disparities.”); *id.* (criticizing media for frequently suggesting that the DL is “new and limited to blacks”); Vickie M. Mays et al., *HIV Prevention Research: Are We Meeting the Needs of African American Men Who Have Sex with Men?*, 30 J. BLACK PSYCHOL. 78, 84 (2004) (recognizing that while “scientific literature has firmly established that African American MSM should be a focus of HIV prevention[,] . . . the connection between the risk of disease and the unique circumstances of African American MSM is in its infancy”). Eighty percent of women who contracted HIV through sex with a man in 2002 did not know or report whether their male sexual partners were in a high-risk group, such as men with multiple partners, MSM, or IV drug users. Ford et al., *supra* note 1, at 210. In a 2003 study, “[o]nly 2% of heterosexually infected Black and Hispanic women had a male partner who was known to be bisexual.” Wolitski, *supra* note 15, at 520.

23. See BOYKIN, *supra* note 3, at 41, 44 (citing songs by TLC, Salt-N-Pepa and Brian McKnight).

R&B/hip-hop. In the song's chorus, Kelly instructed his partnered female lover to "keep [their affair] on the down-low. Nobody has to know."²⁴ By 2001, when the mainstream media noticed the term, it had become associated primarily with men who have relationships with women while secretly having sex with men.²⁵ More recently, it has been adopted by black men who may not have sex with women but may not be "out" in the traditional sense, and may seek to distance themselves from the term "gay," which they see as rooted in white norms.²⁶ The media coverage has produced public perceptions that the down low is a common practice among black men. These perceptions have taken on a life of their own and tend to conceal the scant empirical support.²⁷

After briefly describing the central themes of DL discourse, I will illustrate them by analyzing some prominent examples. Media reports on this "phenomenon" are almost entirely anecdotal²⁸ and tend to highlight the most alarming examples. The stories consistently frame the DL as a distinctly black issue, rarely even mentioning white men or nonblack men of color. Further, they present as a paradox DL men's enjoyment of sex with men while denying that they are gay. In addition, they emphasize that the DL involves deception of women, a refusal to wear condoms, and exposure of female partners to a heightened risk of HIV. Moreover, the media tend not to acknowledge that scholars have not been able to pinpoint a single reason as the cause of HIV/AIDS among black women. Scholars have identified multiple factors that likely contribute to the high incidence of HIV/AIDS among black women, including sex between heterosexually identified men in prison who reenter the

24. R. KELLY FEATURING THE ISLEY BROTHERS, *Down Low (Nobody Has to Know)*, on R. KELLY (Jive Records 1995). As in the TLC song *Creep*, this narrative depicts a woman as violating her commitment to a partner, unlike current DL discourse, which depicts male infidelity. See TLC, *Creep*, on CRAZY SEXY COOL (LaFace Records 1994). Around the same time, black gay author E. Lynn Harris published his first of many successful novels about black men who sleep with men and women. See ELYnnHarris.com, 'Bookshelf,' <http://www.elynnharris.com/bookshelf.htm> (last visited July 24, 2008). Harris' books, as well as J.L. King's *ON THE DOWN LOW*, represent the DL as cutting across social classes and including middle class black men. See J.L. KING, *ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF "STRAIGHT" BLACK MEN WHO SLEEP WITH MEN* (2004).

25. See, e.g., Linda Villarosa, *AIDS Education Is Aimed 'Down Low,'* N.Y. TIMES, Apr. 3, 2001, at F5. Keith Boykin observes that an important transition occurred in the transformation of "down low" from a general term for secret practices in the black community to a description of black men who have sex with women and men: "The down low was not a description of who [certain black people] were, it described something that they did." BOYKIN, *supra* note 3, at 42. The extent to which the media produced the link between "down low" and men who sleep with both women and men, as opposed to merely reflecting an emerging understanding in the black community, is unclear.

26. See BOYKIN, *supra* note 3, at 15-16; cf. Wolitski, *supra* note 15, at 519 (noting that in general black and Hispanic men are "less likely than Whites to describe themselves as gay").

27. See, e.g., Ford et al., *supra* note 1, at 210.

28. See, e.g., *id.*; Wolitski, *supra* note 15, at 519 (stating that DL discourse is "largely based on anecdotal reports and externally applied labels").

black community upon release, heterosexual black men who have multiple sex partners, sex work among impoverished black men, and IV drug use, which impacts not just users but also people who sleep with them.²⁹ Researchers also recently identified an apparent genetic link that may make many African Americans more vulnerable to HIV.³⁰ Despite these numerous factors, DL discourse tends to omit all factors other than the DL.³¹

Perhaps the most inflammatory example of this discourse is an episode of *The Oprah Winfrey Show* from April 2004. This episode featured J.L. King, an African American man and author of *On the Down Low*.³² In case King's stories of sleeping with men while being married to and raising children with a black woman were not disturbing enough, Oprah featured two men with even more salacious tales of life on the low. Oprah began the show by stating that "AIDS is on the rise again. Here's a shocker! It's one of the big reasons why so many women are getting AIDS. Their husbands and their boyfriends are having secret sex with other men."³³ Then two men whose identities were obscured provided accounts of their sex lives with women and men:

Man # 1

Having a main girl, two other girls on the side and three guys makes for a lot of sex in the course of a month. I have non-committed sex with men. In no way, shape, or form do I consider myself gay. I just don't – I refuse to accept that at all. I won't even use the term 'bi-sexual'. Being in a relationship with a woman . . . there is a certain warmth; a certain comfort that you just can't get with another dude. The women I sleep with have not always known that I

29. See Brian Dodge et al., *Beyond the Down Low: Sexual Risk, Protection, and Disclosure Among At-Risk Black Men Who Have Sex with Both Men and Women (MSMW)*, 37 ARCHIVES SEXUAL BEHAV. 683, 683 (2008) (discussing findings suggesting that black men are significantly more likely to engage in sex work than white men); Gregorio A. Millett et al., *Explaining Disparities in HIV Infection Among Black and White Men Who Have Sex with Men: A Meta-Analysis of HIV Risk Behaviors*, 21 AIDS 2083, 2084 (2007); J.P. Montgomery et al., *The Extent of Bisexual Behaviour in HIV-Infected Men and Implications for Transmission to Their Female Sex Partners*, 15 AIDS CARE 829, 833 (2003) (referring to prolonged incarceration, particularly among black and Hispanic men, as one explanation for their bisexual behavior); Rucker C. Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on AIDS Infection Rates Among African-American Women and Men* 5-8 (U.C. Berkeley Ctr. on Insts. and Governance, Working Paper No. 47, 2006), available at http://igov.berkeley.edu/workingpapers/series2/No47_Johnson.pdf. I analyze sexuality between men in prison and its legal and cultural implications in a work-in-progress. See Russell K. Robinson, *Masculinity as Prison* (Mar. 11, 2009) (unpublished manuscript, on file with author).

30. See Nicholas Wade, *Gene Variation May Raise Risk of H.I.V., Study Finds*, N.Y. TIMES, July 17, 2008, at A12.

31. An exception to this trend appeared in *Ebony* in 2004. Zondra Hughes, *Why Sisters Are the No. 1 Victims of HIV and How You Can Avoid It*, EBONY, July 2004, at 64 (expressing concern that obsession with DL will distract from other contributing factors).

32. *The Oprah Winfrey Show* (CBS television broadcast Apr. 16, 2004) (transcript on file with author); see KING, *supra* note 24.

33. *The Oprah Winfrey Show*, *supra* note 32.

also sleep with men. In the past, I haven't told them because it's a lot easier to just not to [sic] tell.

Man # 2

I'm shuffling three guys right now, actually. One is married, the other two gentleman [sic], I am with basically for sex. What we do is very promiscuous . . . very, very, very promiscuous. Sometimes I practice safe sex, sometimes I do not. The married guy, we use condoms all the time. He insists on it. The other two guys, we don't use condoms. Usually, if I am with a woman, we don't practice safe sex.

Man # 1

For quite a while, I had very bad behavior and had unprotected sex with men, with women.³⁴

[Later in the show]

Man # 1

After I was diagnosed with HIV, my behaviors didn't change. My behaviors got worse. I hung out in bars and picked up anonymous people. I had unprotected sex with guys, with women. Unfortunately, I would say I most likely have infected other people. I didn't protect myself or anything else.³⁵

Presumably, Oprah and her producers selected these men because their stories make for good television. However, they provided no reason for believing that these anecdotes are representative of DL black men in general. Nonetheless, the show perpetuated the notion that DL men are highly promiscuous with men and women and place their own sexual gratification above all else.³⁶ As author J.L. King said in response to repeated pressing by Oprah to admit that he is gay: "If I was a gay man, I would want to be in a relationship with another man and play house. So when you're on the D.L., all you want to do is have sex. It's about gratification, not orientation."³⁷ A prominent *New York Times Magazine* story tells a similar story: "DL culture . . . place[s] a premium on pleasure. It is, DL guys insist, one big party. . . . DL men convey a strong sense of masculine independence and power: I do what I want when I want with whom I want."³⁸ According to an

34. *Id.*

35. *Id.*

36. Man #1 failed even to recognize the humanity of the people he harmed: "I didn't protect myself or *anything* else." *Id.* (emphasis added). In general, studies show that black MSM are no more promiscuous than white MSM. *See, e.g.,* Millett et al., *supra* note 29, at 2086 (concluding, based on meta-analysis of 53 studies, that "black MSM reported significantly fewer sex partners across studies than white MSM" and engaged in no more unprotected anal sex than white MSM); Montgomery et al., *supra* note 29, at 832-34 (concluding, with respect to HIV-positive men with male and female partners, that "[t]here were no significant differences in the distribution of number of partners by race/ethnicity").

37. *The Oprah Winfrey Show*, *supra* note 32.

38. Benoit Denizet-Lewis, *Double Lives on the Down Low*, N.Y. TIMES, Aug. 3, 2003,

Ebony article, “for the most part, [DL men] think they are invincible. They don’t use condoms.”³⁹ As I explain below, these portrayals may fuel public interest in passing or maintaining laws criminalizing the exposure of sex partners to the risk of HIV, even though real life situations may be far more complex than media portrayals.⁴⁰

An examination of an *Essence* story further underscores the central theme of most DL discourse—black women as unwitting victims and “low down” black men as the villains.⁴¹ *Essence* titled one DL story “Deadly Deception.”⁴² The article begins: “There have always been men on the ‘down low,’ self-described straight men who have sex with other men. Problem is, the HIV threat makes the deception of these brothers disturbing, deadly—and just low-down.”⁴³ The DL man thus represents not just an individual enemy but a racial traitor. He is supposed to be a “brother,” yet he is hurting his black “sisters,” and implicitly the black community, by turning to men for sex and deceiving black women.

An important backdrop for many of these articles is the frustrated heteronormative aspirations of many single black women, who are depicted as doing everything right and yet being denied the black husbands to which they are entitled.⁴⁴ These stories either assume or demonstrate the respectability of the black women they frame as victims, which is supposed to heighten the injustice of their exposure to the DL threat.⁴⁵ For example, during the *Oprah*

(Magazine), at 31.

39. Lynn Norment, *The Low-Down on the Down-Low*, EBONY, Aug. 2004, at 34; see also *id.* (“So the DL man is sleeping with his men and his women *and not using protection with anybody*, and putting the entire Black community at risk of AIDS, just because he can’t face the fact that he is gay?” (emphasis added)).

40. See *infra* Part IV.

41. See Ford et al., *supra* note 1, at 209 (“Most [articles] framed [the DL] as black men’s deviant immoral sexual behavior and focused on implications for ‘innocent’ women partners . . .”).

42. See Taigi Smith, *Deadly Deception*, ESSENCE, Aug. 2004, at 148.

43. *Id.*

44. See Norment, *supra* note 39, at 34 (“The down-low Brother is yet another reason so many good and worthy Sisters can’t find suitable mates.”). On the hegemony of marriage and its shadow, see Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008) (seeking to unsettle hegemonic nature of marriage by focusing on friendship); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1694 (2005) (discussing how the law of marriage has been used in the United States as a “cure for the social ills that are assumed to be the fault of racial minorities, specifically of Blacks”).

45. Cathy J. Cohen notes a similar trend in black media coverage of AIDS:

Less successful black women, those who were perceived as having brought AIDS upon themselves through bad behavior—namely, injection drug users, sex workers and ‘promiscuous’ black women—rarely found their way into the pages of *Essence*. Instead, they remained the voiceless comparative framework from which [‘respectable’ women] could tell their distinguished story of victimization.

CATHY J. COHEN, THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS 226 (1999); see also Evelyn Hammonds, *Black (W)holes and the Geometry of*

episode, Jane testified: “I was the original 1950s good girl. I was a virgin on my wedding night.”⁴⁶ When her husband abandoned her after many years of marriage, Jane turned to a longtime male friend for companionship and sex. She said he infected her with HIV.⁴⁷ *Ebony* began one of its stories on the DL with the following:

She’s never shot-up dope. She’s never been what society might call promiscuous. In fact, by traditional standards, Ida Bythersmith has lived what some people consider the American Dream. She fell in love and married the man of her dreams, gave birth to a healthy child and settled in a quiet, middle-class community on Chicago’s South Side.⁴⁸

Thus, a condition of respectability appears to be middle-class status, behaving as a “good girl,” and not knowing or having reason to know that her partner was involved with men.⁴⁹

The *Essence* author, Taigi Smith, similarly juxtaposes respectable black women and threatening black men:

Less than a year ago, it seemed as if all I could do was stress about whether or not I would meet Mr. Right, start a family and create my own American Dream. Like so many college-educated, professional Black women, I was single, childless and totally unhappy about it. My girlfriends and I would routinely lament the fact that the brothers we knew were either noncommittal, no good, penniless, going after the White girls—or all of the above.⁵⁰

Smith demonstrates her respectability by signaling that she is pursuing the heterosexual ideal of marriage, family, and the “American Dream.” She writes that the specter of the DL man terrorizes her:

We’re unsure about what to do now that we know there’s a possibility that our boyfriends and husbands could be closeted homosexuals carrying HIV. I am now terrified after reading the [*New York*] *Times* article [about rising HIV rates among black women], and my fear manifests itself in curious ways. I no

Black Female Sexuality, 6 DIFFERENCES: J. FEMINIST CULTURAL STUD. 126, 132-34 (1994) (describing efforts of middle class black women to police sexuality of poor and working class black women).

46. *The Oprah Winfrey Show*, *supra* note 32.

47. *Id.*

48. Kevin Chappell, *The Truth About Bisexuality in Black America*, *EBONY*, Aug. 2002, at 158.

49. *See, e.g., id.* at 158 (“I think other people knew what was going on. I just didn’t know. I didn’t know about anything until it was too late. And all along, I thought my husband was my best friend.” (quoting HIV-infected woman, Ida Bythersmith)).

50. Smith, *supra* note 42, at 148. This passage reflects the widespread sentiment that black MSM are aligned with “drug users, men in prison, men who date non-black women, and the other groups of ‘unfit’ men who shirk their supposed racial duty to marry black women and raise ‘strong black families.’” Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809, 1821 (2007) (review essay); *see also* ANITA L. ALLEN, *WHY PRIVACY ISN’T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY* 98 (2003) (noting that in black media, “[b]lack men are criticized for abandoning black women for white partners”); *cf. also* BOYKIN, *supra* note 3, at 57-58, 197 (analyzing a song describing DL man as a “waste” and “just a queen . . . that thought he was a king”).

longer make eye contact with attractive men because I'm afraid that perhaps they're living life on the down low. I spend hours scrolling through my internal directory of past boyfriends, frantically trying to pick out closeted bisexuals. While riding the subway, I try to identify the men who might have a trace of the DL syndrome. In a word, I am obsessed.⁵¹

This passage might strike some readers as so overblown that it verges on the comedic, yet it was intended to convey the dangerous stakes purportedly posed by dating black men today. Midway through the article Smith says she “understand[s] the complexities of being Black and gay in America.”⁵² But we have to take it on faith since she devotes remarkably little space to the homophobia and racism that confine black MSM, dispatching of these topics with one short paragraph. She follows that paragraph by stating: “Still, shame and social stigma don’t make it okay for men on the DL to cheat on their female partners, especially when those liaisons are infecting Black women with HIV.”⁵³ Smith thus quickly returns to the article’s overarching theme—black women being terrorized by DL men, and the black man’s penis as a deadly weapon.⁵⁴ Her focus, consistent with other DL stories, is squarely on the women, as revealed by the cover headline “Do Black Men Still Want Us?”⁵⁵ The terror inspired by the DL man has spawned a cottage industry of authors and bloggers offering advice on “[h]ow to spot a DL brother.”⁵⁶ Misha King, a single black woman quoted in a *New York Times* article, disclosed that she goes on “field trips to the gay bars” to learn how to identify DL men.⁵⁷

Stories on the down low frequently stress how shocked women are that the men featured in these stories do not appear feminine or otherwise stereotypically gay.⁵⁸ The DL man alarms people not simply because of his behavior but because of a widespread belief that gender identity and sexual

51. Smith, *supra* note 42, at 148. Smith’s use of the word “syndrome” is also troubling in that it suggests a medical pathology.

52. *Id.* at 150. To her credit, Smith recognizes that “many Black folks still believe that men who have sex with men are somehow less masculine.” *Id.*

53. *Id.*

54. These depictions carry forward a long tradition of stereotyping black men, and their sexuality, as dangerous. See, e.g., Crenshaw, *Mapping the Margins*, *supra* note 18, at 1253 (discussing stereotype that black men are “uncontrollably violent”).

55. ESSENCE, Aug. 2004, at cover.

56. See, e.g., ByronCrawford.com, How to Spot a DL Brother, http://www.byroncrawford.com/2006/09/how_to_spot_a_d.html (Sept. 26, 2006, 12:33 CST). Blogger Byron Crawford offers such inane tips as checking to see whether your boyfriend owns any CDs by Maxwell (an R&B artist with a huge female following). He also asks “[h]as he taken you to the California Pizza Kitchen?” because “[t]here’s a lot of shit a straight man just doesn’t do, and eating a pizza with 15 different types of shit that’s not made out of pork would have to be chief among them.” *Id.* The unanswered question, however, is how the presumably straight Crawford gained such intimate knowledge of DL men’s habits.

57. Linda Villarosa, *AIDS Fears Grow for Black Women*, N.Y. TIMES, Apr. 5, 2004, at A1.

58. See *id.*

orientation correlate in men.⁵⁹ Engaging in same-sex intimacy is wrongly perceived as stripping males of their masculinity.⁶⁰ They are widely perceived as fallen and closer on the gender spectrum to women than a “real man.”⁶¹ This expectation is then used to police MSM and their gender presentation. Many people expect gay men to disclose their sexual identity through telltale signs of effeminacy, either subtle or overt. After all, is it too much to expect a limp wrist, pursed lips, a lisp, or sway in his walk? The DL man (and many out MSM) disobeys social norms by eschewing these traits and displaying a masculine gender presentation. Similarly, he does not partake in other aspects of gay culture that might make him identifiable: displaying a “gym body” (which is not necessary to attract most women), wearing trendy, formfitting clothes (which are of course designed to reveal the gym body), and using expensive grooming products.⁶² Further frustrating efforts to identify him, the DL man expresses attraction toward women, thus eliding another telltale sign of a gay man—sexual disinterest in women or interest that appears feigned. Therefore, the DL man transgresses social norms in performing masculinity persuasively and failing to affiliate with gay culture. In so doing, he upsets the expectation that gay men should be identifiable, which makes it easy for society to relegate them to the margins. Moreover, in disregarding the rules of sexual identity, the DL man reminds not just women but also men that *any* man might enjoy sex with men if it were detached from the stigmatized social identity that normally comes with it.⁶³

The primary reason for exploring the DL subculture is said to be its effect on black women and their health. Like the *Oprah* episode, DL stories regularly

59. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender,’ and ‘Sexual Orientation’ in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

60. See Denizet-Lewis, *supra* note 38, at 31 (“You don’t hear black people say, ‘Oh yeah, he’s gay, but he’s still a real man, and he still takes care of all his responsibilities.’ What you hear is, ‘Look at that sissy faggot.’” (quoting Rakeem, a young black man interviewed for the article)).

61. See, e.g., John Weir, *Like a Virgin*, DETAILS, Aug. 1996, reprinted in *POMoSEXUALS: CHALLENGING ASSUMPTIONS ABOUT GENDER AND SEXUALITY* 39, 52 (Carol Queen & Lawrence Schimel eds., 1997) (commentary by gay man who wanted to sleep with a woman “so I can see myself, even briefly, even just in Nick’s [his heterosexual male friend] eyes, as a man”); see also David France, *The Science of Gaydar*, N.Y. MAG., June 25, 2007, at 34, available at <http://nymag.com/news/features/33520> (“[W]e’re a third sex—or a third sex and a fourth sex, gay men and lesbians. Today, there’s scientific documentation behind this.” (quoting statement by gay neuroscientist, Simon LeVay)).

62. See, e.g., Mays et al., *supra* note 22, at 94 (describing “homo thugz” as black men who may wear “do-rags, Fubu jackets, platinum and gold necklaces, Timberlands or neonerd Wallabies, sideway knotted bandannas, and army fatigue trousers that hang off the hips”).

63. Because the DL man is unidentifiable as such, he destabilizes the very notion of heterosexuality as a hard-wired construct. No man can be categorized as conclusively heterosexual because his performance in bed and in society may be an illusion. Cf. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 8-9 (1990) (making a similar point about conceptions of homosexuality in general).

state or imply, usually at the outset, that DL men are responsible for high HIV rates among black women.⁶⁴ The purported concern for black women's health is thus used as the hook to justify exploring a topic that readers might otherwise regard as tawdry—black men secretly having sex with other men. Worse still, the stories discuss DL men with little evident interest in or concern for their humanity. Indeed, the depictions of DL men as one-dimensional sexual machines, lacking a heart and a conscience, imply that they do not suffer or struggle internally.⁶⁵ These crude depictions of black men enable their casting as villains, just as simplistic, “respectable” representations of black women and their sexual decision making assist their framing as victims. In Part IV, I show that this reductive binary maps onto the law's framing of sexual relations in the context of HIV transmission laws. In the next Part, I critique the focus on “respectable” black women, and the many black women who are obscured by such accounts.

II. BLURRING THE PERPETRATOR/VICTIM DIVIDE

A. *Not All Black Women Are Victims*

1. *Some women know; some don't care; some prefer bisexual men*

Even as DL discourse sets up a divide between black female victims and black MSM perpetrators, it grants only certain women access to the role of victim. Several categories of women are either expunged or shrouded because they would complicate the divide and present more complex and realistic images of black women. These marginalized women include those who knowingly sleep with a MSM, including bisexual women who might prefer or be comfortable with a bisexual man, and women who choose to stay with an MSM even after learning about his interest in men. The Centers for Disease Control (CDC) found that 12% of young men who disclose their sexual orientation (i.e., out gay or bisexual men) reported having one or more female sex partners within the last six months.⁶⁶ Moreover, half of these men

64. See, e.g., Tamala Edwards, *Men Who Sleep with Men*, ESSENCE, Oct. 2001, at 76 (“Brothers on the down low pose a serious AIDS risk to Black women.”); Scott Jaschik, *A New H.I.V. Alarm*, N.Y. TIMES, Jan. 16, 2005, at 34; Norment, *supra* note 39, at 34. Chandra Ford and her coauthors' systematic review of DL scholarly and public literatures identified this trend. See Ford et al., *supra* note 1, at 210 (reviewing all relevant sources obtained from Lexis/Nexis, Medline, CINAHL, Sociological Abstracts, and Google from 1998-2004).

65. The *Oprah* episode on the DL illustrates this tendency. See *The Oprah Winfrey Show*, *supra* note 32.

66. The sample of disclosing individuals comprised 4952 men. See *HIV/STD Risks in Young Men Who Have Sex with Men Who Do Not Disclose Their Sexual Orientation—Six U.S. Cities, 1994-2000*, 52 MORBIDITY & MORTALITY WKLY. REP. 81, 81, 84 (2003)

acknowledged having unprotected vaginal or anal sex with at least one female partner in the last six months.⁶⁷ A study by Richard Wolitski and others found that one-third of the men who self-identified as DL reported that their main partners were females who knew they had sex with male partners.⁶⁸ These findings counter several deeply entrenched assumptions in DL discourse: (1) out men do not sleep with women; (2) women would not sleep with a man if they knew he had sex with men; and (3) to the extent that a woman would sleep with such a man, she would certainly demand that he use a condom because of the risk of HIV.

A central problem with DL discourse is its tendency to assume that all or most male-female sex occurs in the context of committed relationships, which is evident from its failure to discuss other sexual arrangements. The implicit and misplaced assumption is that every black woman—or every black woman who matters—is in a relationship that she views as committed and monogamous. The Wolitski study of self-identified DL men, however, found that “few DL-identified MSM in this study currently had a female main partner—most female partners reported by these men were nonprimary partners.”⁶⁹ The various forms of male-female relationships that fall outside of marriage or committed partners, whether called “hooking up,” “friends with benefits,” or “maintenance sex,” are not even mentioned in most DL discourse. The failure to acknowledge women in such situations, especially in black-controlled media, seems to arise from their failure to conform to a traditional, “respectable” image of female sexuality.⁷⁰ This is unfortunate because DL

[hereinafter *HIV/STD Risks*].

67. See *id.* A different study found that just 28% of DL-identified men had unprotected vaginal sex in the prior thirty days. See Wolitski et al., *supra* note 15, at 522.

68. See Wolitski et al., *supra* note 15, at 523; see also Dodge et al., *supra* note 29, at 684 (stating that studies of bisexually behaving men have reported rates of disclosure to female partners ranging from one-tenth to one-third). The Wolitski study’s sample of 455 MSM, which was one-third black, one-third Latino and one-third white, yielded only 12 DL-identified men with a main female partner. See Wolitski et al., *supra* note 15, at 523. In addition, 13 non-DL-identified men reported primary relationships with women and having sex with a man within the prior 6 months. See *id.* at 520, 522. As suggested in the introduction, studies that focus on DL identity must be interpreted with caution. The practices of men who cooperate with researchers and identify themselves to researchers as DL may not track the practices of men whose behavior fits the media definition of DL but who may not identify as such to researchers or cooperate with them.

69. See Wolitski et al., *supra* note 15, at 526; see also Montgomery et al., *supra* note 29, at 834 (finding that most HIV-positive men who had sex with men and women reported one to five male and one to five female partners in prior five years, contrary to “common belief that bisexual men often are in a committed relationship with a woman and have many male sex partners”).

70. Cf. Crenshaw, *Mapping the Margins*, *supra* note 18, at 1270 (noting that in the context of rape prosecutions “[p]ast sexual conduct as well as the specific circumstances leading up to the rape are often used to distinguish the moral character of the legitimate rape victim from women who are regarded as morally debased”); *id.* at 1274 (describing black-community criticism of Desiree Washington, who accused Mike Tyson of rape, because she “had no business in Tyson’s hotel room at 2:00 a.m.”).

discourse could be used to make plain burdens on some black women's sexual decision making that stem from governmental policies that reduce the number of black men. As I describe more fully in Part III, the reduced availability of marriage pressures some black women who would prefer marriage to navigate the terrain of temporary sexual relationships.⁷¹ Moreover, the framing of black women as victims in need of protection invokes the peril of the pedestal/cage.⁷² The focus on black female victimhood may forestall important conversations on how society can support female agency in sexual relationships and empower women to reduce their exposure to HIV.⁷³

Two related points bear mentioning. First, in some of these short-term sexual relationships, due to the lack of commitment, the male *and* female may be engaged in overlapping sexual relationships with others. This possibility extends to marital relationships as well. When we hear about another unfaithful husband (e.g., John Edwards, Bill Clinton, Elliot Spitzer), we are conditioned to assume that the wife standing stolidly beside him was faithful. Yet current New York Governor David Paterson's recent disclosure that he and his wife had engaged in extramarital affairs warns us that the assumption of female fidelity may be misplaced.⁷⁴ Rarely does it seem to occur to writers of DL discourse that a woman could transmit HIV to her male partner.⁷⁵ The woman is typically assumed to be monogamous and her MSM partner to be promiscuous.

71. Of course not all women want to be married, and some may enjoy temporary sexual relationships.

72. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 613 (1990) ("[T]he story of woman as passive victim denies the ability of women to shape their own lives, whether for better or worse."). I recognize that, unlike white women, black women have rarely had access to the role of victim. See COHEN, *supra* note 45, at 202 (contrasting stories of respectable black women in the context of media coverage of AIDS with "many dominant narratives of black communities structured around the strong, black matriarch protecting or destroying, depending on your perspective, her family, and black men in particular"); Eugene Robinson, Editorial, (*White*) *Women We Love*, WASH. POST, June 10, 2005, at A23 (identifying the media's obsession with white "damsel[s] in distress," such as Natalee Holloway, Laci Peterson, and JonBenet Ramsey).

73. See, e.g., Hortensia Amaro, *Love, Sex, and Power: Considering Women's Realities in HIV Prevention*, 50 AM. PSYCHOLOGIST 437 (1995) (arguing that scholars seeking to reduce HIV transmission to women must pay greater attention to gender dynamics in sexual relationships).

74. See Danny Hakim & Trymaine Lee, *New Governor and Wife Talk of Past Affairs*, N.Y. TIMES, Mar. 19, 2008, at A1. It is perhaps unfortunate that the first such announcement by a politician involved a black husband and wife, which precluded Michelle Paterson from enjoying the sympathy often heaped on white wives, such as Senator Hillary Rodham Clinton, whose fidelity is assumed. On the other hand, one could view Mrs. Paterson as asserting her agency and rejecting the victim role.

75. Hence, basketball superstar Earvin "Magic" Johnson faced skepticism about his sexuality when he claimed that he contracted HIV through sex with one of his sundry female sex partners. See BOYKIN, *supra* note 3, at 226-29.

Second, people sometimes have sex without asking questions about their partner's sexual history or other potential contemporaneous partners. Thus, in addition to the group of women who know about a man's involvement with men, there are others who do not know because they do not ask.⁷⁶ If they are simply hooking up for a night or two, women may choose not to ask about a man's other sexual involvements. Even if she did ask, such a woman might reason, she cannot expect full candor from someone she just met or knows only casually. Sex outside the context of a long-term relationship typically carries fewer markers of trust and reliability about the risk one takes on by becoming sexually involved.⁷⁷ The point is that women can become involved with men who behave bisexually in the absence of the male deceiving his female partner.

Another woman who receives little attention in most DL discourse is the woman who chooses to stay with her husband after she learns of his involvement with men. The *New York Times* revealed such women in a story that focused on white couples and did not mention the DL.⁷⁸ The article identified "Brokeback marriages," named after the acclaimed, groundbreaking movie *Brokeback Mountain*, which depicted two men who fell in love and maintained a clandestine sexual relationship while they were married to women. According to the founder of the International Straight Spouse Network, a group which counsels people with queer spouses, one-third of the wives who contact the network stay with their husbands.⁷⁹ And half of those marriages last for at least three years.⁸⁰ One woman in the story formally divorced her husband, yet later reconciled with him and permitted him to continue having sex with men.⁸¹ Another decided to keep her marriage intact but began having extramarital relations like her husband.⁸² In light of Senator Larry Craig's conviction for soliciting sex from a male police officer, some would put his wife in this category of women who choose to stay.

In sharp contrast to the framing of most DL stories, the Brokeback marriages article assiduously avoids placing the blame on the men in such

76. The presumption of heterosexuality, coupled with the myth that all "gay" men are identifiable, may lead women to assume that there is no need to question a man's sexual orientation if he appears masculine. See *supra* text accompanying note 58.

77. The authors of a small qualitative study of black men who have sex with men and women found that "because of the anonymous, emotionally detached nature of some sexual encounters, many of our participants simply did not feel obliged to disclose to some male partners." Dodge et al., *supra* note 29, at 694.

78. See Katy Butler, *Many Couples Must Negotiate Terms of 'Brokeback' Marriages*, N.Y. TIMES, Mar. 7, 2006, at F5.

79. See *id.*

80. See *id.*; see also Chappell, *supra* note 48, at 162 ("Some women confront the issue, and stay in the relationship with a belief that their partner will never again commit a bisexual act.").

81. See Butler, *supra* note 78, at F5.

82. See *id.*

marriages and instead revealed the complex motivations animating the decision making of the husbands and wives. Consider the following passage:

On the whole these are not marriages of convenience or cynical efforts to create cover. Gay and bisexual men continue to marry for complex reasons, many impelled not only by discrimination, but also by wishful thinking, the layered ambiguities of sexual love and authentic affection.

"These men genuinely love their wives," said Joe Kort, a clinical social worker in Royal Oak, Mich., who has counseled hundreds of gay married men, including a minority who stay in their marriages. Many, he said, considered themselves heterosexual men with homosexual urges that they hoped to confine to private fantasy life.

"They fall in love with their wives, they have children, they're on a chemical, romantic high, and then after about seven years, the high falls away and their gay identity starts emerging," Mr. Kort said. "They don't mean any harm."⁸³

Although the conduct of the men in Brokeback marriages is indistinguishable from that of DL men, the *New York Times* treats white men on the DL with a compassion and generosity that I have never seen in a DL story. Kort even suggests that the women who marry gay men bear some responsibility for the marriages: "'Straight people rarely marry gay people accidentally,' he wrote in a case study of a mixed-orientation marriage published [September 2005] in *Psychotherapy Networker* Some women, Mr. Kort said, find gay men less judgmental and more flexible, while others unconsciously seek partnerships that are not sexually passionate."⁸⁴ One need not accept Kort's essentialized conceptions of gay men to find that he raises a valid question. Some women may be drawn to gay or bisexual men (consciously or unconsciously) because of their own psychological reasons. Like many parents who raise queer children, a wife might know and yet not let herself see that her mate is gay. When lawyer/TV host Star Jones announced her marriage to Al Reynolds, rumors swirled that Reynolds had a gay past. Rather than denying that he was gay, the couple released a statement that some understood to imply that, on some level, Jones knew and accepted Reynolds' past.⁸⁵ Former New Jersey Governor Jim McGreevey and his wife Dina are locked in a divorce battle that pivots largely on whether Dina knew her husband was gay. Dina has tapped the deep reservoir of sympathy for wronged wives by writing a book and promoting it with media appearances, including one on *The Oprah Winfrey Show*. But her husband and his chauffeur, Teddy

83. *Id.* In a similar vein, the wife of one gay man compared men like her husband to reckless teenagers discovering their sexuality who do not "really realize how much they're hurting their spouse." *Id.*

84. *Id.*

85. The statement said: "My fiancé and I have discussed all relevant parts of our personal histories. We are satisfied that we know everything we need to know about each other's pasts and are looking forward to our future together." Lynn Norment, *Star & Al*, *EBONY*, Dec. 2004, at 172, 173.

Pedersen, charge that Dina knew of his sexual interest in men because they all engaged in “three-way” sex on a regular basis before the McGreeveys’ marriage and afterward.⁸⁶ Pedersen, who identifies as heterosexual, claims that his involvement was necessary for Jim to be interested in having sex with his wife.⁸⁷ If this is true, Dina either knew or should have known that her husband was not heterosexual. Black women may face even greater pressure to stay with an unfaithful man than their white counterparts because of the perceived lack of “good black men” and the community expectation that each black person is responsible for fostering the fragile black family.⁸⁸ This obligation may lead some black women to overlook their male partner’s infidelities, whether they are with women or men.

Finally, lesbian and bisexual women are overlooked in DL discourse. Followers of celebrity gossip know that a few high-profile Hollywood couples have been rumored to be closeted gays and lesbians in marriages of convenience. Whether these rumors are true or not, there likely are some women who marry a gay man in order to avoid their own interest in women. Out bisexual women, by contrast, may seek a bisexual man because he is more likely to understand her sexuality and less likely to be threatened than a heterosexual man. In such situations, a bisexual woman might see a man’s sexual interest in men as a benefit, not a burden. For example, in one qualitative study of men who have sex with men and women, one subject reported that he came out to a female sex partner for the first time because she was bisexual and he anticipated that she would be comfortable with his bisexuality.⁸⁹

2. Women can live “down low”

In this Part, I argue that, although there certainly are genuine differences at play,⁹⁰ our gender schemas are an important reason why women on the DL are invisible in public discourse. The upshot is that while the DL story casts suspicion on all heterosexual-identified black men, it simultaneously shifts

86. See Jeane MacIntosh, *I Was McG and Wife’s Three-Way Sex Stud: Ex-Driver*, N.Y. POST, Mar. 17, 2008, at 6. In explaining his decision to testify, Pedersen stated: “She’s framed herself as a victim—yet she was a willing participant. She had complete control over what happened in her relationship She was there, she knew what was happening, she made the moves. We all did. It’s disgusting to watch her play the victim card.” *Id.*

87. See *id.*

88. Cf. ALLEN, *supra* note 50, at 98 (stating that black women are urged to “give older, younger, and lower-income black men a chance before giving up on the possibility of finding a suitable black mate”).

89. Dodge et al., *supra* note 29, at 691.

90. The chief distinction is that a married man who secretly has sex with a man is more likely to increase his wife’s exposure to HIV than a married woman who secretly has sex with a woman. This is especially so if the married man engages in receptive anal sex or performs the “bottom” role when he is with men. See *id.* at 692.

attention away from black women, who may thus more easily lead double lives. Why don't we hear anything about women living on the "down low"? Do such women not exist? Studies suggest that bisexual behavior and attraction are at least as prevalent among women as among men.⁹¹ An interesting study by Michael Ross on discrepancies between sexual behavior and sexual identity, which he calls "discordance," found that discordance rates were similar for men and women of each race, except African Americans.⁹² But it was African American women—not African American men—who were significantly more likely to engage in sexual behavior that did not match their self-described sexual identity.⁹³ Although a Google search for "down low women" turned up mainly stories about DL men, a perusal of "women for women" personal ads at Craigslist.org revealed several women who said they were married and looking for discreet sex with women, and even a few who described themselves as "down low."⁹⁴ These findings would seem to provide the basis for identifying a DL phenomenon among black women (and nonblack women), and yet there is utter silence. Why?

Built into the DL model are certain assumptions that betray a gendered tilt. The model assumes that (1) a man and a woman are married or in a committed relationship; (2) the man's sex with a man (or men) is a secret; (3) if his wife/girlfriend learned about this secret sex, she would feel betrayed; and (4) she would likely end the relationship because the secret sex reveals that her man is gay and thus continuing the marriage would be futile. In the prior Subpart, I attempted to complicate the first three assumptions. In this Subpart, I focus on the third and fourth assumptions, which become less intelligible if one flips the sexes of the "DL perpetrator" and "victim."

First, many believe that sex between women does not necessarily reveal a woman to be inherently lesbian the way sex between men is believed to reveal a man to be inherently gay. Women's sexuality is regarded as more fluid and flexible, as exemplified by the notion of the "college lesbian," the woman who "experiments" with a relationship with another woman while in school but is

91. See, e.g., William D. Mosher et al., *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, 362 ADVANCE DATA FROM VITAL & HEALTH STAT., (Nat'l Ctrs. for Health Statistics), Sept. 15, 2005, at 1, 13.

92. See Michael W. Ross et al., *Concordance of Sexual Behavior and Sexual Identity in Street Outreach Samples of Four Racial/Ethnic Groups*, 30 SEXUALLY TRANSMITTED DISEASES 110, 110, 112 (2003).

93. See *id.* at 112 tbl.2 (reporting that concordance rate was 43.1% for black men and 33.4% for black women); see also Lisa M. Diamond, *Female Bisexuality from Adolescence to Adulthood: Results from a 10-Year Longitudinal Study*, 44 DEVELOPMENTAL PSYCHOL. 5, 9 (2008) (finding that over a ten-year period "67% of [female] participants had changed their identities at least once since [year one], and 36% had changed identities more than once"). The women in Diamond's study, who had already "come out," switched labels from "bisexual" to "heterosexual" to "lesbian" to "unlabeled" in various, nonlinear directions over a ten-year span. *Id.* at 9, 13.

94. Research on file with author.

accepted back into heterosexuality when the relationship ends and she “graduates” to a marriage with a man.⁹⁵ Consider, for example, the recurring storylines on television shows (*Nip/Tuck*, *Six Feet Under*, *The OC*, *Ally McBeal*, and *L.A. Law* are just a few examples) where a sexy female character kisses another woman (not infrequently during a “sweeps month,” the ratings period where producers spice up their storylines to attract more viewers), but the same-sex flirtation quickly subsides and the show affirms the central female character’s heterosexuality. Because many heterosexual men enjoy such performances, whether featured on mainstream TV or in adult films, it may be hard for them to envision a man viewing his wife’s same-sex affair as confirmation of a lesbian identity and feeling compelled to divorce.

By contrast, the DL man cannot invoke the “just a phase” defense that many heterosexuals ascribe to women who pursue same-sex relationships. Just as many think (erroneously) that a man cannot be a little bit black, many believe he cannot be a little bit gay.⁹⁶ Some people suspect that a man is gay based on minor gender transgressions, such as tight pants or gelled hair, which fall far short of the ultimate male gender taboo—being penetrated by a man.⁹⁷ This taboo also reveals why some do not see sex between women as a serious threat to heterosexuality.⁹⁸ While the heterosexual man loses his right to that

95. For a scholarly analysis of media representations of female sexuality, see, for example, Lisa M. Diamond, *I’m Straight, but I Kissed a Girl’: The Trouble with American Media Representations of Female-Female Sexuality*, 15 *FEMINISM & PSYCHOL.* 104 (2005).

96. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 290 (1994). These rigid conceptions of race and sexuality are inconsistent with many scholarly understandings. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259, 1262, 1279-85 (2000) (arguing that race is performative and blacks can enhance or reduce their “racial salience” through their conduct); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1 (1994) (reviewing literature demonstrating variance in racial features among people classified as belonging to a single racial group). Even as the dominant popular conceptions of race and sexuality view these traits as fixed, they compete with undercurrents that recognize, and often fret about, the possibility that a heterosexual man could become gay and that a black person might be either “too black” or “not black enough.” See, e.g., SEDGWICK, *supra* note 63, at 8-9 (describing minoritizing and universalizing conceptions of homosexuality); Carbado & Gulati, *supra*, at 1262 (arguing that employers evaluate employees based on racial performance); Marcus Mabry, *Where Whites Draw the Line*, *N.Y. TIMES*, June 8, 2008, at WK1 (analyzing the shifting line of racial palatability and asking “how black can Mr. [Barack] Obama be before he alienates white voters”).

97. The recent construction of the “metrosexual” has alleviated some of the pressure on men to perform a pure version of masculinity or be deemed gay. See Warren St. John, *Metrosexuals Come Out*, *N.Y. TIMES*, June 22, 2003, at 9-1. Metrosexuals are thought to display “heightened aesthetic senses and exhibit a lifestyle, spending habits and concern for personal appearance close enough to the stereotype of a fashionable urban gay man,” even though they are heterosexual. *Gaydar*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Gaydar> (last visited Feb. 1, 2009). However, this identity is not an entirely safe or stable one because some suspect that metrosexuals are “pre-gay.”

98. Cf. Martha C. Nussbaum, *The Prohibition Era*, *THE NEW REPUBLIC*, Mar. 20 & 27, 2006, at 21, 24 (book review) (suggesting that “anti-gay feeling” is driven by “panic” over “sex between men”).

identity through penetration with a penis, the lesbian's lack of a (biological) penis is sometimes thought to deprive her of the power to "turn" a woman gay.⁹⁹ A 2008 *New York Magazine* survey showed that a majority of men (56%) stated that their wife having an affair with a man would be worse than her having an affair with a woman.¹⁰⁰ A mere 18% considered a same-sex affair to be worse.¹⁰¹ The results flipped when the question was put to married women: 49% considered it worse for a husband to have an affair with a man, while 29% were bothered more by an affair with a woman.¹⁰² In short, the public's phallocentrism makes it hard for people to believe that lesbians *can* fuck, as female characters on the Showtime series *The L Word* argued when confronted by a disbelieving straight man.¹⁰³ These differences between perceptions of male and female sexuality explain much of the invisibility of the DL woman. Further, the absence of DL women must be situated in the larger context of a society that erases lesbians in general.¹⁰⁴ As depictions of Playboy Channel-like "lesbian sex" proliferate,¹⁰⁵ representations of women who persistently express a desire for women, and *not* men, as well as those who diverge from heterosexual conceptions of what is feminine and sexy, remain rare. In DL discourse, the disinterest in women may rest on the fact that sex between women is not considered to place a woman or her male partners at risk for HIV infection. While some might see this as an independent ground for ignoring DL women, DL discourse has flourished despite the scant evidentiary

99. See generally JUDITH BUTLER, *The Lesbian Phallus and the Morphological Imaginary*, in BODIES THAT MATTER 57-91 (1993).

100. See *New Yorkers on Their Sex Lives at Home . . . and on Cheating*, N.Y. MAG., May 26, 2008, at 22, 23.

101. See *id.*

102. See *id.*

103. *The L Word: Labyrinth* (Showtime television broadcast Mar. 20, 2005).

104. See, e.g., Christine A. Littleton, *Double and Nothing: Lesbian as Category*, 7 UCLA WOMEN'S L.J. 1, 1-4 (1996); Susan J. Wolfe & Lee Ann Roripaugh, *The (In)visible Lesbian: Anxieties of Representation in The L Word*, in READING THE L WORD: OUTING CONTEMPORARY TELEVISION 43 (Kim Akass & Janet McCabe eds., 2006). At least one storyline on *The L Word* has depicted a closeted woman having sex with women behind the back of her male partner. See Wolfe & Roripaugh, *supra*, at 49-50.

105. Katy Perry's recent #1 radio hit "I Kissed a Girl" brazenly works this theme. KATY PERRY, *I Kissed a Girl*, on ONE OF THE BOYS (Capitol Records 2008). Remarkably, *Out* magazine featured Perry (who is not queer) as the only woman on the cover of its 2008 People of the Year issue. OUT, Dec. 2008/Jan. 2009, at cover, available at <http://www.out.com/out100>; see also Posting by Richard Lawson to Gawker, Katie Perry Kissed a Girl and Out Magazine Liked It But I Didn't, <http://gawker.com/5084483/katy-perry-kissed-a-girl-and-out-magazine-liked-it-but-i-didnt> (Nov. 12, 2008, 14:04 EST). Another example is how the media was utterly fascinated when Madonna kissed Britney Spears (and Christina Aguilera) to open the 2003 MTV Video Music Awards. It is interesting that the kiss was staged so that it happened *before* the threesome was joined by Missy Elliott, a black and relatively masculine hip-hop performer. See Corey Moss, *Madonna Smooches with Britney and Christina; Justin, Coldplay Win Big at VMAs*, MTV NEWS, Aug. 28, 2003, http://www.mtv.com/news/articles/1477729/20030828/spears_britney.jhtml.

foundation for the belief that it is a primary cause of HIV in black women. Moreover, it is interesting that the factor that reduces the risk of HIV transmission—the absence of a male penis—is the same reason why some do not regard sex between women as “real” sex.

Despite these norms, surely there are some men who are averse to their wives or girlfriends having sex with women, would feel betrayed by it and might end the relationship.¹⁰⁶ These men’s invisibility would seem to follow in part from their status as men who transgress gender norms. The sympathy expressed for the Dina McGreeveys of the world might not fully extend to a husband of a DL woman. Rather than demonize the wife, many might think (if not say): “What’s wrong with *him*? Why isn’t *he* open to a threesome when that is what heterosexual men are supposed to like?”¹⁰⁷

B. *Black Men Can Be Victims Too*

1. *Bisexuality is not an intelligible option*

The dominant explanation of the down low is that it reveals that there are many black gay men who remain closeted because of the extreme homophobia of the black community.¹⁰⁸ The perceived prevalence of such men encourages black women to root out men who are thought to be posing as straight but are actually gay. Although homophobia certainly is a factor, the central flaw in this account is that it denies the existence of genuine bisexuality, even though many men (black and otherwise) attest to experiencing significant sexual attraction to both sexes.¹⁰⁹ A recent study indicated that over one million men identify as bisexual, almost as many as identify as gay.¹¹⁰ Studies suggest that black men and other men of color are more likely to report having had sex with both men and women than white men.¹¹¹ However, many heterosexual and homosexual-

106. *The L Word* depicted such a scenario in its first season. See Wolfe & Roripaugh, *supra* note 104, at 50 (describing Jenny’s affair with Marina leaving Tim “upset, betrayed, excluded and emasculated”).

107. For a discussion of the struggles of men who choose to stay with wives who come out as lesbian or bisexual, see Amity Pierce Buxton, *Works in Progress: How Mixed-Orientation Couples Maintain Their Marriages After the Wives Come Out*, in CURRENT RESEARCH ON BISEXUALITY 59, 68-69 (Ronald C. Fox ed., 2004) (discussing two wives who continued seeing their female lovers after their husbands found out).

108. See Denizet-Lewis, *supra* note 38, at 32 (“The easy answer to most of these questions is that the black community is simply too homophobic . . .”).

109. See, e.g., Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 377-85 (2000) (reviewing studies of self-reports of sexual desire and concluding that “the incidence of bisexuality was greater than or comparable to the incidence of homosexuality” (emphasis omitted)).

110. See Mosher et al., *supra* note 91, at tbl.14.

111. See, e.g., Gary Goldbaum et al., *Differences in Risk Behavior and Sources of AIDS Information Among Gay, Bisexual, and Straight-Identified Men Who Have Sex with*

identified people believe that men are either gay or straight—there is no room for something in between. A prominent *New York Times* article, entitled *Straight, Gay or Lying? Bisexuality Revisited*, advanced this belief and attempted to ground it in science.¹¹² The article reported on *Sexual Arousal Patterns of Bisexual Men*, a controversial 2005 study by Gerulf Rieger, Meredith L. Chivers and J. Michael Bailey.¹¹³ The study attempted to measure sexual arousal patterns in self-identified bisexual men by attaching a gauge to each man's penis to measure its circumference and then showing each man clips of adult films.¹¹⁴ All men were required to watch several two minute sexual clips, which were sandwiched in between two neutral, relaxing clips. Two sexual clips depicted two men having sex with each other; two other clips depicted two women having sex.¹¹⁵

The results revealed discordance between the bisexual men's self-reported arousal during the sexual clips and the report of the gauge. While the bisexual men expressed in their self-reports substantial attraction to both the male-male and female-female clips, the circumferential gauge indicated that bisexual men were as likely as homosexuals and heterosexuals to have "much higher arousal

Men, 2 AIDS & BEHAV. 13, 16 (1998) (finding that black men at MSM public sex venues were more likely to identify as bisexual or straight than white men); Gregorio Millett et al., *Focusing "Down Low": Bisexual Black Men, HIV Risk and Heterosexual Transmission*, J. NAT'L MED. ASS'N, July 2005, at 52S, 53S ("Studies clearly show that black MSM are more likely than MSM of other races and ethnicities to identify themselves as bisexual and to be bisexually active."); Montgomery et al., *supra* note 29, at 831 (reporting that the following percentages of HIV-positive MSM reported sex with women in the last five years: 34% black, 26% Hispanic, 19% Asian/Pacific Islander, 13% American Indian/Alaska Native, and 13% white). The Montgomery study found that, even though black and Latino men were most likely to report having had male and female sex partners, black and Latina women were least likely to report having had sex with bisexual men. *See id.* (stating that 14% of white women reported sex with bisexual men, compared to 6% of blacks and 6% of Latinas). Note, however, that the study's five-year window is very broad and many of the men who reported sex with women may have engaged in it before they began having sex with men. Some might think the greater prevalence of bisexual behavior among black men is evidence of greater homophobia in the black community, which coerces such men into having sex with women. *See* Carlos Ulises Decena, *Profiles, Compulsory Disclosure and Ethical Sexual Citizenship in the Contemporary USA*, 11 SEXUALITIES 397, 398, 401 (2008) (criticizing public health scholars for uncritical assumptions that "internalized homophobia" among black men produces the DL and can be cured by urging men to come out). However, this interpretation rests on an erroneous assumption that the level of bisexuality among white people is the "correct" level and that there is something necessarily deviant in black behavior that departs from this white baseline.

112. *See* Benedict Carey, *Straight, Gay or Lying? Bisexuality Revisited*, N.Y. TIMES, July 5, 2005, at F1 (describing a scientific study suggesting that bisexuality in men does not exist).

113. Gerulf Rieger et al., *Sexual Arousal Patterns of Bisexual Men*, 16 PSYCHOL. SCI. 579 (2005).

114. *See id.* at 580-81 (describing use of "circumferential strain gauge that reflects the changes in penile girth during erection"). The initial sample included 101 men, including 30 self-identified heterosexuals, 33 bisexuals, and 38 homosexuals. *Id.* at 580.

115. *Id.*

to one sex than the other.”¹¹⁶ The authors concluded that “most bisexual men appeared homosexual with respect to genital arousal, although some appeared heterosexual.”¹¹⁷ The *New York Times* treated this study as corroboration of the statement by some gay men that a man is either “gay, straight or lying.”¹¹⁸ Based on this logic, to identify as bisexual is to reveal oneself as a liar, because real bisexuals do not exist.¹¹⁹

However, a response by the National Gay and Lesbian Task Force (NGLTF) suggests that the *Times* glossed over the study’s various limitations as well as aspects of the findings that complicate this facile interpretation. First, the study measured only one aspect of sexual orientation, sexual desire as reflected in an erection. The researchers did not seem to recognize that not all sexual attraction instantly produces an erection.¹²⁰ Indeed, with respect to about one-third of the subjects, the gauge did not detect a sexual response to any of the clips.¹²¹ As NGLTF commented:

Since the [*Times*] article[] quotes one of the authors as saying, ‘that for men arousal is orientation,’ does this mean that more than one-third of the participants had *no* sexual orientation? Any mechanical device that purports to accurately assess a condition and is unable to do so one out of three times is surely suspect.¹²²

Second, the study’s phallocentric conception of sexual orientation cannot account for emotional attachments, which many people see as central to their sexuality. Third, the Rieger study obtained its sample from advertisements in “gay oriented magazines.” Moreover, it required subjects to identify as “bisexual.”¹²³ Thus, the study says little about the many bisexually behaving MSM who shun gay culture and a bisexual label and identify as heterosexual, DL, or reject any sexual label at all.¹²⁴ Fourth, oddly the study’s measure of

116. *Id.* at 582.

117. *Id.* at 579.

118. Carey, *supra* note 112, at F1.

119. See Yoshino, *supra* note 109, at 395 (noting academic arguments that “all self-identified bisexuals were actually homosexuals in denial” and arguing that such explicit denials of bisexuality’s existence are currently outnumbered by implicit denials that speak of heterosexuals and homosexuals as if no intermediate category exists).

120. Recall that the clips were just two minutes in length. Rieger et al., *supra* note 113, at 580.

121. See *id.* at 580-81.

122. See NAT’L GAY & LESBIAN TASK FORCE, THE PROBLEMS WITH “STRAIGHT, GAY OR LYING?” (2005), <http://www.thetaskforce.org/downloads/reports/NYTBisexualityFactSheet.pdf>.

123. Rieger et al., *supra* note 113, at 580. The study also advertised for subjects in an “alternative” newspaper, *id.*, but the authors did not report how many subjects responded to the advertisements in gay magazines and how many responded to the newspaper. To the authors’ credit, their sample was roughly half nonwhite. See *id.* They did not provide a further racial breakdown.

124. As I describe more fully below, almost four percent of men who responded to a CDC survey described their sexuality as “something else” when the other options were

heterosexuality was not a clip of a naked woman but of two women having sex. Some bisexual men may not have responded to the female clip not because they are not aroused by women, but because they are not turned on by depictions of two women having sex. Finally, perhaps the most striking finding of the study is that about one-quarter of bisexual-identified men showed minimal attraction to *men*. While the “‘bisexual,’ but really gay” stereotype enjoys wide currency, there is no popular explanation for why a man with heterosexual patterns of sexual attraction would choose to identify as bisexual and take on an immense social stigma. One real possibility is that the study imperfectly captured men’s sexual attraction. In the end, rather than putting to rest the notion that real bisexual men exist—as suggested by the *Times*’s headline—the study seems to raise more questions than it answers. Yet, as with DL discourse, there is a danger that the public will absorb media reports that rest on an unsteady empirical foundation because they are congruent with prevailing stereotypes.

The dominant stereotype of bisexuality in men is that evidence that a man has had sex with men is treated as conclusive proof that he is immutably and eternally gay and, further, any past romantic relationships with women were just a charade.¹²⁵ This model fits the experiences of many in the dominant white gay male community (and many out black men) and also dovetails nicely with the mainstream gay rights movement’s political strategy of proving that queer people are born gay.¹²⁶ Frequently drawing on race as an analogy, the movement forcefully argues that queer people must be accepted for who they are because, like blacks, they were “born that way.”¹²⁷ The immutability claim attempts to show the futility of trying to change queer people and simultaneously alleviates heterosexual anxieties that queer people want to convert straight adults and children. As politically effective as this argument may (or may not) be,¹²⁸ it does not jibe with the significant community of men who have sex with men at some point in their lives but identify as “straight,” “str8,” “bisexual,” “bicurious,” “Same Gender Loving,” “in the life,” “questioning,” “homothug,” and “DL,” among others, or who simply refuse to accept *any* sexual identity label and assert that they have genuine sexual and emotional attraction to women and men.¹²⁹ Contrary to the implication of the

heterosexual, homosexual, and bisexual. See Mosher et al., *supra* note 91, at 13. By contrast, less than two percent of men identified as bisexual. *Id.*

125. There are minor exceptions to this rule. Some might discount sexual behavior that happens in prison and during early adolescence.

126. See Edward Stein, *Born that Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights* 45 (Benjamin N. Cardozo Sch. of Law, Working Paper No. 223, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538.

127. *Id.* at 9 (internal quotation marks removed); see *id.* at 7.

128. See generally Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

129. See Vickie Mays et al., Preferred Sexual Orientation Labels for African American Men Who Have Sex with Men: Implications for HIV/AIDS Research and Interventions

DL discourse, this is no tiny fringe of people. Indeed, studies of human sexuality suggest that the category of men who have had sex with men but do not identify as gay is as large or larger than the category of men who self-identify as gay.¹³⁰ A 2002 CDC survey asked a nationally representative sample of men and women: “Do you think of yourself as heterosexual, homosexual, bisexual, or something else?”¹³¹ Just 2.3% of men identified as homosexual. A larger group, 3.9%, chose “something else.”¹³² In addition, 1.8% identified as bisexual, and the same percentage did not answer the question.¹³³ It seems fair to assume that the men who chose “something else” and probably a good number of those who failed to answer are not entirely heterosexual since adopting a heterosexual identity carries no stigma. One could read the large percentage of men who picked “something else” over “bisexual” to reflect their awareness that bisexuality is not a realistic space for men to occupy—to identify as a bisexual man is to mark oneself as a dishonest gay man.¹³⁴ The “something else” finding also may reveal the discomfort that many men of color have with the terms “gay,” “homosexual,” and “bisexual.”¹³⁵ The study concluded that “[i]t is noteworthy that 7.3 percent of Hispanic or Latino men, and 7.5 percent of black men, reported that their sexual orientation was ‘something else,’ and another 3-4 percent of each group did not report an answer to the question.”¹³⁶

Public attitudes toward men who identify as bisexual may be even more negative than attitudes toward gay men.¹³⁷ Bisexual men face condemnation

(draft on file with author). These labels could be subdivided based on whether they acknowledge same-sex attraction (e.g., “Same Gender Loving,” “bicurious”), deny it (“straight”), or seek not to answer the question at all (those who refuse to label their sexuality).

130. See LAUMANN ET AL., *supra* note 96, at 296-97 (finding that 2.8% of men self-identify as gay or bisexual while 9% of men report having had at least one male sexual partner since puberty); Ritch C. Savin-Williams, *Who’s Gay? Does it Matter?*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 40 (2006). Sonia Katyal’s examination of non-Western conceptions of sexuality provides further evidence that many MSM do not see sex with men as necessitating the adoption of gay identity. See Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 156 (2002) (discussing men in India and elsewhere who view “their sexual orientation as heterosexual, and consider their same-sex sexual activities to be a completely separate pastime, rather than a determinative part of their identities”).

131. Mosher et al., *supra* note 91, at 1, 13. This sample included adults in households who were ages fifteen to forty-four. The results from this question focus on those eighteen to forty-four. See *id.* at 13. A 1994 study found that just 1% of respondents identified as “something else.” LAUMANN ET AL., *supra* note 96, at 293 n.11.

132. Mosher et al., *supra* note 91, at 13.

133. *Id.*

134. See *supra* text accompanying notes 112-18.

135. See Montgomery et al., *supra* note 29, at 832 (finding that black and Latino MSM who reported only male partners were less likely to self-identify as gay than their white counterparts).

136. Mosher et al., *supra* note 91, at 13.

137. See Gregory M. Herek, *Heterosexuals’ Attitudes Toward Bisexual Men and*

not just from heterosexuals but also from homosexuals.¹³⁸ The primary response to bisexual conduct and identification among men (and perhaps to MSM who refuse to label their sexuality) is essentially one of false consciousness. Bisexual men may *say* they are attracted to women, the argument goes, but that is just to avoid the full-on stigma of being perceived as gay.¹³⁹ If there were no social pressure to be straight, they would confess that their genuine desire is to be with men and *only* men. All of the sex, long-term relationships, and even marriages that these men have shared with women are thus dismissed as a sham, motivated by social pressure rather than genuine sexual and emotional attraction. However, studies reveal that even openly gay men sometimes sleep with women. As discussed earlier, the CDC found that more than one in ten out young men reported having at least one female sex partner in the last six months.¹⁴⁰ This finding suggests that even some men who openly identify as gay or bisexual may enjoy sex with women. If a significant number of out men, who have little social capital to gain from post-coming out sex with women, engage in such sex nonetheless, they are presumably motivated by genuine sexual/emotional desire.

Clearly, there are a number of men who at some point in their lives said they enjoyed sex with women and identified as bisexual and yet later came to identify as gay and minimize their attraction to women. Because many gay men have experienced this sexual identification trajectory, they may misapprehend it to be the *only* trajectory for MSM. They might assume that their experience is representative of all men's experiences and be skeptical of men who express interest in women and men. The very creation of a gay male community may

Women in the United States, 39 J. SEX RES. 264, 268 tbl.1 (2002) (reporting results of national survey demonstrating that public attitudes toward bisexuals were lower than any other stigmatized group listed in the survey, except drug users). In general, attitudes toward bisexual male targets were more negative than those toward bisexual women. *See id.* at 271. The Herek study also found that people of color expressed greater negativity toward bisexuals than whites, but once Herek factored in class, this effect was not significant. However, white women's attitudes remained more favorable than other women and all men. *See id.* at 270.

138. *See, e.g.,* Yoshino, *supra* note 109, at 399 (stating that the "'gay community abounds with negative images of bisexuals as fence-sitters, traitors, cop-outs, closet cases, people whose primary goal in life is to retain 'heterosexual privilege,' [or] power-hungry seducers who use and discard their same-sex lovers'") (quoting Lisa Orlando, *Loving Whom We Choose*, in BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT 223, 224 (Lorraine Hutchins & Lani Kaahumanu eds., 1991)). An important contributor to bisexual invisibility is that people typically look to a person's current partner to define his sexual orientation. Hence, a man who has a boyfriend is marked as gay even though his last relationship might have been with a woman. *See* Mary Bradford, *The Bisexual Experience: Living in a Dichotomous Culture*, in CURRENT RESEARCH ON BISEXUALITY *supra* note 107, at 14.

139. *See* Bradford, *supra* note 138, at 15 ("One man who felt his bisexuality was invalidated by gay men said, 'If I tell my gay friends that I'm bi, they immediately say, 'Well, you just have not figured it out yet,' or 'You want to hang onto the straight world,' or 'You're not ready to admit that you're gay.'").

140. *See supra* text accompanying note 66.

serve to distort the perceptions of the prevalence of this bisexual-to-gay narrative. Gay enclaves are organized primarily around providing opportunities for men to meet male sexual partners and to consume gay culture (i.e., gay gyms, gay clubs, gay clothing stores). As a result, men who have a strong interest in women (in addition to their interest in men) are likely to be less interested in spending their time exclusively in a male-centered enclave where potential heterosexual female sex partners are few.¹⁴¹ As I have written elsewhere, the organization of a community around gay male sexuality is not infrequently coupled with hostility to women.¹⁴² Moreover, there is a circular nature to this phenomenon. Bisexual men, anticipating skepticism and hostility from gay men in such male-centered spaces, avoid those spaces because they do not feel welcome or identify with gay culture. To the extent that such men congregate in gay spaces, they may “cover” their bisexuality. Hence, gay men immersed in gay enclaves and gay culture come across fewer genuinely bisexual men and come to doubt that such men exist. The upshot is that men who are exclusively interested in men dominate gay enclaves, and this most visible group of MSM often perceives itself and is perceived by the general public as representative of all nonheterosexual men.¹⁴³

The existence of genuine bisexuality in men matters because it suggests that some of the men who lead DL lives are not closeted gay men but rather men whose desires and behavior do not fit the reductive and simplistic conceptions of sexuality that are prevalent among gay and straight people. Some DL men may not be gay or straight; they might be “something else.” The sexual binary pressures such men to hide their interest in men because any expression of sexual interest in men is likely to be read by their wives or girlfriends as a disclosure of gay identity. In short, to the extent that DL men are genuinely bisexual or have a sexuality that does not fit any well-worn label, their failure to disclose their sexuality to women may not be driven by a gratuitous desire to deceive or harm their female partners but by the reality that their sexual desire, as *they* conceive and experience it, is unintelligible in contemporary U.S. culture.¹⁴⁴ Moreover, a black man who does not fit the

141. See Thomas C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in “Gay Ghettos” with Those Living Elsewhere*, 91 AM. J. PUB. HEALTH 980, 980-81 (2001) (comparing characteristics of MSM in four major cities and finding that those who do not live in gay enclaves are more likely to identify as bisexual).

142. See Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2802 (2008); see also Corey W. Johnson & Diane M. Samdahl, “*The Night They Took Over*”: Misogyny in a Country-Western Gay Bar, 27 LEISURE SCI. 331, 337 (2005) (documenting in an ethnographic study the hostility expressed by gay men at lesbians whom they perceived to be invading their space during a bar’s sole “Lesbian Night”).

143. Cf. Crenshaw, *Mapping the Margins*, *supra* note 18, at 1299 (calling “attention to how the identity of ‘the group’ has been centered on the intersectional identities of a few”).

144. See Bradford, *supra* note 138, at 21 (“To affirm a bisexual identity requires transcending the culture.”).

heterosexual-homosexual binary is likely influenced by the knowledge that disclosing his sexuality will invite another form of discrimination, in addition to race-based discrimination, and that it may be more stigmatizing than simply coming out as gay, which at least is often understood as a legitimate if disfavored identity.¹⁴⁵

2. *The down low harms out black men*

The gender binary reflected in DL discourse, which frames women as presumptive victims and men as presumptive perpetrators, obscures the fact that the DL harms men, including DL men and out black men. Although the media imply that openly gay black men represent what DL men are supposed to be, out black men warrant remarkably little notice in most stories. As I have written elsewhere, members of minority groups face identity-based pressures from members of their own group(s) as well as pressures from mainstream expectations.¹⁴⁶ Some DL-identified¹⁴⁷ men appear to be among the most strident proponents of identity policing among black MSM. It is not uncommon for men who describe themselves as “DL” also to describe themselves as “masculine” or “masc” in their online profiles. Further, some DL-identified men emphasize that they will not associate with out men nor with those they deem effeminate.¹⁴⁸ In fact, some men appear to conflate the two: to be out is to be effeminate. The assumption may be that only those men who could not perform masculinity would be out. Some ads frame inner-city experience and a thug persona as requirements for authentic blackness, although few expect this to manifest itself in actual criminal or violent behavior.¹⁴⁹ Such norms are not

145. Of course racial discrimination and sexual orientation discrimination are not experienced as distinct forces. Once he discloses his bisexual behavior, a man is likely to find that stereotypes about bisexuals inflect the racial discrimination that he faces and vice versa.

146. See Robinson, *supra* note 50, at 1819.

147. I use “DL-identified” to refer to men who describe themselves as DL, although studies suggest that some such men are not engaged in relationships with women while secretly having sex with men and failing to use condoms. The term is now used by some black men to signify that they are not out, to reject white gay culture, and to express their expectation of discretion from their male partners. Some Hispanic men use this label, and white men increasingly do as well. See Wolitski et al., *supra* note 15, at 523 tbl.1 (finding that 41% of black, 17% of Hispanic and 4% of white men identified as “down low”). Moreover, some self-identified DL men depart from the idealized DL man described in the introduction in other respects, such as in their gender performance.

148. My observations here are based on my perusal of personal ads as part of an empirical study on race and sex role preferences on the website adam4adam.com, see Robinson, *supra* note 142, as well as my own informal research.

149. As one might expect, men who post such ads are often emphatic about preferring blacks only and instructing white men not to e-mail them.

exclusive to DL-identified men and are also apparent in ads posted by white men in search of stereotypical black men.¹⁵⁰

Some might wonder why an out black man would become involved with DL or DL-identified men in the first place. Why aren't out black men and DL men in completely different romantic marketplaces? The issue boils down to racial segregation and the numbers game. De facto racial segregation is prevalent in the U.S. and wields a strong influence on conceptions of race and romantic possibilities.¹⁵¹ Most people partner with someone of the same race for a variety of reasons; some are legitimate, many not.¹⁵² The impact of same-race partnering, however, does not fall equally. A heterosexual white person who lives in a mostly white community and wants to date only white people faces few restrictions. If, say, 80% of the community is white, almost half of that number (either the male or female half) is available for partnering. Even if 10% of the whites are gay, lesbian or bisexual (a generous assumption),¹⁵³ the white heterosexual still has ample opportunity for same-race partnering. The black heterosexual, by contrast, is limited to half of the black population, which is 20% of the community in this stylized example.¹⁵⁴ Black heterosexual women face a further disadvantage—and black heterosexual men, a relative advantage—because of the sex ratio imbalance in black populations in the United States. As I discuss more fully in the next Part, because of the mass incarceration of black men, the number of eligible black women significantly outstrips that of eligible black male partners.

The romantic market for the black MSM is even more sharply circumscribed. He is subject to the same diminution of the black male population that impacts black women—discussed below. Yet he also is limited to the fraction of black men who engage in sex with men. If he is out and

150. See Robinson, *supra* note 142, at 2805-06.

151. See, e.g., ALLEN, *supra* note 50, at 99; Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 279 (2006); Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1398-99 (2009).

152. Many such decisions may reflect explicit or implicit bias. See Patrick A. Wilson et al., *Race-based Sexual Stereotyping and Sexual Partnering Among Men Who Use the Internet to Identify Other Men for Bareback Sex*, J. SEX RES. (forthcoming 2009) (manuscript at 1, on file with author) ("For many, race is a key factor that determines preferences for sexual partners."); *id.* at 13 ("[T]he belief that Asian and Black MSM take on strikingly different gendered characteristics during sex was pervasive among participants in the study."). Even determinations about what one finds attractive may be intertwined with racial stereotypes, which is not to suggest that one can easily alter such conceptions. See *infra* text accompanying notes 212-53 (discussing aesthetic racial hierarchy). For a discussion of some legitimate reasons why blacks might prefer to date other blacks, see Robinson, *supra* note 142, at 2793.

153. See Mosher et al., *supra* note 91, at 2 (finding that 6% of men ages fifteen to forty-four reported having had oral or anal sex with a man at least once, and just 1.6% reported only male partners in the last twelve months).

154. One could of course alter this hypothetical to make 20% of the community people of color. In some parts of the country, the racial demographics are essentially black-white.

prefers to date only other out black men, his market is further reduced because black men appear less likely than white men to be out.¹⁵⁵ He may choose to deal with DL or DL-identified men, yet if he is seeking a long-term committed relationship, this may very well be an exercise in frustration, as such a man may resist attachments that would out him, such as sharing a home with a male partner and meeting his partner's family. Moreover, gay male spaces are often racially segregated.¹⁵⁶ In many black communities, out men, DL-identified men, and DL men intermingle in bars, clubs, and Internet sites.¹⁵⁷ Although white-dominated spaces may seem to offer an alternative, a black man is likely to feel like a token and be either shunned or fetishized, depending on how he performs blackness.¹⁵⁸ If he plays up his racial identity by performing the stereotype of an aggressive black top, white men may relegate him to a momentary fetish.¹⁵⁹ If he defies the racial expectation—by being an effeminate bottom, for example—he is likely to draw little interest from white men.¹⁶⁰

The romantic possibilities of an out black man are thus impinged by at least four structural constraints that do not similarly restrict white gay men: (1) his racial group is in the minority; (2) men of his race are less likely to be out; (3) there is a substantially smaller proportion of black men who are not incarcerated or otherwise under the supervision of the criminal justice system; and (4) he must navigate racialized expectations, including gendered sex-role expectations, which are likely to be particularly salient when dealing with white men.¹⁶¹ Moreover, socioeconomic status impacts poor and better-off men differently but limits opportunity in both cases. Men in lower socioeconomic classes are more likely to have to depend on heterosexual, and likely homophobic, relatives and friends for material support. For instance, such men may have to share living quarters with several family members or take on roommates, which may leave them no space for cultivating a same-sex relationship. While the black professional is more likely to have the capacity to cut ties with his racial community and move to a gay enclave,¹⁶² many such men feel a strong pull toward their families and the broader black community.

155. See *HIV/STD Risks*, *supra* note 66, at 84.

156. See Mills et al., *supra* note 141, at 981 (finding that MSM who reside in gay enclaves are more likely to be white than those who live elsewhere).

157. In most cities, the black, out man does not have access to a black version of West Hollywood, where there are plenty of out men of the same race for coupling. A rare exception is New York City, where there is a fairly well-developed network of out black men. Yet these networks tend to be more dispersed and less visible than white gay enclaves.

158. See Robinson, *supra* note 142, at 2815.

159. See *id.* at 2807.

160. See Wilson et al., *supra* note 152, at 15-16.

161. Cf. MCBRIDE, *supra* note 9, at 104 (discussing how interracial depictions in pornography are designed for white viewers).

162. See Mills et al., *supra* note 141, at 981 (finding that "MSM with incomes below \$20,000 were more than twice as likely to live outside gay ghettos").

Because his success makes him atypical among black men, the black professional is likely to find a large socioeconomic gap separating him from potential black male romantic partners. Race, in turn, isolates him from white men whom he might otherwise view as compatible based on socioeconomic status. In sum, race, socioeconomic status and gendered sex role norms (i.e., pressure to identify as a “top”) work in tandem to shrink the romantic options of black MSM.

The DL distorts relationships between men, yet these harms are never discussed in DL discourse, which concerns itself only with harms that befall “respectable” heterosexual women ensnared in the DL. When the media depicts DL men as refusing to wear condoms when having sex with men, as in the *Oprah* episode, why doesn’t the concern for the DL man’s female sex partner extend to the male sex partner, who also is put at risk because of the unsafe sex?¹⁶³ Clearly, a major theme is deception: the DL man may be endangering women who do not know he has sex with men and may be HIV positive. Still there are harms that persist even when full information is exchanged. Power imbalances may track perceived gender differences even when two men are involved. Although we should be careful about generalizing about the power dynamics in such relations, power may be allocated according to “top” and “bottom” roles, masculinity/femininity, and outness.¹⁶⁴ Under a common scenario, the DL-identified man performs the top role,¹⁶⁵ perceives himself as more masculine, and is not out.¹⁶⁶ To the extent that his partner differs, he may be viewed as less desirable and thus have less power in the relationship. In some scenarios, the DL-identified man uses the leverage of superior perceived masculinity to pressure the out man into having unprotected sex. For instance, David Malebranche, a medical expert on the sexual health of black men, writes about

[o]ne young Black man [who] described his sexual behavior with ‘trade’—a masculine-appearing or -acting Black man: ‘A lot of time whatever trade wants is what trade gets. If that boy don’t want—‘Oh, it don’t feel the same with a condom on’—if he feel like that then a lot of time it’s like ‘ok then,’

163. Studies suggest that some HIV positive men have unprotected sex with men whose HIV status is negative or unknown. See Trevor A. Hart et al., *Sexual Behavior Among HIV-Positive Men Who Have Sex With Men: What’s in a Label?*, 40 J. SEX RES. 179, 183 (2003) (finding that “approximately 66% [of HIV positive MSM subjects over a three month span] engaged in unprotected anal intercourse with partners who were HIV-negative or of unknown serostatus”).

164. To be clear, I am not arguing that distinct sexual roles necessitate power differentials in the bedroom or the relationship in general. I do not believe that to be the case and argue for detaching sex roles from assumptions about gender performance, outness, and power.

165. See, e.g., Bond et al., *supra* note 15, at 3 (finding that DL-identified men were less likely to report receptive anal sex than non-DL-identified men).

166. Cf. Hart et al., *supra* note 163, at 186 (reporting that men who identified as tops were more likely to report sex with women and not identify as gay).

'all right then. And that alone could be it [the reason to have unprotected sex].'¹⁶⁷

In a similar vein, the *New York Times Magazine* quotes William, a masculine top at a DL club event in Atlanta: "'You have no idea how many of the boys here tonight would let me'—have sex with them—'without a condom . . . These young guys swear they know it all. They all want a black thug. They just want the black thug to do his thing.'"¹⁶⁸ Importantly, the HIV risk from unprotected anal intercourse does not impact the top and bottom equally. Just as a woman is more likely to contract HIV from a man than vice versa,¹⁶⁹ a bottom is generally more likely to get HIV from a top than to give it to him.¹⁷⁰

To be clear, these dynamics are not limited to the black community and do not depend on a man identifying as DL. Masculinity carries significant advantages in gay white communities as well.¹⁷¹ Because the more masculine man (often a top) is likely to have more sexual options than a man who is perceived as less masculine (often a bottom or sexually versatile),¹⁷² the latter might offer implicitly to take the sexual risk of unprotected sex in exchange for sex with a more masculine partner. These dynamics should trouble us just as much as the harms that befall women.

Yet gender schemas tend to conceal harms that men suffer in relationships with men. To the extent that heterosexuals know about unsafe sexual practices among MSM, including those containing an element of coercion (rather than deception), one might wonder why there is little public outrage over MSM being pressured into having sex without condoms and potentially contracting HIV. With a male-female dyad, we are primed to see the man as taking sexual advantage of the woman (and in some cases this happens). If the two have sex without a condom, we may put the blame on the man because he is presumed to have exercised more power. Whereas we are predisposed to view a male-female dyad through a dominant/subordinate lens, when two men have sex, we may wrongly assume that each had equal opportunity to decide whether to use a condom.¹⁷³ For example, Hortensia Amaro, a professor of health sciences who studies women and HIV, writes:

167. Malebranche, *supra* note 15, at 863-64 (emphasis in original).

168. Denizet-Lewis, *supra* note 38, at 31-32; cf. Mays et al, *supra* note 22, at 82 (expressing concern that a MSM may adopt a "deferential script that allows one's partner to steer the course of the sexual experience"). I do not mean to suggest the men discussed in the text are utter victims or lack any agency.

169. See Amaro, *supra* note 73, at 438; see *infra* text accompanying note 297-98 (explaining per contact risk of HIV infection).

170. See Hart et al., *supra* note 163, at 180.

171. See Robinson, *supra* note 50, at 1821.

172. See Robinson, *supra* note 142, at 2816 (establishing stronger market demand for tops than bottoms with respect to all racial groups except Asians).

173. See Marc Spindelman, *Surviving* *Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1665 (2004) ("[T]hat gay relationships are same-sexed does not mean that, by definition,

The tasks of safer sex negotiation for women require them to act in conflict with their traditional socialization as unequals and subordinates to men; thus, negotiating safer sex is a much more complex and conflict-laden task than it would be *in a relationship between individuals with equal social status (e.g., between two men)*.¹⁷⁴

Amaro wrongly and casually assumes that just because two men are relating gender disappears and power is equally shared. Because of his gender, an MSM (whether he is in the bottom, versatile or top role), cannot easily assume the role of presumably powerless victim and subordinate. Although he may be regarded as feminine by heterosexuals and potentially by other MSM, that does not mean he enjoys the moral standing of a “real” woman.

Moreover, there may be a sense that an MSM contracting HIV does not compare to the tragedy of a heterosexual female victim. After all, HIV/AIDS has been framed as a gay disease.¹⁷⁵ When a gay man gets AIDS, some may view it as the normal outcome for those of a certain social identity.¹⁷⁶ Some may think that it is sad when a gay man gets AIDS, but predictable, not the shock to the system delivered by a heterosexual woman getting a “gay disease.”¹⁷⁷ CDC statistics show that HIV continues to devastate MSM of all races. Contrary to the media focus on women, the vast majority of HIV victims continue to be male—74% in 2005.¹⁷⁸ And most of the male victims were MSM, including a disproportionately black segment.¹⁷⁹ Yet such men are relegated to the margins not just in stories on the DL, but also in broader stories on the HIV crisis in black communities.¹⁸⁰ I do not mean to deny that some black (and nonblack) men find pleasure in the DL, which may offer the excitement of breaking social norms and fantasies that DL men are more masculine and enticing than out men.¹⁸¹ However, this Subpart has focused on

they are relationships where sex is freely and coequally willed or determined—or equal.”)

174. Amaro, *supra* note 73, at 442 (emphasis added).

175. See, e.g., COHEN, *supra* note 45, at 125; *infra* Part III.C.

176. Cf. COHEN, *supra* note 45, at 166-67 (noting that women of color received greater media attention than black gay men in the *New York Times*’ early AIDS coverage and arguing that the ability of women to assume the role of “innocent victim[]” helps to explain this pattern).

177. See *id.* at 201 (discussing black media’s depiction of “black women as the victims of AIDS for whom we should feel most sorry”).

178. CTR. FOR DISEASE CONTROL & PREVENTION, CDC HIV/AIDS FACT SHEET: A GLANCE AT THE HIV/AIDS EPIDEMIC (2007), available at <http://www.cdc.gov/hiv/resources/factsheets/At-A-Glance.htm>.

179. See Ctrs. for Disease Control & Prevention, HIV/AIDS and African Americans, <http://www.cdc.gov/hiv/topics/aa/index.htm> (last visited Apr. 6, 2009) (stating that in 2005 “41% of men living with HIV/AIDS were black” and that sex with men is the most common route of transmission for black men).

180. See COHEN, *supra* note 45, at 166-67.

181. It is always important to put the DL in context and not automatically assume that unhealthy practices or ways of thinking are distinctly black. The myth that DL men are “real” men and more desirable than out men is connected to a broader phenomenon in which some gay men of all races think of heterosexual men as forbidden fruit and fantasize about

making visible the harms experienced by out black men, which have been repeatedly ignored. We should recognize that the DL victimizes women and men—including the DL black man who is imprisoned by homophobia, racism, and narrow conceptions of black masculinity, and out black men, who may deal with the same structural constraints and experience a reduced number of viable black partners because of the DL. If the media acknowledged these perspectives, it could not as easily draw a stark divide between perpetrator and victim. In many cases, the DL man may be both.

III. STRUCTURAL CONNECTIONS: WHAT BLACK WOMEN AND BLACK MSM HAVE IN COMMON

In this Part, I show how DL discourse relies on an individualistic presentation that erases the social structures that account for much of the behavior that the media demonizes. Different but related structural conditions channel the sexual decision making of black MSM and women. The interlocking pressures of heterosexism, racism, and patriarchy push black MSM to hide their interest in men and maintain public relationships only with women. Meanwhile, the requirement that a woman maintain a committed relationship with a man, no matter the personal cost, pushes women to acquiesce in unprotected sex with men and to overlook their male partner's concurrent sexual relationships, which may be with women, men, or both. At the same time, the aesthetic hierarchy that deems black women relatively undesirable limits black women's pool of potential romantic partners. Heteronormativity also bounds black women's romantic choices, ruling out for many the possibility of choosing a female partner. This examination of structural constraints shows that black MSM and women can find common ground in critiquing and challenging the structures that limit their romantic possibilities rather than simply blaming each other.¹⁸²

A. Governmental Policies Reduce the Number of Eligible Black Male Romantic Partners

Governmental policies that rely heavily on incarcerating young black men for drug crimes and do little to combat violence and poor public health in the black community produce a “strikingly low” male-female ratio in black

sex with straight-identified men. This mode of thinking is evident in gay pornography, where some of the most popular models are marketed as “gay for pay.” Gay men who express a preference for straight-identified men or “straight acting” men may simply mean that they desire masculine men. However, I object to the assignment of masculinity to straight men, and the implicit assumption that gay men are naturally effeminate. Moreover, in some cases, the preference for straight-identified men may reflect internalized homophobia—a belief that straight is inherently better than gay.

182. See PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 180 (2004).

communities.¹⁸³ These policies include a war on drugs that punishes drugs used by blacks much more severely than those used by whites.¹⁸⁴ Federal laws that disproportionately punish crack offenses as compared to cocaine offenses have locked up many low-level black male crack offenders through mandatory minimum sentences.¹⁸⁵ More broadly, a constellation of Supreme Court cases limit opportunities for black men to be productive citizens and viable romantic partners. The Court never finished the work begun by *Brown v. Board of Education*,¹⁸⁶ and has turned a blind eye to pervasive de facto racial segregation in schools.¹⁸⁷ Further, the Court's refusal to recognize education as a fundamental constitutional right permits government to starve public schools of funding necessary to educate the many black and brown children dependent on them.¹⁸⁸ This national lack of commitment to education has produced a pipeline through which black boys drop out of school, become involved in criminal activity, and, even when released, find that their status as ex-cons makes legitimate employment inaccessible.¹⁸⁹ The criminal justice system is also infected with racial bias,¹⁹⁰ yet the Supreme Court has foreclosed important avenues of relief. It has refused to recognize evidence of systemic bias¹⁹¹ and dismissed police brutality claims based on strict procedural requirements.¹⁹²

183. Adaora A. Adimora & Victor J. Schoenbach, *Social Context, Sexual Networks, and Racial Disparities in Rates of Sexually Transmitted Infections*, 191 J. INFECTIOUS DISEASES S115, S117, S119 (2005); Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1279 (2004) (“[M]ass imprisonment inflicts devastating collateral damage on black communities.”).

184. See, e.g., MICHAEL COYLE, RACE AND CLASS PENALTIES IN CRACK COCAINE SENTENCING, 7-8, http://www.sentencingproject.org/Admin/Documents/publications/rd_raceandclass_penalties.pdf.

185. See *id.* at 4, 6. The U.S. Sentencing Commission recently took steps to reduce this disparity. See Alexandra Marks, *As Many Crack Convicts Are Freed, Will Crime Rise?*, CHRISTIAN SCI. MONITOR, Apr. 9, 2008, at 1.

186. 347 U.S. 483 (1954).

187. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (striking down race-conscious policy that attempted to integrate schools); *Milliken v. Bradley*, 418 U.S. 717 (1974) (limiting efforts to desegregate that would cross school district lines).

188. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

189. See Erik Eckholm, *Plight Deepens for Black Men*, STUDIES WASH., N.Y. TIMES, Mar. 20, 2006, at A1.

190. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (authorizing racial profiling in Fourth Amendment case).

191. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting black defendant's claim of systemic bias in imposition of death penalty because he failed to prove bias infected his individual case).

192. *See City of L.A. v. Lyons*, 461 U.S. 95 (1983) (holding that plaintiff that alleged he was victim of illegal choking lacked standing to bring lawsuit because he was unlikely to be victimized again by that practice).

This legal backdrop has helped produce a world in which “[a]lmost one-third of black men between the ages of 20 and 29 years are in jail, in prison, on probation, or on parole.”¹⁹³ In 2002, 10.4% of black men ages 25-29 were incarcerated, compared to just 1.2% of white men and 2.4% of Latinos in the same age range.¹⁹⁴ The mass incarceration of black young men physically removes them from the romantic marketplace in black communities.¹⁹⁵ The impact of this removal may be felt sharply by black women in their 20s and 30s, a period in which most other women marry: “According to the 2000 Census, 47 percent of black women in the 30-to-34 age range have never married, compared with 10 percent of white women.”¹⁹⁶ In some cases, single black women struggle to find suitable male partners because the policy of mass incarceration reduces the pool of eligible men. In other cases, married women and those in committed relationships find such relationships disrupted by the removal of their male partners, whose release from prison might not be for several years. Women who were in committed relationships may find themselves thrust into the pool of single people when their partner is removed and they are left behind to seek companionship and sexual satisfaction until he returns.

Other factors producing the imbalanced sex-ratio and marriage rates among blacks include “higher mortality rates among black infants, children, and adults because of disease and violence.”¹⁹⁷ “A black man is more than six times as likely as a white man” to die of a homicide.¹⁹⁸ “[B]lack men are nine times as likely” to die of AIDS in part due to lack of healthcare.¹⁹⁹ According to two public health experts, “[o]ther than during postwar shortages of men that have been experienced by various countries, black populations in the United States have sustained the most severe and persistent shortage of men of any subculture since documentation by modern censuses.”²⁰⁰ Economic marginalization further reduces the pool of black male potential partners that black women view as eligible.²⁰¹ For instance, black men suffer the highest unemployment rates and are disproportionately likely to be homeless.²⁰²

193. Adimora & Schoenbach, *supra* note 183, at S119.

194. *See id.*

195. Some women seek to maintain or initiate relationships with men who are incarcerated. Others, however, are opposed to marrying an ex-convict. *See* Allison Samuels, *Time to Tell It Like It Is*, NEWSWEEK, Mar. 3, 2003, at 52.

196. Ellis Cose & Allison Samuels, *The Black Gender Gap*, NEWSWEEK, Mar. 3, 2003, at 46.

197. Adimora & Schoenbach, *supra* note 183, at S117.

198. *See* Michael A. Fletcher, *At the Corner of Progress and Peril*, WASH. POST, June 2, 2006, at A1.

199. *See id.*

200. Adimora & Schoenbach, *supra* note 183, at S117-S118.

201. *See, e.g.*, Joy Jones, *‘Marriage Is for White People,’* WASH. POST, Mar. 26, 2006, at B1.

202. *See* Fletcher, *supra* note 198, at A1; Danielle Kwateng, *New Study: Black Men*

The imbalanced sex ratio distorts romantic relationships and sexual networks in black communities.²⁰³ Not only does it produce a larger percentage of African American women who have never married than women of other races, the “shortage of men places women at a disadvantage in negotiating and maintaining mutually monogamous relationships, because men can easily find another relationship if they perceive their primary relationship to be problematic.”²⁰⁴ The smaller pool of eligible black men increases the market power of a black man, especially those who earn a good income and are not presently incarcerated. According to one study, 34% of black men ages 15-44 reported having 15 or more lifetime sex partners, compared to 22% of white men and 18% of Latinos.²⁰⁵ “[M]en who maintain multiple simultaneous partnerships may be confident that their primary partner will not end the relationship, because primary relationships are relatively difficult for women to attain.”²⁰⁶ Moreover, incarceration of a black male often disrupts a marriage or romantic relationship and the separation increases the odds that each partner will have sex with other people, even as they may try to maintain their original relationship.²⁰⁷ This increase in sexual partnering, which often overlaps, enhances the individual’s risk of contracting HIV.²⁰⁸ In sum, government policies destabilize black families and committed relationships and hobble the romantic possibilities of single people, even as government claims to promote marriage.²⁰⁹

B. *Romantic Segregation Limits Romantic Possibilities for Black Women and Black MSM*

An underlying assumption in much DL discourse is that black men are the only potential partners for black women.²¹⁰ White, Latino, and Asian men are generally not even mentioned as potential partners or part of the problem. This tendency to assume that only black men will mate with black women manifests what I call “romantic segregation,” and it contributes to the plight of black

Comprise Large Percentage of Nearly 800,000 Homeless in America, HOWARD U. NEWS SERV., Mar. 11, 2007, <http://www.blackamericaweb.com/site.aspx/bawnews/homeless312>.

203. See Roberts, *supra* note 183, at 1290.

204. Adimora & Schoenbach, *supra* note 183, at S118.

205. See Mosher et al., *supra* note 91, at 3.

206. Adimora & Schoenbach, *supra* note 183, at S118.

207. See *id.* at S119 (“Ethnographic research has suggested that ‘separational concurrency’ is common among people whose partners are frequently incarcerated.”).

208. *Id.* (“The partner entering prison is now at risk of forming new (and sometimes coercive) sexual connections with a pool of individuals among whom the prevalences of high-risk sexual behaviors, HIV infection, and other STIs are high.”).

209. See Roberts, *supra* note 183, at 1290.

210. See, e.g., Villarosa, *supra* note 57, at A1 (identifying the “shortage of black men” as a factor producing high HIV rates among black women, but never mentioning nonblack men as potential partners).

women. If black women have fewer opportunities to partner with black men because of the governmental policies described above, one might expect them to partner with white men and other men of color. As media stories have (over)emphasized, an elite segment of single professional black women is increasingly educated and financially prosperous.²¹¹ Yet there are no signs that white and other nonblack men are rushing in to partner with these eligible black women.

A primary explanation for this failure is an aesthetic hierarchy infected with racial stereotypes. It positions white women at the top, Asian American women and Latinas in the middle, and black women at the bottom. The hierarchy reflects a preference for certain race-related physical features, such as lighter skin tones and straight hair,²¹² but also stereotypes that depict black women as bossy, difficult, and sexually promiscuous.²¹³ The distortion of black women's sexuality seems critical in elevating white women as the aesthetic ideal.²¹⁴ A study of interracial dating preferences by M. Belinda Tucker and Claudia Mitchell-Kernan included a telephone survey of 1116 adult residents in Southern California.²¹⁵ The survey asked respondents if there were racial/ethnic groups they would not marry, and if so, to list which groups. White men were more likely to exclude black women than any other race, and their opposition to a black wife (72.5%) far exceeded that of white women to a black husband (44.7%).²¹⁶ By contrast, black women most frequently excluded Asian men (51.7%), rather than white men.²¹⁷ The interracial marriage rates

211. See, e.g., Cose & Samuels, *supra* note 196, at 46.

212. See KELLINA M. CRAIG-HENDERSON, BLACK MEN IN INTERRACIAL RELATIONSHIPS: WHAT'S LOVE GOT TO DO WITH IT? 5, 79-80 (2006); see also Wilson et al., *supra* note 151, at 29 (discussing "historical and cultural forces that have for centuries promoted White features as the standard of beauty" in context of MSM romantic preferences and noting whites' preferences for lighter-skinned Latinos and blacks).

213. See COLLINS, *supra* note 182, at 123 ("Representations of Black women as bitches abound in contemporary popular culture . . ."); Harris, *supra* note 72, at 599 (noting the historical failure to prosecute the rapes of black women "since black women were considered promiscuous by nature").

214. See Hammonds, *supra* note 45, at 131.

215. See M. Belinda Tucker & Claudia Mitchell-Kernan, *Social Structural and Psychological Correlates of Interethnic Dating*, 12 J. SOC. & PERS. RELATIONSHIPS 341, 348 (1995).

216. See *id.* at 350.

217. *Id.* These results make sense against the backdrop of racialized conceptions of masculinity. This view posits that black men are the most masculine (and also that they are dangerously "hypermasculine") and that Asian men are the least masculine. See Robinson, *supra* note 50, at 1821-22; Wilson et al., *supra* note 152, at 11 (quoting white respondent as stating that sex with black men is "hot" because they have a "voraciousness . . . [and] very animalistic quality"); *id.* at 11-14, 16 (finding that gender stereotypes were most frequently reported about black men and Asian men, that white men were likely to perceive Asian men as "submissive" and "effeminate" and that men of all races expected black men to be "tops" with large penises and Asians to be "bottoms"). While some black men and Asian women may benefit (to some extent) from the stereotyping of an entire race as masculine or feminine, perceptions of black female and Asian male attractiveness suffer from the same

reflect the hierarchy. Just 5% of black married women are married to a man of another race, compared to 23% of Asian women and 19% of Latinas.²¹⁸

The Miss America beauty pageant, which began in 1921, once barred black women from competing; a black woman did not compete until 1970, three years after *Loving v. Virginia*.²¹⁹ While blacks make up about 13% of the population,²²⁰ roughly 7% of the Miss America and Miss USA winners have been black.²²¹ There have been forty-nine Playmates of the Year in *Playboy* magazine—just one was black, in 1990.²²² Men's magazines *Maxim* and *FHM* issue annual lists of the sexiest celebrity women. Other than a handful of mainstream celebrities (Beyonce, Rihanna), black women rarely make these lists. Just 6% of the women selected by *Maxim* in 2008 and in 2007 were black.²²³ A mere 2% of the women on *FHM*'s 2008 and 2007 lists were black. In film, where female roles often revolve around their sexuality,²²⁴ black women struggle to be cast in lead roles and as love interests. Black women have recently complained about being displaced from love interest roles opposite black male stars by Latinas and other nonblack female actors who are

stereotype. See *id.* at 20; cf. Phillip Atiba Goff et al., "Ain't I a Woman?": Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 *SEX ROLES* 392, 396, 401 (2008) (finding that "Black faces were rated as more masculine than White faces" and that this perception correlated with rating black females as less attractive).

218. Special Tabulation by Gary J. Gates, Senior Research Fellow, Williams Institute, UCLA School of Law (research on file with author). Gates combined 2005-2006 data from the American Community Survey (ACS), a national survey conducted by the U.S. Census Bureau. American Community Survey (ACS) Home Page, <http://www.census.gov/acs/www> (last visited Aug. 19, 2008). In this tabulation, "Latino(a)" includes all individuals, regardless of race classification, who indicated that they had a Hispanic/Latino(a) ethnicity.

219. 388 U.S. 1 (1967); see People & Events: Breaking the Color Line at the Pageant, PBS American Experience Website, http://www.pbs.org/wgbh/amex/missamerica/peopleevents/e_inclusion.html (last visited Mar. 14, 2009). After Vanessa Williams's breakthrough victory in 1984, one could understand the pageant judges to have tried to make up for lost time, picking three black women between 1990 and 1994, and another in 2004.

220. See Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 *CAL. L. REV.* 1, 21-22 (2007).

221. The precise numbers, based on our calculations, are 7.41% for Miss America and 6.45% for Miss USA. Wikipedia contains a list of title holders for each pageant. See *List of Miss America Titleholders*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Miss_America_titleholders; *Miss USA, List of Titleholders*, WIKIPEDIA, http://en.wikipedia.org/wiki/Miss_USA#List_of_titleholders. We read the articles for each titleholder and, if necessary, googled images of each of them to determine race.

222. That is, 2% of the Playmates of the Year have been black. This is consistent with the number of monthly Playmates, which approaches 3%. Wikipedia contains an entry listing Playmates that appears comprehensive. See *Chronological List of Playboy Playmates*, WIKIPEDIA, http://en.wikipedia.org/wiki/Chronological_List_of_Playboy_Playmates. We read the articles for each title holder and, if necessary, googled images of each of them to determine race.

223. The *Maxim* and *FHM* sexy women lists are posted on their websites. We went through all of the women who made the lists and researched their racial identities on Wikipedia, unless it seemed clear that they were completely Caucasian.

224. See Robinson, *supra* note 220, at 26.

thought to be more palatable to nonblack audiences.²²⁵ In terms of leads, my study of the casting of top roles in 2004 and 2005 found that black men captured roughly three-quarters of the roles given to black actors.²²⁶ Today, it seems as if black female lead characters in major films are more likely to be played by black males in drag, such as Tyler Perry (the Madea character), Eddie Murphy (*Norbit*), and Martin Lawrence (*Big Momma's House*). Actual black women are typically relegated to bit parts as prostitutes, asexual mother figures, or neck-rolling mammies.²²⁷ On TV, one of the most prominent roles featuring a black women is played by Tiffany Pollard, the vulgar, surgically enhanced star of VH1's ghetto bachelorette "reality" series *I Love New York*, who mooned the parents of one of her suitors.²²⁸ Notwithstanding Tyra Banks's racially diverse TV hit *America's Next Top Model*, actual runways remain conspicuously white.²²⁹ These media depictions form part of the backdrop for interactions (or the absence of interactions) between black women and nonblack men.

Moreover, such derogatory media representations dovetail with images of black women in political discourse. Decades ago, Senator Daniel Patrick Moynihan argued in an influential report that the black family is pathological because of the absence of fathers and as a result, mothers' assumption of a masculine role.²³⁰ In the 1970s, then-candidate Ronald Reagan offered another iconic caricature of black women with the "welfare queen," a woman who indulgently procreates while fraudulently cashing checks from the government.²³¹ Echoes of these stereotypes continue to frame black women,

225. See, e.g., *id.*, at 23 n.91; Allison Samuels, *Why Can't a Black Actress Play the Girlfriend?*, NEWSWEEK, Mar. 14, 2005, at 52, 52 (reporting studio's refusal to cast an African American female actor opposite Will Smith in the film *Hitch*).

226. See Robinson, *supra* note 220, at 22. This is in contrast to other minorities, where women often fared as well or better than men.

227. See, e.g., COLLINS, *supra* note 182, at 140-42 (discussing "modern mammies"); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 569-70.

228. Black women are more likely to find work in supporting parts than in lead roles. Supporting female characters on TV include Vanessa Williams (*Ugly Betty*) and Chandra Wilson (*Grey's Anatomy*). Their shows are two of the most diverse on TV and, not coincidentally, are produced by women of color, Salma Hayek and Shonda Rhimes, respectively. Although they do not necessarily qualify as actors, Oprah Winfrey and Tyra Banks are prominent figures on TV.

229. See Guy Trebay, *Has the 'Obama Effect' Come to Runway Castings?*, N.Y. TIMES, Feb. 15, 2009, <http://www.nytimes.com/2009/02/15/fashion/13diary.html> (stating that some casting notices say "No Blacks" and indicating that black male models face substantial barriers as well); see also Guy Trebay, *Runways Fade to White*, N.Y. TIMES, Oct. 14, 2007, at 9-1 (stating that some agencies specify "Caucasians only" in their casting notices).

230. See, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1477 (2000).

231. See Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 934 (2006) (review essay); Franklin D. Gilliam, *The "Welfare Queen" Experiment: How Viewers React to Images of African-American Mothers on Welfare* (Ctr. for Commc'ns

even those who seem as upstanding as possible. The public's initial reaction to Michelle Obama is a recent case in point. Obama, an Ivy League-educated lawyer and hospital administrator, has been depicted as emasculating, militant,²³² and a "baby mama," ostensibly because of viewpoints and comments that strike many in the black community as commonplace.²³³ A New York artist extended radio personality Don Imus's attack on the Rutgers women's basketball team by calling Obama's daughters "nappy headed hos."²³⁴ These moments show the collision of representations that some would try to minimize as "just culture" or "art" and public affairs that carry indisputable material consequences. Some political commentators predicted that in the absence of a race-inflected makeover, voters' views of Michelle Obama and her racial salience could have impeded the election of her husband Barack Obama.²³⁵ Since President Obama's election, First Lady Michelle has unexpectedly emerged as a fashion icon.²³⁶ She has graced the covers of numerous magazines, including *Vogue*, and the media seem increasingly to describe her as "beautiful."²³⁷ This is promising and contains exciting potential to transform public perceptions of black women, especially as Obama is perceived as representative of "regular" black women. However, it remains to be seen whether the aforementioned ugly stereotypes will resurface around her when the election's afterglow fades.

Despite the prevalence of black female stereotypes and their impact on romantic opportunities, some might respond that most black women prefer black men, and their preferences help explain the low interracial marriage rates

& Cmty., Research on Media Coverage, UCLA, Paper No. 007, 1999).

232. *The New Yorker* magazine featured a cartoon on its cover that depicted Michelle Obama as a gun-toting black nationalist. See Rachel Sklar, *Yikes! Controversial New Yorker Cover Shows Muslim, Flag-Burning, Osama-Loving, Fist Bumping, Obama*, HUFFINGTON POST, July 13, 2008, http://www.huffingtonpost.com/2008/07/13/yikes-controversial-emnew_n_112429.html.

233. The "baby mama" remark, which was made by Fox News, is the most stunning because it is undisputed that Michelle and Barack Obama were legally married when they had their daughters. See *Fox Refers to Michelle Obama as 'Baby Mama'*, MSNBC.COM, June 12, 2008, <http://www.msnbc.msn.com/id/25129598/>. On the tendency of black and white observers to interpret race-related events differently, see Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1100 (2008).

234. See Bill Carter & Jacques Steinberg, *Off the Air: The Light Goes Out for Don Imus*, N.Y. TIMES, Apr. 13, 2007, at C1; *The Assassination of Barack Obama Has Come!*, THE RUNDOWN, June 9, 2008, <http://www.therundown.tv/headlines/say-what/the-assassination-of-barack-obamas-has-come/>.

235. See, e.g., Michael Powell & Jodi Kantor, *After Attacks, Michelle Obama Looks for a New Introduction*, N.Y. TIMES, June 18, 2008, at A1 (suggesting that makeover was intended to respond to perceptions that Obama "simmers with undigested racial anger").

236. *New York* magazine summed up this shift in its cover story entitled "The Power of Michelle Obama: From Fist-Bumper to American Icon in Eight Months Flat." Joseph O'Neill, *Democracy and Its Discontents: Why We Crave a Royal Michelle—and Why We Shouldn't*, N.Y. MAG., Mar. 23, 2009, at 32.

237. See *id.*

among black women. It appears, however, that black women are more likely to approve of interracial marriage than white women.²³⁸ Moreover, a preference for a black partner may be a reaction to white men's rejection and stigmatization of black women. Another contributor to black women's preferences is the ideal of the "strong black family," and the desire of many African Americans to see the black family structure recover from the devastation wrought by slavery. The success of blacks is often linked not to the success of blacks as *individuals* but to a collective commitment to black community, which centers on a heteronormative nuclear family.²³⁹ This notion of "linked fate" or racial solidarity is valuable in combating discrimination, yet if carried too far, it may limit individual freedom and the capacity to imagine lives that extend beyond the narrow confines of the traditional nuclear family.²⁴⁰ Black women should be able to marry a nonblack man—or a woman—or choose not to marry at all, without losing their standing in the community.²⁴¹ To be clear, I am not arguing that black women should be compelled to consider nonblack men, but that reducing cultural expectations within the black community would increase options for women who want to marry. Moreover, the marital options of black women impact black MSM. The tendency to exclude nonblack men as potential partners for black women increases the pressure on black men to identify as heterosexual and marry a black woman. If black men don't step up, according to this thinking, who will?

Black MSM also face disadvantages in white-dominated romantic marketplaces, although they are not identically situated to black women. We analyzed cover images of gay magazines *Out* and *The Advocate* to measure the extent of black male representation.²⁴² These images are often sexualized, displaying handsome, muscled men who typify the gay aesthetic ideal. Of the men on *Out*'s cover, 88.9% were white, and 3.7% black. *The Advocate* was more diverse: 72.3% white and 8.5% black.

238. Most surveys comparing black and white attitudes on interracial romance do not draw distinctions based on gender. See, e.g., Tucker & Mitchell-Kernan, *supra* note 215, at 344. A 2000 New York Times poll on race provided data that we were able to analyze for potential gender differences. We found that 32% of white women disapproved of interracial marriage and 18% of black women disapproved. The difference is statistically significant (chi-square = 28.1, $df=1$, $p<.000$). Weighted results are very similar (31% vs. 16%). I thank Joseph Doherty for his assistance with this analysis.

239. See ALLEN, *supra* note 50, at 97-99 ("African Americans . . . actively and routinely struggle with questions about the morality of outmarriage premised on group-specific obligations of solidarity and care."); COHEN, *supra* note 45, at 24-25 (discussing linked fate).

240. See ALLEN, *supra* note 50, at 101; Dee DePass, *Looking for Mr. White: Interracial Relationship Survey*, ESSENCE, June 2006, at 175, 176 (describing black strangers' harassment of a black woman for dating a white man).

241. See Hammonds, *supra* note 45, at 137 (stating that some blacks view black lesbians as "traitors to the race").

242. Alexandra Chasin quotes a magazine editor who suggested that featuring people of color on covers depresses sales. See ALEXANDRA CHASIN, SELLING OUT 97 (2000).

Film and television images of gay men reflect a similar pattern of marginalization and distortion. The dominant theme is invisibility—whether one watches mainstream media or gay-themed content, black LGBT people are rarely represented.²⁴³ Aside from *The L Word*, the most popular gay-themed series have featured no black regular characters. *Will & Grace*, *Ellen*, *Queer Eye for the Straight Guy*, and *Queer as Folk* reaffirmed the popular notion that LGBT people are affluent whites. The few black LGBT images that do exist tend to be minor or recurring roles or are relegated to independent channels of distribution that reach a tiny audience, such as the movie and TV series *Noah's Arc*.²⁴⁴ Specifically, images of black MSM tend to fall into three problematic categories: (1) aggressive, threatening “angry black men;”²⁴⁵ (2) at the other extreme of the gender spectrum, flamboyant queens;²⁴⁶ and (3) black men who are in relationships with white men, which seems to imply that black MSM are of interest only when they are paired with a white man.²⁴⁷ There are occasional

243. See Rod McCollum, *Breakthrough Black and Latino Roles on the Big Screen*, AFTERELTON.COM, Nov. 7, 2007, http://www.afterelton.com/movies/2007/11/breakthrough_black_latino_roles?page=0%2C0 (“[T]he current landscape for big-screen presentations of black and Latino gay characters is practically barren.”).

244. Other films with black male casts but extremely limited distribution include *Punks*, *Ski Trip*, and *Brother to Brother*. According to GLAAD, the Gay and Lesbian Alliance Against Defamation, there were no regular black LGBT TV characters on the broadcast networks during the 2007-2008 season; such characters appeared only on cable networks, which normally draw fewer viewers. See GLAAD, GLAAD'S 12TH ANNUAL DIVERSITY STUDY EXAMINES 2007-2008 PRIMETIME TELEVISION SEASON 6 (2007-08) <http://www.glaad.org/2007/2007PDFS/WhereAreWeOnTV0708.pdf>. Even these roles tend to consist of small parts in large ensemble casts. The primary exception is Jennifer Beals, who played a central character on Showtime's *The L Word*, which recently ended its run. Yet Beals' biracial character could, pass for white, and the show rarely mentioned her race.

245. A recent example is the character Lafayette on HBO's *True Blood*. Lafayette is a muscle-bound drug dealer and prostitute. He also wears makeup and is flamboyant. Remarkably, the show's writers managed to mash up two archetypal black male images (the thug and the queen) into one truly horrifying character.

246. See McCollum, *supra* note 243 (discussing the “sassy sidekick” and “snap queen,” which are typically used for comic relief (internal quotation omitted)). Big screen examples include *To Wong Foo, Thanks for Everything, Julie Newmar*, which starred Wesley Snipes as a drag queen. TO WONG FOO THANKS FOR EVERYTHING, JULIE NEWMAR (Universal Pictures 1995). My concern is not that black men should never be portrayed as effeminate, but that the dominant images lack balance and complexity. “We have to fight against our one-dimensional media identity without fighting against the black men who embrace that identity.” BOYKIN, *supra* note 3, at 216.

247. A central problem with these depictions is that the writers rarely bother to explain why the black and white lovers are together. As one black gay critic noted, such relationships are “usually a mismatch, or the black character is simply an object of lust,” See McCollum, *supra* note 243. Examples include the pairing of Keith and David on the otherwise superb *Six Feet Under* and the casting of Taye Diggs opposite Eric McCormack, who played Will on *Will & Grace*. Moreover, these storylines may serve as a voyeuristic experience for white men interested in having a sexual relationship with a black man. Cf. MCBRIDE, *supra* note 9, at 104 (arguing that interracial gay pornography presents black men “as fetish objects for the ‘white’ gaze”).

exceptions to these trends and even some complex, interesting portrayals, but such performances are all too rare.²⁴⁸

Further evidence of the status of black MSM comes from an empirical study of racial preferences on an MSM website used for sex and dating. My research assistant and I posted profiles and torso photographs of the same racially ambiguous model but changed the race and sex position (“top” or “bottom”) each time we posted.²⁴⁹ We posted the profiles in Los Angeles and New York on the same night and at the same time each weekend.²⁵⁰ We then counted the numbers of e-mails received by each profile. This study revealed that the black and Asian profiles received significantly fewer e-mails than the white and Latino profiles.²⁵¹ Moreover, the interest in black men correlated with the stereotype of black sexual aggression/masculinity.²⁵² The black bottom profiles received, by far, the fewest number of e-mails in the entire study.²⁵³ Thus, certain black MSM, like black heterosexual women, struggle to attract partners. The experience of black women may also provide a cautionary tale for black MSM who think that obtaining marriage rights will necessarily translate into opportunities to be married.²⁵⁴

248. For example, Michael Boatman played political consultant Carter Heywood on ABC’s *Spin City*, and Michael K. Williams played Omar Little, a skilled and ethical gangster who had three relationships with black or biracial men on HBO’s *The Wire*.

249. See Robinson, *supra* note 142, at 2811. The photos revealed the torso of the model but not his face, which is common on the website, adam4adam.com. Many men use the site primarily for sex. Some men refuse to show face photos online because they consider themselves closeted or DL.

250. For a more in-depth explanation of the methodology, see *id.* at 2811-13.

251. See *id.* at 2814. This finding is consistent with a recent study by Patrick A. Wilson, who found that

Asian and Black men were generally considered the least sexually desirable among different-race men who were interviewed . . . Interestingly, few Asian men saw men from within their racial group as desirable, which is quite different from Black, Latino, and White participants, who consistently rated same-race men as being one of their most preferred types of sexual partners.

See Wilson et al., *supra* note 152, at 18.

252. Some black men have internalized this stereotype. A major theme of Wilson’s study of racial stereotypes among MSM on “bareback” Internet websites is the convergence between stereotypes held by white men and men of color about particular minority groups, principally blacks and Asians. See Wilson et al., *supra* note 152, at 15 (“White and Latino participants characterized Black MSM as generally taking on the hyper-masculine (i.e., ‘thug’ or ‘macho’) role and being dominant in sexual relationships, which is very similar to the views Black MSM had of themselves”); *id.* at 9 (reporting that many black subjects described sex with black men as “‘rhythmic,’ involving ‘more body movements,’ ‘hot,’ and ‘aggressive’”); *id.* at 10 (stating that Asian men “‘frequently’ described sex with [Asian men] as ‘mechanical’ or ‘reserved’ . . . [or] ‘boring’”).

253. See Robinson, *supra* note 142, at 2813-14.

254. See Darren Lenard Hutchinson, “*Gay Rights*” for “*Gay Whites*”? : *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1371 (2000). An analysis by the Williams Institute at UCLA School of Law suggests that black MSM are more likely to live with a nonblack partner than are black women to marry a nonblack men. However, since marriage is not an option in most states, we do not know how many of these

C. The Branding of HIV as a Gay White Disease Disserved Black MSM and Black Women

A final connection between black MSM and black women returns to the HIV/AIDS context and, like the impact of mass incarceration, reveals the role of government. As noted in the Introduction, the media typically cite rising HIV rates among black women as the justification for exploring the DL. This provides an opportunity to think about how the government has responded to HIV in the black community. In this Subpart, I focus on the Centers for Disease Control's role in framing HIV/AIDS and the resulting signals it sent to black people about the need to get tested and worry about HIV. Then, in Part IV, I turn to a governmental response to HIV/AIDS: the enforcement of criminal laws that punish people who knowingly expose others to HIV.

Cathy Cohen has demonstrated how early government and media descriptions of HIV/AIDS effectively branded it as a gay white male problem, thus leading black MSM and women to discount the extent to which it threatened them. In explaining HIV/AIDS to the public, the media relied heavily on information from the federal government, primarily the CDC.²⁵⁵ The dominant media narrative was that the "first wave" of HIV/AIDS primarily affected gay men, and especially white gay men, and years later, the "second . . . wave" expanded the reach of the epidemic to IV drug users and women of color.²⁵⁶ We now know that this story was flawed in various respects.

First, although the media rarely mentioned race explicitly, its representations of AIDS victims concentrated unduly on white, privileged, openly gay men—the group with the strongest connections to the media. Black MSM, by and large, "did not merit the attention of the [*New York*] *Times*'s reporters and editors."²⁵⁷ Once the media became aware of the rising number of AIDS cases in black communities, it tended to "pit[] white gay men and their

cohabitating interracial same-sex couples would commit to marriage if the law permitted that step. Further, the figures suggest that black men are less likely to have an interracial partner than all other minority men: blacks—33% partnered with a man of a different race; Latinos—36%; Asian—51%; and Native American—71%. As with marriage rates for white women (4%), white men with male partners are the least likely to partner with someone of a different race (12%). See Gates, *supra* note 218.

255. See COHEN, *supra* note 45, at 124 ("The importance of the CDC as a primary signaling institution in the medical care and health policy industries cannot be overstated."); *id.* ("Clearly, staff at the CDC played an enormous role in defining this disease: delineating those at greater risk (risk groups); deciding who could be classified and counted as having AIDS (case definition); and communicating to the public the progress of the epidemic."). The CDC is part of the Department of Health and Human Services. Centers for Disease Control, About CDC Organization, <http://www.cdc.gov/about/organization/cio.htm> (last visited Mar. 14, 2009).

256. See COHEN, *supra* note 45, at 125.

257. *Id.* at 166 (finding that only three articles focused on black gay men and AIDS in the *New York Times* from 1981-1993, and that they received less coverage than drug users).

demands against the increasing numbers of blacks and Latinos living with AIDS,” as if one could not be black *and* gay.²⁵⁸ Relatedly, some media reports, following the CDC’s lead, suggested that HIV/AIDS stemmed from engaging in a “gay lifestyle.”²⁵⁹ Introducing NBC News’s first story on AIDS, Tom Brokaw announced: “scientists at the National Centers for Disease Control in Atlanta today received the results of a study that shows that the lifestyle of some male homosexuals has triggered an epidemic of a rare form of cancer.”²⁶⁰ This emphasis on a specific “gay lifestyle” may have misled the many men of color who did not identify as gay, live in a gay enclave, or otherwise share a way of life with white gay men.²⁶¹

Cohen explains that “[t]he strength of [the CDC’s] commitment to framing this disease as one exclusively located in gay communities is reflected in the early working names given this medical mystery by the press (including the gay press) and researchers—‘gay pneumonia,’ ‘gay cancer,’ and the more official sounding ‘GRID’ (gay-related immune deficiency).”²⁶² Once CDC researchers locked onto this gay lifestyle theory, they made various choices that prevented reframing.²⁶³ Many of the CDC’s early case-controlled studies of AIDS “used only gay men as the subjects.”²⁶⁴ It is virtually impossible to prove that a man is heterosexual since we know from the down low narrative that even a masculine, married man might engage in secret sex with men. This uncertainty about sexual categorization, coupled with many victims who were either dead or potentially closeted, permitted doctors to attribute AIDS cases among male IV drug users to homosexual practices. According to one CDC official, some doctors “seemed obsessed with the gay angle ‘He says he’s not homosexual, but he must be,’ doctors would confide.”²⁶⁵ Because of the

258. *See id.* (“Rarely were the intersections of these identities considered.”).

259. *See id.* at 124 (“[T]he CDC task force . . . focused much of its attention on the gay lifestyle hypothesis.”).

260. *Id.* at 169 (quoting *NBC Nightly News* (NBC Television Broadcast June 17, 1982)).

261. *Cf.* Ford et al., *supra* note 1, at 213 (arguing for a focus on certain risky behaviors instead of sexual orientation); Mays et al., *supra* note 22, at 93 (“For traditional public health disease eradication to be successful, we need to find ways to meet our needs for categorization while interfacing with individuals in ways that resonate with their own experiences.”); Savin-Williams, *supra* note 130, at 43 (urging researchers to “forsake the general notion of sexual orientation altogether” and instead focus only on components relevant for particular research questions); Wolitski et al., *supra* note 15, at 520 (“[Nongay-identified] MSM are less likely than gay-identified MSM to have been exposed to some specific sources of HIV information.”).

262. COHEN, *supra* note 45, at 125.

263. *See id.* at 137 (criticizing the “rigidity of assumptions” about AIDS).

264. *Id.* at 125.

265. *Id.* at 137 (quoting RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 83 (1987)).

background cultural understanding that gay = white,²⁶⁶ the branding of HIV/AIDS as a gay epidemic simultaneously inscribed it as a white problem. Cohen's analysis of leading media sources, including the *New York Times*, bears this out. Just 5% of the *Times* stories about AIDS from 1981-1993 focused on African Americans; and 62% of *those* stories fixated on black celebrities, namely Earvin "Magic" Johnson and Arthur Ashe, rather than the everyday African Americans at high risk.²⁶⁷ Yet blacks made up "32 percent of all AIDS cases" from the beginning of the epidemic until 1993.²⁶⁸ "The majority of women diagnosed with AIDS are Black"²⁶⁹ And among MSM, black and brown men constitute an increasingly disproportionate share of HIV and AIDS cases.²⁷⁰ Hence, the media's framing marginalized nongay-identified black MSM and black women.²⁷¹

Second, the distinction between gay men as the primary victims and IV drug users as secondary is questionable because it appears that medical authorities substantially undercounted the number of drug users who died of AIDS. This failure arose from structural differences in access to health care. White and relatively wealthy gay men were much more likely to see a private doctor on a regular basis, and their doctors were more likely to report potential cases of HIV/AIDS to the CDC. By contrast, drug users were likely to visit a doctor rarely and rarely see the same doctor. They also were more likely to see overburdened doctors with fewer connections to the CDC and less knowledge about cutting-edge medical developments.²⁷² In some cases, the same teaching

266. An interesting study on homophobia among blacks found that blacks who did not include black men in their conceptualization of gay identity were less likely to express favorable attitudes towards gay people than blacks who thought of gay identity as including blacks. See Gregory M. Herek & John P. Capitanio, *Black Heterosexuals' Attitudes Toward Lesbians and Gay Men in the United States*, 32 J. SEX RES. 95, 99 tbl.1, 102 (1995); see also COLLINS, *supra* note 182, at 281 (noting that "[l]abeling homosexuality as 'white' suppresses recognition of the range of sexual identities among African Americans"); Allan Bérubé, *How Gay Stays White and What Kind of White It Stays*, in THE MAKING AND UNMAKING OF WHITENESS 234, 236 (Birgit Brander Rasmussen et al. eds., 2001) (noting the discrepancy between the racial demographics of the population of gay men and the whiteness of the out gay men who purport to represent the larger group); Carbado, *supra* note 230, at 1499, 1506 (arguing that mainstream LGBT groups employ interracial analogies and construct icons of victimization that "convey[] the idea that to be black is to be heterosexual; to be homosexual is to be white").

267. See COHEN, *supra* note 45, at 160-61.

268. *Id.* at 162.

269. Amaro, *supra* note 73, at 438.

270. See, e.g., Mays et al., *supra* note 22, at 80.

271. See COHEN, *supra* note 45, at 139 ("African Americans came to see this disease as something they did not need to be concerned about, something completely outside of their communities."); see also SEDGWICK, *supra* note 63, at 5 n.8 (noting the obsessive focus on gay men and "discursive erasure" of other vulnerable groups, including "intravenous drug users, sex workers, wives and girlfriends of closeted men").

272. See COHEN, *supra* note 45, at 129 (stating that "[t]his population most often received their care from 'Medicaid mills' or . . . emergency rooms").

hospitals dealt with both populations (IV drug users and openly gay men), but the former came in through the emergency rooms and received less attention than the wealthier gay men.²⁷³ “Providers seemed uninterested in the sickness of poor drug users, many of whom were people of color. Ideologies of exclusion that defined their lives as expendable had become systematically integrated into a public health system purportedly responsible for their well-being.”²⁷⁴

Another obstacle was the resistance of drug users to seek medical care for fear of prosecution or other interventions that would interrupt their habit.²⁷⁵ Because of the lack of health care, many drug users died before they could be identified as suffering from AIDS.²⁷⁶ If these structural hurdles had not existed, HIV/AIDS might not have become so firmly affixed in the public mind as a gay (white) problem, instead of a disease also impacting many black IV drug users.²⁷⁷ This privileging of white gay men’s health also shows how a colorblind queer/straight binary masks the complexity of power relations.²⁷⁸ An intersectional analysis demonstrates that in this case, heterosexual privilege was undercut by the stigma attaching to drug use, blackness, and poverty.²⁷⁹ Ultimately, Cohen suggests that the identification of AIDS as a gay disease functioned as a double-edged sword. It imposed a great stigma on gay men, who were presumptively considered AIDS carriers, a legacy that would resurface in DL discourse. Yet it also galvanized the gay community to political activism and community organizing.²⁸⁰ The black community failed to organize around AIDS in part because of the disproportionate focus on

273. *See id.* (noting that drug users were likely to depend on emergency rooms for care); *id.* at 135 (stating that drug users, many of whom were of color “never received the attention they deserved from the CDC, in part because of systemic biases that made them invisible to the official record keeping of the CDC, but also because of the personal attitudes of researchers who viewed this population as . . . unworthy victims”).

274. *Id.* at 135; *see also* Herek, *supra* note 137, at 268 tbl.1 (finding that public attitudes toward IV drug users were significantly lower than any other stigmatized group listed in the survey, including blacks, Mexican Americans, homosexuals, bisexuals, and people with AIDS).

275. *See* COHEN, *supra* note 45, at 129-30.

276. *See id.* at 130.

277. *See id.* at 127 (“[W]e are left to wonder how the response of African Americans and Latinos/as in particular would have evolved if faced from the very beginning with the framing of AIDS as a disease of black and Latino communities.”).

278. *See* Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, in BLACK QUEER STUDIES 21, 31, 36 (E. Patrick Johnson & Mae G. Henderson eds., 2005); *see also* Bérubé, *supra* note 266, at 257 (“Some gay white men explicitly reject, as nongay, this broader goal of joining activists who stand and work at the intersections of the many struggles to achieve social justice and to dismantle interlocking systems of domination.”).

279. *See* COHEN, *supra* note 45, at 137 (noting “the lack of power and influence possessed by the heterosexual population thought to be at risk”); *cf.* Cohen, *supra* note 278, at 26 (discussing sexual regulation of women on welfare).

280. *See* COHEN, *supra* note 45, at 182.

openly gay white men. However, the desire of blacks, particularly black governmental leaders, to avoid taking on an additional racial stigma also explains the lack of traction regarding AIDS in the black community.²⁸¹

IV. THE FAILURE OF HIV TRANSMISSION LAWS

Because HIV continues to be viewed primarily as a problem of gay men and IV drug users, nongay-identified MSM and their female partners may not see themselves as at risk. Although public health scholars have to some extent moved away from a focus on gay identity and adopted more inclusive terms such as “MSM,” HIV prevention and testing efforts remain highly concentrated in gay communities. Under current law, this underinclusive approach to HIV testing is paired with HIV-specific criminal laws. Criminal laws in many states impose strong penalties on people who know they are HIV positive and fail to disclose their status to a sexual partner. But, as I explain below, these laws have done little to stem HIV transmission, partly because they fail to engage the complex dynamics of many sexual relationships and reflect a simplistic perpetrator-victim dichotomy like that fostered by DL discourse. My principal proposal here is a legally mandated expansion of HIV testing beyond so-called “risk groups,” which would reach some of the people who inadvertently transmit HIV, which appears to be a bigger problem than knowing transmission. Rather than focusing on individual bad actors, I recommend a legal focus on public health interventions, which may alter the conditions in which people negotiate the risks of sexual intimacy.

From 1986 to 2001, at least twenty-five states enacted criminal HIV exposure or transmission statutes.²⁸² A handful of notorious cases in which HIV-positive people were perceived as deliberately or recklessly spreading HIV infection spurred states to enact HIV-specific criminal sanctions and/or increase penalties under existing general criminal laws.²⁸³ The most highly publicized case involved Nushawn Williams, a young black man who was believed to have had sex with forty-eight women and girls in upstate New York, many of whom were white, after he was informed of his positive

281. *See id.*; *see also id.* at 313 (discussing efforts by black representatives to downplay connection between AIDS in black community and homosexuality and focus on “those respectable and innocent segments of communities of color—women and children”); *id.* at 201 (noting that black newspapers “often used [the stories of unsuspecting black women] as a respectable way to bring along ‘the black community’ in the fight against AIDS”).

282. *See* Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J. L. MED. & ETHICS 327, 327-28 (2004); Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J. L. MED. & ETHICS 239, 241 (2002).

283. Preexisting general state criminal laws also would have permitted prosecution of HIV transmission in certain instances. *Cf.* Lazzarini et al., *supra* note 282, at 241 (noting that whether HIV would be covered by statutes criminalizing exposure to communicable or sexually transmitted diseases would depend on the definition of relevant terms in the statute).

status.²⁸⁴ It was reported that thirteen of Williams' partners became positive, and some became pregnant, although not necessarily by him.²⁸⁵ Although the media labeled Williams an "AIDS monster," even this most extreme case raises questions sometimes glossed over by the media.²⁸⁶ For example, Williams claimed that he had sex with some of these women before he learned that he was HIV positive, which would have prevented prosecution for infection under most HIV transmission laws.²⁸⁷

In this Part, I argue that the dominant criminal law model, like DL discourse, fails to come to terms with the complexities of many sexual relationships and the attendant moral ambiguities regarding HIV transmission risk. I first seek to blur the perpetrator-victim divide that undergirds most HIV transmission statutes by drawing on empirical studies on the varied nature of HIV risk and complex norms regarding discussing HIV status. Second, I argue that the law's emphasis on punishing individual perpetrators has done little to apprehend HIV transmission, which could be addressed more effectively by public health interventions.

A. Positive Perpetrators and Negative Victims

HIV transmission statutes generally impose a clear and broad legal obligation on people who are positive to disclose their HIV status to all sexual partners. Almost all of these laws require that the positive person know of his HIV status, but not that he intend to infect another.²⁸⁸ Such laws generally require the positive partner to disclose his status prior to sex, regardless of whether a sex partner inquires about HIV. Some laws extend the disclosure requirement not only to vaginal or anal intercourse but also to oral sex and even digital masturbation of a partner and stimulation with a sex toy or other object.²⁸⁹ Further, most such statutes do not take into account whether the positive partner used a condom during the sex acts, even though condoms reduce risk dramatically.²⁹⁰ The law acts as if the risk of HIV transmission is

284. See Jennifer Frey, *Jamestown and the Story of 'Nushawn's Girls,'* WASH. POST, June 1, 1999, at C1. The Williams case spawned over 700 media articles—far more than any other case of HIV transmission. See Lazzarini et al., *supra* note 282, at 246 (finding that the Williams case produced 727 articles and next most popular case generated 335 articles).

285. See Frey, *supra* note 284, at C1.

286. See Carlos Ulises Decena, *Infectious Lives*, 11 GLQ: J. LESBIAN & GAY STUD. 635, 635 (2005) (book review) (noting "the media's insistent effacing of complexity for the sake of creating a narrative of 'good' versus 'evil'"); *id.* at 636 (indicating that Williams was described as an "AIDS monster").

287. See Frey, *supra* note 283, at C1. (suggesting that Williams had sex with six of the thirteen sex partners who became HIV-positive before he was diagnosed).

288. See Lazzarini et al., *supra* note 282, at 246-47.

289. See Galletly & Pinkerton, *supra* note 282, at 328.

290. See *id.*; Lazzarini et al., *supra* note 282, at 241 ("Only two laws distinguish between protected sex (when a condom is used during intercourse) and unprotected sex.");

the same whether the sex is protected or unprotected. Most strikingly, most such statutes do not differentiate between situations in which the positive person infects his partner or merely exposes his partner to the risk of HIV infection.²⁹¹

By contrast to this strict obligation on the positive partner, such laws ask little of sexual partners of positive people, imagining them as passive victims. The law does not require that such people ask whether their sex partners are positive or engage in activity that might place them into an HIV risk group, such as MSM or IV drug users. The statutes generally consider these questions irrelevant in determining the culpability of the positive partner. In one unusual case, a military court went so far as to uphold conviction of a defendant, a private in the army, for consensual sodomy and wanton disregard for human life even though his female partner both knew he was positive and may have even asked him *not* to wear a condom.²⁹²

Many HIV transmission statutes seem to be exaggerated responses based on unsubstantiated fears of infection. HIV transmission statutes tend not to be tailored to the actual risk posed by engaging in particular sex acts with a positive person. Legislators and judges appear to misunderstand the actual risk of infection based on a single sexual contact with a positive partner. Some readers might be surprised to learn how rarely a single sexual contact with a positive person results in the transmission of HIV. A few statutes criminalize a positive person sexually stimulating a negative person with his fingers or a sex toy, activities that are widely considered to pose no risk of infection and are promoted by some public health officials as safe alternatives to anal or vaginal intercourse.²⁹³ A second category of behavior, including cunnilingus, anilingus, and being the insertive partner in fellatio, carries a risk that is “generally (though not universally) considered to be negligible.”²⁹⁴ Performing fellatio as the receptive partner is considered to pose a greater, but still relatively low risk, perhaps as much as 1 in 2500.²⁹⁵ Anal and vaginal sex are

see also infra text accompanying note 300.

291. *See, e.g., State v. Gonzalez*, 154 Ohio App. 3d 9, 2003-Ohio-4421, 796 N.E.2d 12, at ¶ 97 (“It was not necessary to decide whether the victim developed HIV As soon as the sexual conduct occurred without disclosure, the crime was committed.”).

292. *See United States v. Morris*, 30 M.J. 1221, 1228 (A.C.M.R. 1990). This case was brought under general military law, not an HIV-specific statute. The court interpreted the law to forbid a positive person from engaging in unprotected sex, rather than merely requiring disclosure prior to sex, like most HIV-specific statutes. *See id.*

293. *See, e.g., Gonzalez* at ¶ 32 (quoting Ohio statute prohibiting “without privilege to do so, the insertion, however, slight, of any part of the [positive person’s] body or any instrument, apparatus, or other object into the vaginal or anal cavity of another” (citation omitted)); *see also Galletly & Pinkerton, supra* note 282, at 329 (analyzing Arizona and Michigan statutes).

294. Galletly & Pinkerton, *supra* note 282, at 328.

295. *See id.* Factors that increase the risk of infection include cuts or sores in the receptive partner’s mouth. Scholars know less about transmission through oral sex than they do about anal and vaginal transmission in part because most subjects engage in oral and

considered the riskiest activities.²⁹⁶ Even within this category, however, there are important distinctions. With respect to vaginal sex, the risk is 1 in 1000 for male-to-female and 1 in 2000 for female-to-male transmission.²⁹⁷ A man who performs the insertive or “top” role in anal sex with a positive partner (male or female) is estimated to take on a risk of 1 in 2000.²⁹⁸ By far the riskiest activity is performing the receptive or “bottom” role in anal sex with a positive top, which carries a 1 in 50 risk of infection.²⁹⁹ However, properly used condoms reduce the risk of transmission by as much as 90%.³⁰⁰ While some of these risks remain cause for concern, they are also “very small for most of these activities and . . . negligible for the remainder.”³⁰¹

One would not gather the above-mentioned distinctions by inspecting HIV transmission statutes, which tend not to differentiate between sexual acts and not to require greater penalties for actual infection than for exposure to a small risk of infection. Given the sweeping scope and blunt nature of most of these statutes, one might expect them to yield a substantial number of prosecutions and convictions. In fact, people are rarely charged under these laws. An analysis by Zita Lazzarini, Sarah Bray, and Scott Burris found no evidence of systematic enforcement of these laws based on a search of Westlaw and Lexis databases for judicial opinions and news reports of cases that may not have produced opinions from 1986 to 2001.³⁰² The study found just 211 prosecutions alleging sexual exposure, a number dwarfed by the number of prosecutions for sexual offenses such as rape or prostitution in a single year.³⁰³ “A quarter of the states had no prosecutions of any kind. Thirty-six states and territories had five or fewer prosecutions under generic criminal statutes or HIV-specific provisions. Only thirteen jurisdictions had ten or more prosecutions.”³⁰⁴ Moreover, the authors found that the prosecutions were typically aimed at people who had broken additional criminal laws: “More than 70 percent had committed their HIV-related illegal act in the course of a sex

vaginal sex, oral and anal sex, or all three. Thus, it can be challenging identifying subjects who engage in only oral sex. See *Sex Research Update*, 15 CAN. J. HUM. SEXUALITY 47, 49 (2006).

296. See *id.*

297. See *id.*

298. See *id.*

299. See *id.*

300. See *id.*

301. *Id.*; see also *Guevara v. Superior Court*, 73 Cal. Rptr. 2d 421, 424 (Ct. App. 1998) (finding no “evidentiary basis” for claim that it is likely that “one or two individual incidents of unprotected sex between an HIV-positive male and an uninfected female would result in transmission of HIV to the female”). Of course the likelihood of infection increases if one is having regular, unprotected sex with a positive partner.

302. See Lazzarini et al., *supra* note 282, at 241, 247.

303. See *id.* at 245 tbl.2, 247. Including other modes of potential transmission, such as biting, the total number of prosecutions was 316. *Id.* at 245 tbl.2.

304. *Id.* at 247.

crime, an assault, or an act of prostitution.”³⁰⁵ Although the authors could not determine the outcome of a significant minority of the prosecutions, 80% of the remainder produced convictions.³⁰⁶

A subsequent study by some of the same authors cast further doubt on the efficacy of HIV transmission laws.³⁰⁷ The study utilized surveys in two cities that are subject to different legal regimes, Chicago and New York. New York, despite being the home of Nushawn Williams, has no HIV-specific law.³⁰⁸ Illinois punishes the “criminal transmission of HIV,” which happens when a person, “knowing that he or she is infected with HIV . . . engages in intimate conduct with another.”³⁰⁹ The statute defines “intimate conduct” to require “exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV,” which appears to permit condom use as a substitute for disclosure.³¹⁰

The survey respondents were members of established risk groups, MSM and/or IV drug users, and were recruited from gay clubs and bars, needle exchange programs and places known for drug selling.³¹¹ Nearly 500 respondents answered questions about their knowledge of the law and whether they had used a condom during their last sexual encounter involving anal or vaginal intercourse.³¹² A slight majority was made up of people of color.³¹³ The study found broad support for the morality of disclosing HIV status and using condoms,³¹⁴ but little indication that the law shaped these norms: “Neither anal nor vaginal sex without a condom was significantly associated with beliefs about whether law requires condom use.”³¹⁵ Respondents displayed concern for the harmful ramifications stemming from unsafe sex, but

305. *Id.*

306. *See id.* at 244-45.

307. Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467 (2007).

308. *See id.* at 490.

309. 720 ILL. COMP. STAT. 5/12-16.2 (2006).

310. *Id.* (quotation marks omitted).

311. *See Burris et al.*, *supra* note 307, at 490-91.

312. *See id.* at 492-94.

313. *See id.* at 495. About one-third of the sample reported being HIV-positive; many did not know whether they were positive. *See id.* at 495-96.

314. *See id.* at 496 (“As a group, the respondents strongly agreed that it was morally right for people with HIV to use condoms and disclose their status to partners.”).

315. *Id.* at 497. The authors did find a significant interaction between state of residence and condom use, that is, “people from Illinois were more likely than people in New York to report condom use during their most recent episode of vaginal sex.” *Id.* at 501. The same did not hold for anal sex. Although the correlation regarding vaginal sex creates the possibility that the law has some effect, there are also many other reasons that could explain the difference. Since beliefs about the law did not correlate with condom use, the authors were not persuaded by the interaction between state of residence and condom use. *See id.* at 502-03.

again such concern “does not depend at all upon the existence of HIV-specific laws or the belief that the law requires specific acts by people with HIV.”³¹⁶

B. *Complexity and Culpability*

Studies on the sexual practices of MSM reveal the complexity of sexual scenarios that may result in HIV transmission and assist in explaining the disconnect between legal prohibitions and actual sex practices.³¹⁷ Based on their belief that gay men are the primary group at risk of HIV, scholars have concentrated on uncovering sexual norms and negotiation practices among MSM.³¹⁸ There appears to be limited data about condom usage between black women and black male partners, particularly black MSM. Although the following discussion of sexual norms among MSM does not automatically apply to male-female sexual relations, my hope is that this exploration yields some tentative insights. The investigation of sexual norms among MSM is valuable in its own right. This is so because HIV-transmission statutes apply to a man infected by a man, as well as a woman infected by a man.³¹⁹ Understanding the complexity of norms regarding safe sex should help us understand why few positive men have been prosecuted for infecting a male partner.³²⁰

I initially try to reveal this complexity by offering some hypothetical sexual scenarios in which arguably both partners have some responsibility for discussing HIV and safe sex. These scenarios are intended to counter the assumption of HIV transmission laws that there is always an obvious perpetrator and victim. Assume in the following scenario that the first person is HIV-negative, and the second is HIV-positive.

316. *Id.* at 503. Some might argue that HIV transmission laws have expressive value in establishing a moral baseline for society. However, these findings suggest that the role of law in creating moral standards in this context is uncertain.

317. Clearly, there are other factors that also explain the low prosecution rate. Principal reasons likely include stigma and norms of sexual privacy/shame. Most states appear not to protect the identity of a victim of HIV transmission as they would a rape victim. A person who learns that he was infected by a partner might blame himself for failing to use protection or ask about HIV status. Even if he does not accept any blame and sees his partner as the sole wrongdoer, he may be ashamed about his sexual orientation, the particular sex acts he engaged in (i.e., “bottoming”), that he chose a partner that infected him, and/or having HIV. A person who was exposed to the risk of HIV but ended up negative may feel lucky to be alive and may see prosecuting his HIV-positive ex-partner as pointlessly cruel.

318. *Cf.* COHEN, *supra* note 45, at 129-30.

319. Of course, the laws also apply to women who infect men and women who infect women, but these modes of transmissions are not as common. *See supra* text accompanying notes 297-99 (explaining that the risk of a positive man infecting a negative woman during vaginal or anal sex exceeds the risk of a positive woman infecting a negative man during those sexual acts).

320. As noted earlier, a study found just 211 prosecutions of men and women alleging sexual exposure. *See supra* text accompanying note 303.

- Linda goes to a Swingers club with a boyfriend in Chicago late on Friday night. She attended this club before with an ex-boyfriend. She knows that many of the men in attendance are bisexual. On Friday, she meets an attractive man by the bar. They do several lines of cocaine and have unprotected sex. No one brings up HIV or using a condom.
- After a lonely weekend in San Francisco, Todd logs onto a website for men who enjoy “bareback” or unprotected sex with other men. Although he formerly canceled his website membership, on this Sunday, he quickly connects with a man who lives five blocks away. The man tells him to unlock his door and get ready for casual sex. Todd reluctantly complies; some minutes later, the man enters the house and immediately has bareback sex with Todd.
- Anita plans a dinner at her home in Los Angeles for her boyfriend, Julio, who is being released from prison after serving ten years in the state penitentiary for selling drugs. Her brother, also an ex-con, has told her how during his time in the state penitentiary he felt pressure to join a prison gang and rape men or become a target of rape himself. After a romantic dinner, Julio and Anita have sex. When Anita suggests that they use a condom, Julio refuses because he “wants to feel close to you” after being away so long. Anita goes along with this.
- Matt is surprised to see Richard, a very sexy man, cruising him at the local supermarket in Seattle. The two strike up a conversation and exchange numbers. Later that night, they go to dinner and have an enjoyable conversation. Richard invites Matt back to his place. After making out on the couch, Matt asks to use the restroom to freshen up before sex. Richard recalls that he left his HIV-related medications on the sink in the restroom. Matt returns, and they have unprotected sex without discussing HIV. Although Matt typically insists on using condoms, he does not want to take a chance on upsetting Richard, whom he sees as “out of his league,” and interrupting the romantic encounter.
- Shante is out with her girlfriends at a bar in Detroit when Derrick, a tall, handsome man approaches her. She is taken with his deep voice, enchanting eyes and smooth talk. They flirt for a few hours, and at the end of the night the man asks to take her home. Monique, one of Shante’s girlfriends, warns her that “Derrick’s

face looks a little funny.” Monique says that his face looks gaunt, with pronounced cheekbones, not unlike the facial wasting experienced by a gay man with AIDS who works at her beauty salon. Shante, who has had several drinks, tells Monique she’s being ridiculous. “A man that strapping and masculine could *not* have AIDS,” she insists. Shante and Derrick retire to her house, where they have sex without a condom. Since she is on birth control, Shante is not concerned.

These scenarios represent multiple realistic ways in which an HIV-negative person might become infected through sex with a positive person. Like the unresolved empirical question of DL prevalence, one cannot say how often these situations, or other analogous scenarios, actually occur. But they do help us imagine how a person might become infected with HIV without a clear “perpetrator” and “victim.” In each case, a person knew or should have known of a heightened risk of HIV and yet chose to have unprotected sex for reasons that range from emotional attachment to misconceptions about masculinity to lack of confidence in dating a more attractive partner.

In this Subpart, I explore three themes that emerge from the literature on condom usage and the negotiation of safe sex. First, sexual partners often do not discuss HIV and under some circumstances, the positive and negative partner might act under contradictory assumptions. Second, relationship status matters. The degree of intimacy in a relationship appears to determine the extent to which a positive partner discloses his HIV status, but intimacy also increases the likelihood of unsafe sex. Positive men are most likely to disclose when in a relationship, while they tend to feel a lesser obligation to disclose to casual sexual partners. Third, context matters. Positive men may assume that sex partners in certain casual sex markets are themselves positive or expect not to have a discussion about HIV before sex.

First, sexual partners often do not discuss HIV and condoms and might act under contradictory assumptions. CDC scientists and university professors collaborated to produce the Seropositive Urban Men’s Study (SUMS), which studied a racially diverse set of HIV-positive MSM in New York and San Francisco.³²¹ The study revealed divergent assumptions between positive and negative men when meeting a new sex partner. Some positive men reported that they assumed a negative partner would declare his status and request a condom, especially if the negative partner intended to perform the bottom

321. See Perry N. Halkitis, *Understanding the Sexual Lives of HIV-Positive Gay and Bisexual Men: An Overview of the Seropositive Urban Men’s Study*, in *HIV+ SEX: THE PSYCHOLOGICAL AND INTERPERSONAL DYNAMICS OF HIV-SEROPOSITIVE GAY AND BISEXUAL MEN’S RELATIONSHIPS* (Perry N. Halkitis et al., eds., 2005) [hereinafter “HIV+ SEX”]. Men of color made up 70% of the sample. Over 80% of the men identified as gay/queer/homosexual, 10% identified as bisexual, and 6% did not identify with any of these labels. *See id.* at 11.

role.³²² When a partner did not take such precautions, the positive men assumed that he was also positive and/or unconcerned about HIV transmission. However, in some instances, the positive partner disclosed his status at some point *after* sex and learned that his partner was in fact negative and was shocked that he had not disclosed his positive status or used a condom.³²³ In another study, instead of discussing HIV status, men inferred it from sex role.³²⁴ Because the bottom role poses a greater risk of HIV infection, some men apparently assume that anyone willing to bottom is already infected or indifferent to the risk.³²⁵ In short, positive and negative men may disagree as to which partner bears the responsibility for asking about HIV status and condom use. A background assumption of the positive men may be that HIV rates are extremely high in certain communities, such as the Castro in San Francisco, and thus they are likely to meet mostly men who are already positive, which eliminates the need for discussion.³²⁶

The assumption of HIV-positive status might seem to have little applicability in a MSM-female sexual relationship. However, there may be certain risky contexts, such as the sex club that Linda frequented,³²⁷ in which women who have sex without a condom are assumed to be positive or indifferent to the risk. A DL man might make similar assumptions about a female sexual partner who is known to have multiple sexual partners. The more likely scenario, with respect to the DL, might be that the DL man does not view himself or his female partner as being at risk for HIV infection because he does not see himself as gay. Even when a MSM recognizes that he is at risk, the branding of HIV as a “gay disease” shapes his sexual interactions with women. Such a man might know that suggesting condom use with female partners will cast suspicion on his sexuality.³²⁸ Thus, the creation of risk groups—and the implicit corollary assumption that people who fall outside such groups need not worry about HIV³²⁹—helps instill a silence about HIV in male-female relationships.

322. See Ann O’Leary, *Guessing Games: Sex Partner Serostatus Assumptions Among HIV-Positive Gay and Bisexual Men*, in *HIV+ SEX*, *supra* note 321, at 121-23, 125, 129.

323. See *id.* at 122-23.

324. See *id.* at 125-26.

325. See Nicolas Sheon & G. Michael Crosby, *Ambivalent Tales of HIV Disclosure in San Francisco*, 58 SOC. SCI. & MED. 2105, 2116 (2004) (quoting one survey participant’s conclusion that “[i]f a partner is willing to ‘bottom’ they must already be positive or willing to take the risk”).

326. See O’Leary, *supra* note 322, at 126 (quoting one individual as saying “I assume everybody in the Castro’s HIV-positive”).

327. For an example of an extensive national list of swingers clubs, see <http://www.swinger.net/> (last visited Mar. 25, 2009).

328. See Kathleen M. Sullivan, *Male Self-Disclosure of HIV-Positive Serostatus to Sex Partners: A Review of the Literature*, J. ASS’N NURSES IN AIDS CARE, Nov.-Dec. 2005, at 33, 36 (“Some men choose not to reveal their HIV-positive status because they did not want to elicit suspicions about their sexual orientation.”).

329. See Ronald A. Brooks et al., *Sexual Risk Behavior Has Decreased Among Men*

Second, relationship status matters. Studies indicate that most positive men feel a moral obligation to tell their primary partners, although some believe that using condoms reduces this obligation.³³⁰ Similarly, a study of heterosexual male and female college students indicated that the more positively subjects felt about their sexual partner with respect to love, trust, and commitment, the less likely they were to be influenced by the fear of AIDS in deciding whether to use condoms.³³¹ By contrast, many positive men feel a minimal responsibility to disclose to casual sex partners due to the lack of intimacy in such interactions. In the words of one author, the attitude is “let[] the buyer beware” when engaged in casual sex.³³² Recall that a study of self-identified DL men reported that “few DL-identified MSM . . . currently had a female main partner—most female partners reported by these men were nonprimary partners.”³³³ If this study accurately represents most sex between DL men and women, such men’s failure to disclose might stem in part from the casual nature of the interactions.

Third and relatedly, studies of positive men reveal that many think context determines a duty to disclose. According to this norm, men who seek sex in certain spaces, such as public parks or sex parties, should expect their partners to be positive.³³⁴ Under such circumstances, it may be considered bad manners to raise HIV since it is a given and something that most men do not want to think about.³³⁵ Often people use drugs or alcohol to facilitate an escape from the awareness of HIV risk.³³⁶ Although studies have focused on MSM sites of casual sex, such as bathhouses and parks, there may be analogous settings in

Who Have Sex with Men in Los Angeles but Remains Greater Than that Among Heterosexual Men and Women, 20 AIDS EDUC. & PREVENTION 312, 321 (2008) (“For many heterosexual men and women, HIV may not be perceived as a real threat. In many communities, people still perceive of HIV as primarily a gay disease and may therefore not see the need to concern themselves with practicing safer sex.” (citation omitted)); *see also* Constance J. Pilkington et al., *Is Safer Sex Necessary with a “Safe” Partner? Condom Use and Romantic Feelings*, 31 J. SEX RES. 203, 205 (1994) (finding that 87% of college students who used condoms cited contraception, rather than AIDS, as the most important factor in deciding to use condoms).

330. *See, e.g.*, Sullivan, *supra* note 328, at 38.

331. *See* Pilkington et al., *supra* note 329, at 206-07.

332. Sullivan, *supra* note 328, at 38 (citation omitted).

333. Wolitski et al., *supra* note 15, at 526; *see also* Montgomery, et al. *supra* note 29, at 834 (finding that most HIV-positive men who had sex with men and women reported one to five male and one to five female partners in prior five years, contrary to “the common belief that bisexual men often are in a committed relationship with a woman and have many male sex partners”).

334. *See, e.g.*, Michael J. Stirratt, *I Have Something to Tell You: HIV Serostatus Disclosure Practices of HIV-Positive Gay and Bisexual Men with Sex Partners*, in HIV+ SEX, *supra* note 321, at 101, 104.

335. *See, e.g.*, Sheon & Crosby, *supra* note 325, at 2112, 2116 (discussing perceptions that bringing up HIV “ruin[s] the mood”).

336. *See id.* at 2114 (“Substance abuse during sex provided many respondents with a justification for their risk behavior.”).

which male-female couples meet for sex and our normal assumptions about a duty to disclose do not apply. For instance, because Linda met her partner at a sex club frequented by bisexual men, used cocaine with him, and failed to ask about HIV or condoms, her partner might have assumed from this context that she was positive. Anita also was aware that Julio had been in prison, and she understood this to be a context in which unprotected sex between men is common.

I raise these scenarios not to suggest that the HIV-positive partner has done nothing wrong in failing to disclose his HIV status, but to argue that the other partner might share some responsibility. This discussion also illuminates reasons why the other partner might not press charges even if she learned of the illegal failure to disclose. Such a person might accept some responsibility for failing to insist on using a condom in light of the scenario indicating heightened risk. Especially where the person does not become infected as a result of unprotected sex (which is entirely probable based on a one-time exposure), she is likely not to turn to the criminal law and submit to the invasion of privacy required to bring a case against her HIV-positive sex partner.

C. A Structural Approach to HIV Risk

Do these complexities and the minimal impact of existing criminal laws mean the law is powerless to halt the spread of HIV? Not necessarily. Although the analysis above does cast doubt on the viability of criminal regulation, focusing on structural conditions that engender HIV infection offers a better alternative. A critical limitation of most HIV-transmission statutes is that they require the defendant to *know* he is HIV positive, and many people who are positive simply do not know.³³⁷ Studies suggest that about 25% of people living with HIV do not know of their status.³³⁸ Moreover, HIV-positive people who are unaware account for a disproportionate share of transmission to negative partners—at least half and as much as two-thirds.³³⁹ This is because people who learn they are positive generally change their sexual behavior and may gain access to highly active antiretroviral therapy (HAART), which can reduce their viral load to low or undetectable levels.³⁴⁰ People with low viral

337. See, e.g., Gary Marks et al., *Estimating Sexual Transmission of HIV from Persons Aware and Unaware that They Are Infected with the Virus in the USA*, 20 AIDS 1447, 1447 (2006). Indeed, these laws could create the perverse incentive not to get tested because only those who know they are positive are subject to the law's disclosure requirement. However, in practice, it appears that few know about such laws and they have little impact on sexual decision making. See *supra* text accompanying notes 314-15.

338. See Marks et al., *supra* note 337, at 1447.

339. See, e.g., *id.* at 1448-49; see also Rachel Smith et al., *Beyond the End of Exceptionalism: Integrating HIV Testing into Routine Medical Care and HIV Prevention*, 5 EXPERT REV. ANTI INFECTION THERAPY 1, 1 (2007).

340. See Marks et al., *supra* note 337, at 1447.

loads are very unlikely to transmit HIV when having unprotected sex.³⁴¹ A meta-analysis of studies comparing the sexual practices of people who were aware of their positive status with those who were not found that “the prevalence of high-risk sexual behavior is markedly lower in HIV+ persons aware of their seropositive status”—approximately 68% lower.³⁴² A study that focused on black men who have sex with men and women (MSMW) found differences between HIV-positive MSMW and other MSMW in terms of their disclosure and sexual practices.³⁴³ Specifically, HIV-positive MSMW were more likely to have disclosed their same-sex behavior to their female partners, and they were much less likely to have engaged in unprotected sex with female and male partners than HIV-negative MSMW and MSMW who did not know their HIV status.³⁴⁴ But blacks, including black women and nongay-identified MSM, are less likely to know they are positive and less likely to be on HAART.³⁴⁵ A multi-city survey of over 900 black MSM found that 93% of those who tested positive did not know their status prior to the test.³⁴⁶ As described in Subpart III.C, the branding of HIV as a problem for gay men who live a lifestyle more common among whites misled black people about the extent to which they were at risk. As a result, blacks may not sufficiently recognize their risk, obtain testing, and receive treatment.³⁴⁷

341. *See id.* at 1448.

342. Gary Marks et al., *Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States*, 39 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 446, 448 (2005).

343. *See* Jennifer L. Lauby, *Sexual Risk Behaviors of HIV-Positive, HIV-Negative, and Serostatus-Unknown Black Men Who Have Sex with Men and Women*, 37 ARCHIVES SEX. BEHAV. 708, 717 (2008). This study likely uncovered more men meeting the standard media definition of down low than other studies because it used respondent-driven sampling, drawing on personal networks to identify subjects, instead of relying on men found at gay-identified venues. *See id.*

344. *See id.*

345. *See id.* at 709 (“The prevalence of unrecognized HIV infection is highest among Black persons compared with all other racial and ethnic groups, and unrecognized HIV infection rates are particularly high among Black MSM.” (citation omitted)); David Malebranche, *Adverse Health Outcomes Among Black Americans*, POSITIVELY AWARE, Nov./Dec. 2005, at 26, 27 (“African Americans . . . are less likely to receive HAART.”). There are many reasons that contribute to this disparity; they include cultural differences which may impact communication between black patients and nonblack doctors, doctors’ stereotypical beliefs that black patients will not follow their advice, and “pervasive distrust of medical and public health messages and personnel, combined with widespread support of HIV conspiracy theories.” *Id.* at 28; *see also* Robinson, *supra* note 233, at 1110-11 (discussing support in black community for conspiracy theories).

346. Ctrs. for Disease Control & Prevention, *Unrecognized HIV Infection, Risk Behaviors, and Perceptions of Risk Among Young Black Men Who Have Sex with Men—Six US Cities, 1994-1998*, 51 MORBIDITY & MORTALITY WKLY. REP. 733 (2002), *reprinted in* 288 J. AM. MED. ASS’N 1344, 1347 (2002). The Lauby study, which focused on men who have sex with men and women found a lower, but still disturbing prevalence rate of 39%. *See* Lauby, *supra* note 343, at 717.

347. Although blacks are more likely to report being tested for HIV than whites, *see*

The law must think beyond the established risk groups in order to reach those who have been left out, while still channeling resources to the groups hardest hit by HIV. The CDC has recommended that health care providers institute routine HIV testing for all people ages 13 to 64.³⁴⁸ It based this decision on the following findings:

- 1) HIV infection is a serious health disorder that can be diagnosed before symptoms develop; 2) HIV can be detected by reliable, inexpensive, and noninvasive screening tests; 3) infected patients have years of life to gain if treatment is initiated early, before symptoms develop; and 4) the costs of screening are reasonable in relation to the anticipated benefits.³⁴⁹

Moreover, routine testing is superior to offering testing only to members of established risk groups, because the latter “fails to identify a substantial number of persons who are HIV infected.”³⁵⁰ Studies suggest that a “substantial number of persons, including persons with HIV infection, do not perceive themselves to be at risk for HIV or do not disclose their risks.”³⁵¹ Further, “[r]outine HIV testing reduces the stigma associated with testing that requires assessment of risk behaviors. More patients accept recommended HIV testing when it is offered routinely to everyone, without a risk assessment.”³⁵² One survey found that 31% of respondents said “they would be concerned that people would think less of them if they found out they had been tested [for HIV].”³⁵³ Making HIV testing a standard aspect of health care for everyone can change norms and reduce stigma.³⁵⁴

Shahul H. Ebrahim et al., *Race/Ethnic Disparities in HIV Testing and Knowledge About Treatment for HIV/AIDS: United States, 2001*, 18 AIDS PATIENT CARE & STDs 27, 32 (2004), that does not establish whether testing among blacks is sufficient because HIV prevalence is much higher among blacks. It also does not tell us whether there are subsets of the black community that are at high risk yet not being tested. As the CDC noted in a report, “since 1994, the annual number of cases among blacks, members of other racial/ethnic populations, and persons exposed through heterosexual contact has increased.” BERNARD M. BRANSON ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, REVISED RECOMMENDATIONS FOR HIV TESTING OF ADULTS, ADOLESCENTS, AND PREGNANT WOMEN IN HEALTH-CARE SETTINGS 2 (2006), available at <http://www.cdc.gov/mmwr/pdf/rr/rr5514.pdf>; see also *id.* (“Persons tested late in the course of their infection were more likely to be black or Hispanic and to have been exposed through heterosexual contact . . .”). As of 2002, between 38 and 44% of adults in the United States had been tested for HIV. See *id.*

348. See BRANSON ET AL., *supra* note 347, at 7.

349. *Id.* at 4 (citation omitted).

350. *Id.* at 5 (citations omitted).

351. *Id.* (citation omitted).

352. *Id.* (citations omitted).

353. KAISER FAMILY FOUNDATION, HIV/AIDS POLICY FACT SHEET: HIV TESTING IN THE UNITED STATES 1, (2004) <http://www.kff.org/hivaids/upload/Updated-Fact-Sheet-on-HIV-Testing-in-the-U-S.pdf>.

354. See Lawrence O. Gostin, *HIV Screening in Health Care Settings: Public Health and Civil Liberties in Conflict?*, 296 J. AM. MED. ASS’N 2023, 2024 (2006) (arguing that universal testing is “less stigmatizing because it does not single out vulnerable populations and applies equally to all socioeconomic classes and racial groups”).

Some public health scholars have argued for a focus on encouraging DL men to come out in order to reduce HIV transmission.³⁵⁵ This strategy contains considerable flaws beyond its reflexive assumption that disclosure of sexual identity is always a good thing.³⁵⁶ First, it assumes that if women knew their partner was a MSM, they would no longer have sex with him.³⁵⁷ Yet as I have argued above, some women know and stay involved with a MSM for a variety of reasons.³⁵⁸ Moreover, a significant number of out young men report recent sex with women.³⁵⁹ And studies suggest that out black men engage in more risky sex and have higher HIV rates than those who do not disclose their sexual involvement with men.³⁶⁰ The risk-based strategy ultimately founders because it depends on DL men to out themselves to their doctors or others by asking for an HIV test. Moving away from risk groups offers a promising alternative. Studies show high acceptance rates when HIV testing is offered as a matter of course.³⁶¹ Accordingly, in 2006, the CDC recommended that health-care providers incorporate HIV testing into the standard set of tests offered patients and reduce procedural obstacles, such as requiring separate, written consent.³⁶² The recommendations call for oral or written notice that testing will be conducted unless patients opt out, which produces broader testing than requiring people to opt in.³⁶³

As admirable as the CDC recommendations are, they are not legally binding, they raise conflicts with some state laws, and they have had limited effect on the ground.³⁶⁴ The CDC's experience with similar recommendations reveals that many providers failed to implement them for reasons that include

355. See Decana, *supra* note 111, at 401-02 (criticizing authors of influential study on MSM [*HIV/STD Risks*, *supra* note 66] for adhering to coming out demand even though their data suggested that coming out increases sexual risks for black men).

356. See Robinson, *supra* note 50, at 1838 ("Under certain circumstances, failing to pass or cover could expose a person to violence or otherwise cause countervailing harm.").

357. See Decana, *supra* note 111, at 403, 405-06 ("The 'cure' is that MSM of color will disclose and consequently stop having sex with women altogether. The point is . . . to quarantine [MSM] from heterosexuality.").

358. See *supra* Part II.A.1.

359. See *supra* text accompanying note 66.

360. See *HIV/STD Risks*, *supra* note 66. Even if coming out *decreases* a MSM's likelihood of having sex with women, we should be concerned if it *increases* his likelihood of having unprotected sex with men.

361. See Ryan C. Burke et al., *Why Don't Physicians Test for HIV? A Review of the US Literature*, 21 AIDS 1617, 1622 (2007).

362. See BRANSON ET AL., *supra* note 347, at 7-8.

363. See *id.* There is significant confusion about the prevalence of HIV testing. A number of people seem to think that opt-out testing is already the norm. See KAISER FAMILY FOUNDATION, *supra* note 353, at 1 (reporting that nearly a quarter of survey respondents who reported having been tested for HIV "were under the impression that the test was done as a routine part of an exam").

364. See BRANSON ET AL., *supra* note 347, at 13 (noting that CDC recommendations might be trumped by state law and regulations); Smith et al., *supra* note 339, at 2 ("[R]isk-based testing and not universal testing remains the norm in most of the USA.").

the burden of providing pretest counseling, the consent process, insufficient training, lack of time, competing priorities, language differences, and inadequate reimbursement.³⁶⁵ Moreover, providers may feel uncomfortable discussing HIV with patients because they see it as implicating difficult moral issues, including homosexuality and sexual conduct more generally, unlike screening for breast cancer, for example. To overcome these barriers, the federal government should give the CDC's recommendations the force of law and provide funding for HIV testing and training of providers.³⁶⁶ A federal regime should also prioritize counseling, at least for those whose tests come back positive, so that patients understand treatment options and the importance of safe sexual practices.³⁶⁷

The CDC recommendations reflect the changing nature of the HIV epidemic. The current HIV-testing regime was developed during the 1980s, before the emergence of HAART, which can extend an HIV-positive person's life for many years.³⁶⁸ At the time, calls for mandatory testing (as opposed to requiring providers merely to *offer* testing) were inspired by efforts to discriminate against people with HIV.³⁶⁹ Since then, people with HIV have gained protections under various state and federal laws.³⁷⁰ Moreover, while testing once required patients to return one to two weeks later for their results—and many failed to return—rapid, oral testing now enables people to learn their HIV status in twenty minutes without drawing blood.³⁷¹ Most states have laws requiring elaborate procedures to make sure the individual understands the consequences of testing and that her privacy is protected. These regulations include restrictions on the type of personnel that can conduct testing, an informed consent requirement (often in writing) and posttest activities such as confirmation tests at specified laboratories and face-to-face counseling.³⁷² Although these laws were well intended and responded to the civil liberties concerns of the day, they may be out of step with current realities and create unnecessary barriers to innovative and streamlined processes for

365. Burke et al., *supra* note 361, at 1620.

366. There is precedent for this. For example, New York has mandated HIV testing for all newborns since 1996. See Gostin, *supra* note 354, at 2024; see also DAVID W. WEBBER, AIDS AND THE LAW § 2.2, at 52-55 (3d ed. 1997) (discussing history of mandatory testing). In contrast to mandatory testing, my proposal simply requires that health-care providers *offer* testing.

367. Federal law should also establish uniform regulations to protect the privacy of persons with HIV. Otherwise, people might refuse to be tested because of the risk of discrimination and other adverse consequences.

368. See Gostin, *supra* note 354, at 2023.

369. See WEBBER, *supra* note 366, at 53.

370. See Gostin, *supra* note 354, at 2023; Smith et al., *supra* note 339, at 5.

371. See Gostin, *supra* note 354, at 2023; Smith et al., *supra* note 339, at 3 (noting that 30% of Americans who get tested fail to return for their results).

372. See Gostin, *supra* note 354, at 2023; Smith et al., *supra* note 339, at 2.

making HIV-testing more feasible for health-care providers.³⁷³ For example, a New York City program that provided pretesting information through a waiting room video produced a dramatic increase in testing rates at community health centers.³⁷⁴ Some states, like New York, recognize the need to revise their laws and are making efforts in that direction.³⁷⁵ To the extent that other states do not follow suit, the federal government may need to preempt conflicting state laws to ease the burdens on health-care providers and broaden access to testing.³⁷⁶

Further, government entities should promote testing and counseling in nonhealth-care contexts. “[O]ne of the weaknesses of the current system of HIV testing is the reliance on patients to present to a testing site or medical facility.”³⁷⁷ This is important because black men appear especially unlikely to obtain regular healthcare.³⁷⁸ Just as LGBT organizations, assisted by government dollars, offer HIV testing at clubs and parades where gay men congregate, black organizations, with proper government support, could incorporate HIV testing at community events in order to reach those who rarely interact with the healthcare system.³⁷⁹ Certain state and local governments have offered testing at homeless shelters, domestic violence shelters, and church and youth groups.³⁸⁰ The Los Angeles Gay and Lesbian Center runs a service that illustrates the exciting possibilities of taking HIV testing into black communities. The Center’s Prevention on Wheels van—nicknamed POW! and decorated with brightly colored, inviting imagery—serves predominantly poor black and brown communities, including those who do not identify as gay or bisexual. Those served include married men and gang members—groups that might not seek out HIV testing on their own.³⁸¹ This dual-pronged strategy—

373. See WEBBER, *supra* note 366, § 2.20, at 40-41; Burke et al., *supra* note 361, at 1621 (“Separate written consent and pretest counselling [sic] were standards established at a time when HIV was untreatable and highly stigmatized.”); Gostin, *supra* note 354, at 2024; Smith et al., *supra* note 339, at 5 (“Today, the initial safeguards of confidentiality and civil liberty developed with regards to HIV infection in the late 1980s have turned into public health roadblocks.”). For example, some states require posttest counseling even for patients whose results are negative. See Gostin, *supra* note 354, at 2024.

374. See Burke et al., *supra* note 361, at 1621; *id.* at 1622 (discussing other possible innovations such as creating materials for physicians to distribute to patients and instituting a reminder system for HIV testing).

375. See *id.* (noting that in New York, “there is a legislative push to change the informed consent requirement for HIV testing from separate written consent to documented oral consent”).

376. See Gostin, *supra* note 354, at 2024 (“State law reform . . . is critical if the CDC is to fully achieve its objectives.”).

377. Smith et al., *supra* note 339, at 5.

378. See David Malebranche, *Adverse Health Outcomes Among Black Americans*, 16 POSITIVELY AWARE, Nov.-Dec. 2005, at 26, 27-28.

379. It is also critical that governments expand HIV testing and treatment in jails and prisons, whose populations are disproportionately black. See Smith et al., *supra* note 339, at 6.

380. See *id.*

381. POW! Center Takes Free Testing Where It’s Needed, VANGUARD MONTHLY

providing testing to all adults and teenagers in healthcare settings as well as targeting hard-to-reach groups—offers the promise of shifting the terrain in the fight against HIV in black communities.

Ideally efforts to expand HIV testing should be situated in a broader intervention context to address the structural forces that may perpetuate the DL and HIV transmission. These structural barriers include the need for health-care reform. The current system's reliance on employer-provided health insurance leaves many black people without coverage, and Medicaid does not sufficiently fill the gap.³⁸² Further, the government and scholars need to try to rehabilitate the fraught relationship that many blacks have with the medical profession in light of a history of discriminatory experimentation and fears among some blacks that the government may have even created AIDS to harm black communities.³⁸³ In addition, educational efforts might try to destabilize the norm that committed couples need not use condoms.³⁸⁴ Given the reality of infidelity and the likelihood that people will be overly optimistic about their relationships, we should consider incorporating into sex education programs the belief that condoms should be a normal part of sex even for heterosexual couples. Perhaps we can teach people that using condoms and testing regularly for HIV is a demonstration of care for one's partner's life and health, rather than a symbol of distrust or instability in the relationship.

The effort to expand HIV testing may be in tension with HIV transmission laws. Theoretically, people might refuse testing because they know if they test positive and have sex without disclosing their HIV status they may be liable under an HIV transmission law. But this concern is mitigated by a few considerations. First, it appears that few people know about HIV transmission

NEWSL. (Gay & Lesbian Center, L.A. Cal.), Nov. 2008, at 1, 8.

382. Kaiser Family Foundation, *Health Insurance Coverage and Access to Care among African Americans, Medicaid and the Uninsured* 1, (2000), <http://www.kff.org/uninsured/upload/Health-Insurance-Coverage-and-Access-to-Care-Among-African-Americans.pdf> ("African Americans are less likely to have job-based coverage at all income levels compared to whites.").

383. See Malebranche, *supra* note 378, at 27-28; Robinson, *supra* note 233, at 1111 (discussing Tuskegee syphilis study); *id.* at 1110 ("Roughly 60% of blacks [in one survey] stated that that it might be or is definitely true that 'the virus that causes AIDS was deliberately created in a laboratory to infect Black people'"); see also GARY ALAN FINE & PATRICIA A. TURNER, *WHISPERS ON THE COLOR LINE: RUMOR AND RACE IN AMERICA* 158 (2001) ("Many prominent African-Americans, including Louis Farrakhan, Spike Lee, Grace Jones, and Bill Cosby, as well as doctors, lawyers, and professors, have expressed the belief that AIDS might have been deliberately created.").

384. See, e.g., Paul Robert Appleby et al., *The Paradox of Trust for Male Couples: When Risking is a Part of Loving*, 6 PERS. RELATIONSHIPS 81, 89 (1999) (study of male couples found that "feelings of love, trust, and commitment were associated with risky behaviors more often than with safer sexual behaviors"); Peter E. Thomas et al., *HIV Testing at Historically Black Colleges and Universities*, PUB. HEALTH REP., 2008, at 1115 (survey of mostly heterosexual black college students finding that people in committed relationships were less likely to report being tested for HIV).

laws, and they exert little control over individual sexual behavior.³⁸⁵ Second, only about half the states have enacted such laws.³⁸⁶ Third, studies show that many people who are positive recognize that it would be morally wrong to infect another person,³⁸⁷ and many people change their conduct.³⁸⁸ A person might choose sex partners who are also positive, disclose to partners who are negative, or consistently use condoms. Fourth, policymakers might expand anonymous testing in order to alleviate concerns about criminal prosecution.

Nonetheless, if I were convinced that the tension between these policies was substantial, I would choose testing and counseling over criminal prosecution. As I demonstrated above, HIV-transmission laws have produced a tiny number of convictions, and most of the defendants are people who are already in the criminal justice system.³⁸⁹ Few people who are exposed to the risk of HIV infection turn to the criminal law. Moreover, HIV-transmission laws are demonstrably flawed. Many fail to recognize important distinctions, such as (1) did the defendant use a condom (which may reduce HIV risk by as much as 90%)?;³⁹⁰ (2) did the defendant actually infect his sex partner or merely expose her to a small risk of infection?;³⁹¹ and (3) did the sex occur in a context in which the HIV-negative partner bears some responsibility for the risky sex?³⁹² Revising HIV-transmission laws to take account of these important differences in culpability would consume a significant amount of resources and, in the end, would further narrow the already miniscule number of convictions. Therefore, although I do consider it morally wrong, as a general matter, not to disclose one's HIV-positive status, I expect that more cases of HIV infection would be prevented through expanded testing and counseling than relying solely on the criminal law.

CONCLUSION

The framework of DL discourse divides black people into distinct, warring factions. It pits black women against black MSM, especially those who sleep with women and do not identify as gay. It simultaneously portrays black men as a threat to the black community and black women as victims of black men. On the surface, this discourse may seem to privilege black women, affording them

385. See *supra* text accompanying note 307-15.

386. See *supra* text accompanying note 282.

387. See *supra* text accompanying note 314.

388. See *supra* text accompanying note 342-42.

389. See *supra* text accompanying note 302-05.

390. See *supra* text accompanying note 300.

391. This change would entail recognizing that different sexual acts/positions carry different levels of risk, an issue which is glossed by some HIV-transmission statutes. See *supra* text accompanying note 293-301.

392. See *supra* text accompanying note 320.

the opportunity to “play the victim” typically reserved for white women.³⁹³ Even as DL discourse elevates some black women, however, it relegates others to insignificance. These marginalized women include women having sex outside the context of marriage or a committed relationship, nonheterosexual women and women who choose to stay with a man they know to be interested in men. Moreover, framing black women as victims and denying them any responsibility for their sexual decision making hardly empowers women. Recognizing the agency that each participant in consensual sex has would provide a better starting point for conversations on how to enhance women’s (and men’s) ability to protect their health. In contrast to the simplistic perpetrator-victim framework, this Article seeks to reveal the complexity and humanity of the lives of many black people implicated by DL discourse, including those ostensibly at its center—DL men.

The Article also demonstrates the inadequacy of a criminal law model for arresting escalating HIV rates in black communities. A serious commitment to reducing HIV transmission will require universal strategies in addition to targeted group-specific interventions. HIV-transmission laws have failed in part because many people do not know they are HIV positive. Thus, HIV-positive DL men may not be callously harming their sex partners. Rather, they may be unaware of the risk they and their partners face because they do not see themselves in the images of gay men said to be at high risk. A robust public effort to expand HIV testing and counseling would be more effective in reducing transmission than relying solely on criminal laws, which punish a mere handful of perceived perpetrators. To the extent that expanded testing is not perceived as a high priority, this might reflect the identities of the people who tend to fall through the cracks of the current HIV-testing regime, namely black women and black MSM. At the end of the day, the stigma generated by DL discourse, which suggests that the solution is identifying deviant black men, and that the DL is strictly a “black-on-black” problem, might undermine a broader social obligation to attack the structural forces that oppress black MSM and black women.

393. See, e.g., Robinson, *supra* note 72, at A23.

