Michigan Law Review

Volume 101 | Issue 6

2003

Live and Let Love: Self-Determination in Matters of Intimacy and Identity

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INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION. By *Randall Kennedy*. New York: Pantheon Books. 2003. Pp. viii, 677. $30.

INTRODUCTION

Are you free to choose the race of your spouse, . . . of your child, . . . of yourself? Historically, the legal and social answer to these questions was No. Matters of racial identity and interracial intimacy were strictly circumscribed by ideologies of racial essentialism and separation, ostensibly rooted in science, morality, and religion. In contrast, according to Professor Randall Kennedy[1] in his new book, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*, the answer to all three questions should be a resounding Yes. The exclusive source of racial identification and intimacy should be individual choice, free from legal and social interference. The reality today is somewhere in between. In matters of sexual and marital intimacy, the law takes a neutral posture, but significant social constraints remain. And in matters of adoption and racial identity, both law and social norms continue, albeit with decreasing fervor, to restrain individual choice in service of collective notions of racial appropriateness.

Kennedy challenges remaining obstacles to individual self-determination in matters of interracial intimacy and identity. He takes a candid look at America's historical and continuing aversion to intimacy between people of different races, an inquiry that reveals the

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deep and pathological nature of America's racial ideology. He also considers the meaning of race and the burdens imposed by essentialist definitions of race on the identities and intimate relations of those who would live otherwise. Finally, Kennedy criticizes America's continued resistance to interracial adoption, particularly involving black and Native American or Indian[2] children, a resistance that, in Kennedy's view, favors culturalist agendas at the expense of children's welfare.

The book is not, however, pessimistic. It is inspiring. Although opposition to interracial intimacy has reflected a repugnant and often brutal ideology of racial hierarchy, interracial relationships have always developed, revealing the indomitable power of human intimacy. Moreover, significant progress has occurred in the direction of racial tolerance. Kennedy hopes this progress will continue, aided by his book, which aims to "mov[e] interracial intimacy to center stage as a necessary focus of inquiry for anyone seriously interested in understanding and improving American society" (p. 12).

Interracial Intimacies will draw criticism from some quarters. Critics will have difficulty, however, in challenging the scholarliness of Kennedy's methodology, as he endeavors to take competing perspectives seriously, considering their merits with a degree of balance, precision, detail, and candor on issues which are all too often discussed in abstract generality and hyperbole. Instead, critics are likely to take issue with Kennedy's ideology. He is a liberal individualist who consistently defends private choice regarding intimacy and identity, against interference from the state or groups claiming control over personal intimacy for the sake of communal interests. The most public criticism will likely come from blacks on the left. Kennedy unflinchingly criticizes all justifications for discouraging interracial intimacy, including claims that multiracial relationships and identities undermine black cultural and political solidarity. Other likely critics include traditional racialists, who believe the races are fundamentally distinct and should not intermingle, particularly in the context of sex, marriage, and adoption. Although likely less open in their criticism in today's racial climate, traditional racialists exist in substantial numbers, as revealed by polls indicating that one in five white Americans believe interracial marriage should be illegal.[3] Because I largely agree with Kennedy's ideology, my criticisms are few, and I recommend the book wholeheartedly.

2. Whether Native American people should be referred to as "Native American" or "Indian" is a matter of controversy. I will use "Indian" in this Review because of the centrality of that term to the Indian Child Welfare Act and other legal doctrines addressing Native American people, and because Kennedy uses the term in the book.

3. *See* Randall Kennedy, *How Are We Doing With* Loving*?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 820 (1997).

Interracial Intimacies also has important implications beyond race. The principles advanced by Kennedy in defense of individual freedom and self-determination in matters of intimacy and identity afford a basis for evaluating social and legal restrictions on the intimate relations of homosexual[4] people. The human ideals of love, trust, and compassion that Kennedy advocates and celebrates arguably should extend to those members of our community who happen to fall in love with people of the same sex. Accordingly, in addition to promoting racial tolerance, the lessons of *Interracial Intimacies* counsel greater tolerance for intrasexual intimacies.

In Part I, in addition to describing the book, I identify and analyze Kennedy's core claims about the legitimate role of the state and social groups in matters of interracial sex, marriage, identity, and adoption. Although I agree substantially with Kennedy's perspective, I question his quite radical position that racial identity should be exclusively a matter of personal choice.[5] His position, I argue, is unrealistic at the present time and, more importantly, threatens to undermine efforts to remedy the effects of past racial discrimination and to deter present discrimination. I also criticize Kennedy's opposition to race matching in adoption as too extreme, in that he would oppose consideration of race even if evidence persuasively demonstrated that same-race placements were in general better for black children.[6] I broaden my focus, in Part II, to intimacies between people of the same sex. I argue that the principles on which Kennedy relies for accepting interracial intimacies support the acceptance of intrasexual intimacies.

I. INTERRACIAL INTIMACIES

A. *Sex and Marriage*

Kennedy's historical account reveals certain defining features of America's ideological opposition to interracial sex and marriage. A principal underlying premise of that opposition was an understanding of nature and scientific truth. Racial groups were understood as fundamentally different, and intimate relations between them were considered unnatural. Those who would engage in such relationships were commonly believed to be mentally disturbed or overcome by bestial passion. Another justification for opposing interracial relationships was morality and religious doctrine. In justifying Virginia's antimiscegenation law, for example, the lower court in *Loving v.*

4. Whether people who desire sexual or marital intimacy with people of the same sex should be referred to as "homosexual," "gay and lesbian," or by some other term is outside the scope of this Review. I mean "intrasexual," "homosexual," "same sex," and "gay and lesbian" to be interchangeable.

5. *See infra* Section I.C.

6. *See infra* Section I.B.

Virginia[7] explained, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."[8] Similarly, Massachusetts defended its antimiscegenation law as fulfilling the "Infinite Wisdom" of "God's design."[9]

Remarkable was the strength and depth of opposition. "[A]mong white southerners," Kennedy found, "the proscription against interracial marriage and sexual intercourse constituted the racial discrimination of greatest importance, and thus the one most in need of defense" (p. 85). Of all segregationist laws, prohibitions of interracial sex and marriage were the most numerous and geographically widespread; among such laws, only blacks were universally barred from marrying whites. Indeed, every other segregationist law was defended in part on the need to deter interracial intimacy, and proposals to grant legal rights to blacks were opposed most effectively with the simple question, "Do you want your daughter to marry a Negro?"[10] Opposition to interracial relations was also defined by an emotional aversion that provoked white people on mere suspicion to participate in brutal lynchings of black men, often involving the mutilation, castration, and burning of their live bodies. Indeed, the "[i]magery of the black man as sexual predator . . . helped facilitate the lynching that claimed between four and five thousand black lives from the 1880s to the 1960s" (p. 192; citations omitted).

An ironic feature of America's ideology has been its preference for interracial relationships of a purely physical or even coercive nature over sexual relationships involving genuine affection or, worse, marital commitment. Several states, such as Louisiana, banned intermarriage but not interracial sex. And while other states proscribed both sexual and marital miscegenation, the latter laws were often enforced with greater rigor. Although in Alabama, for example, interracial fornication was criminally prosecuted, conviction required proof of an ongoing relationship; occasional sex was not enough. "Tolerant though it might be of a loveless interracial quickie, or even a commercial transaction, Alabama law was intolerant of interracial romance" (p. 215). And, in general, "[w]hile relations between white men and black women could be approved of, or at least tolerated, as sexual exercise or comic diversion, a white man faced sanctions if he revealed

7. 388 U.S. 1 (1967).

8. P. 274 (quoting *Loving*, 388 U.S. at 3 (internal citation and quotation marks omitted)).

9. P. 245 (quoting HOUSE COMM. ON THE JUDICIARY, 25TH CONG., REPORT RESPECTING DISTINCTIONS OF COLOR (Feb. 25, 1839), *reprinted in* LIBERATOR (Mar. 15, 1839) (internal quotation marks omitted)).

10. P. 22 (quoting Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1227 (1966) (internal quotation marks omitted)).

genuine feeling for a black lover or children" (p. 76). As Frederick Douglas explained, "[w]hat they typically objected to . . . was 'not a mixture of the races, but honorable marriage between them.' "[11]

Consider also the controversy surrounding Thomas Jefferson and Sally Hemings. Jefferson's exalted place in American history has prevailed despite his direct participation in slavery, yet his reputation has received its most serious challenge, both during his life and today, by allegations that he had a sexual relationship with one of his slaves, especially the possibility that the relationship involved mutual affection. One Jefferson biographer, Dumas Malone, who steadfastly denied a Jefferson-Hemings affair, eventually conceded that sex between them "might have happened once or twice."[12] "Unwilling to admit the barest possibility of an emotionally serious relationship between his hero and Hemings," Kennedy observes, "Malone preferred to posit the alternative of an emotionally barren one-night stand" (p. 55).

Finally, opposition to interracial sex and marriage has been justified on procreative grounds. Interracial sex, it was feared, would produce a "mongrel breed" of mentally defective or otherwise genetically inferior children (pp. 270, 274, 298). Defending its ban on interracial marriage in 1948, for example, California argued to the state supreme court that the law protected against the risk of physically and mentally inferior children.[13] And eugenicist fears prompted a proposal in New York that would have tolerated racial intermarriage provided the couple submitted to sterilization (p. 255). One can thus discern, in reverse order of customary family values, an ascending hierarchy of interracial wrongs: sex, intimate sex, marriage, and marriage with children.

Kennedy's inquiry into interracial intimacy in the context of sex and marriage is detailed, well-documented, and rich in narrative. Many of his normative claims are implicit in lessons suggested by the exploration. One lesson that emerges is that the opposition to interracial sex and marriage has been, and to some extent continues to be, devastatingly destructive to the lives of those who deign to love across racial lines. An additional, contrasting lesson is that, despite the strength of legal and social sanctions, people have sought interracial intimacy throughout American history. Even in the context of slavery, "in the least nurturing of soils" (p. 69), genuine intimacy bloomed between whites and blacks, notwithstanding the risk of familial and

11. P. 74 (quoting WALDO E. MARTIN, JR., MIND OF FREDERICK DOUGLASS 100 (1984) (quoting the OSWEGO RECORD, Feb. 2, 1884) (internal quotation marks omitted)).

12. P. 55 (quoting Scot A. French & Edward L. Ayers, *The Strange Career of Thomas Jefferson: Race and Slavery in American Memory, 1943-1993*, *in* JEFFERSONIAN LEGACIES 418, 444 (Peter S. Onuf ed., 1993) (internal quotation marks omitted)).

13. P. 263 (discussing Perez v. Sharp, 32 Cal. 2d 711 (1948)).

societal ostracism, criminal punishment, enslavement, and violence. Such relationships provide an inspiring testament to the strength of love in the face of collective prohibition:

> At every turn, the impulse to maintain a strict, clean, consistent racial order was confounded by the force and consequences of passion, compassion, and ingenuity. In the end, the antimiscegenation laws were unable to ensure or re-create white racial chastity because desire, humanity, and hypocrisy kept getting in the way. (p. 223)

There is also a lesson of hope. Tolerance for interracial sex and marriage has increased substantially. The law, rightfully, has become formally permissive, and social antagonisms have lessened significantly. Between 1960 and 2000, for instance, black-white marriages increased more than sixfold (p. 126). Accordingly, Kennedy observes, "despite the black-power backlash and the remnants of white hostility to 'race mixing,' the most salient fact about interracial intimacies today is that those involved in them have never been in a stronger position, or one in which optimism regarding the future was more realistic" (p. 124). Kennedy desires this trend to continue, envisioning a world in which neither state, community, nor family discourage interracial intimacy and, further, that in matters of the heart, individuals would give no consideration to race in their own personal choices. Kennedy's vision is one of optimism, a recognition that differences between people of different races are, ultimately, only skin deep, and that love genuinely can be color-blind.

B. *Adoption*

Kennedy's most pointed attack on state-sponsored constraints on interracial intimacy appears in the final chapters on adoption.[14] Where earlier chapters on sex and marriage were more suggestive than demanding, these chapters advance arguments for immediate legal change, namely, the abolition of "race matching," a policy "which assigns children a permanent racial identity and requires that they be raised by adults of the same race" (p. 367). As I have also argued elsewhere,[15] race-matching practices harm the children they are supposed to help by denying them adoptive parents based on misguided and unsubstantiated fears over interracial adoption.

In the child-placement context, as with sex and marriage, one can observe the usual ordering of family values being subordinated to racial separationism. In Louisiana, for example, a court in the 1950s refused to permit a black couple to adopt a child because the child was classified (erroneously) as white, and state law absolutely barred

14. *See* chapters 9-12.

15. *See* Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994).

transracial adoption.[16] The state instead relegated the child to an orphanage. "The state believed, in other words, that it was better for a child to be reared in an institution, no matter how bad, than to be adopted into a family of a different race, no matter how good" (p. 12). During the same period, a District of Columbia trial court refused to permit a black man to adopt his wife's nonmarital or "illegitimate"[17] white son whom they had raised alongside their two biological children since marrying.[18] The court thus ruled, "in essence, that it would be better for the boy to remain illegitimate but white than to become legitimate but black — or, more precisely, to become the legal son of a black man" (pp. 390-91).

Despite the invalidation of strict race-matching laws in the 1960s, race matching persists in practice. Such policies are, of course, no longer officially justified by segregationist ideology, but rather are defended as necessary to protect the racial identity of black children and to teach them skills for coping with racism. They are also justified as necessary to safeguard the interests of black people as a culturally distinct group. Some proponents of race matching acknowledge the desirability, in theory, of placing children without regard to race, but claim that the reality of pervasive racial prejudice justifies preferring to place black children with black parents. The most ardent proponents of race-matching policies are themselves black. The National Association of Black Social Workers has condemned the transracial placement of black (and biracial) children with white parents as "cultural genocide," and have succeeded, through political pressure, in curtailing the transracial placement of black children.[19] Child-placement officials and courts give so much credence to fears over transracial placement that such placements are routinely denied notwithstanding constitutional constraints on race-conscious state action and recent federal law prohibiting delayed or denied adoption on account of race.[20]

Kennedy rightfully places the burden on those who oppose transracial placement to substantiate the purported risks involved. They should bear the burden of proof because of the healthy suspicion about racial discrimination — particularly when done by the state —

16. *See* pp. 8-12 (discussing Green v. City of New Orleans, 88 So. 2d 76 (La. Ct. App. 1956)).

17. I prefer the term "nonmarital" to refer to children born to an unmarried mother rather than the traditional term "illegitimate," a term which unfairly stigmatizes children for the conduct of their parents. The courts used the term "illegitimate," however, which serves to emphasize how negatively they viewed transracial adoptions, as worse for children than social invalidity.

18. *See* pp. 390-92 (discussing *In re* Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955), which reversed the trial court's decision).

19. *See* pp. 452-53; Forde-Mazrui, *supra* note 15, at 925.

20. *See* Inter-Ethnic Placement Act, 42 U.S.C. § 1996b (Supp. II 1997).

which our society has learned from history. In addition, the serious and predictable harm to children of having no parents, no one "in their corner . . . whose primary responsibility, twenty-four hours a day, is the well-being of his or her charges" (p. 405), further justifies requiring those who would deny black children parents simply because their would-be parents are white to demonstrate persuasively that the risks of transracial placement outweigh the harm of continued parentlessness. In Kennedy's assessment, race-matching proponents have failed utterly to make this case.

Kennedy's most palpable skepticism is toward allegations that white parents are presumptively incompetent to foster an appropriate or authentic cultural identity in black children. Such arguments, for Kennedy, represent a form of communal imperialism by blacks who claim authority over black authenticity. Nor have race-matching proponents adequately demonstrated that white parents are inferior to black parents in teaching black children how to cope with race-related difficulties. The simple observation that some transracial adoptees experience difficulty over racial issues, and even that some believe race matching is preferable, fails adequately to recognize that many if not most black Americans have experienced difficulty over their racial identity. No consensus among blacks has ever emerged regarding the most successful strategy for coping with racism; indeed, many blacks fail to cope successfully, a fact generally ignored by race-matching proponents who presume the fitness of black parents to raise healthy racial identities in black children.

Nor are Kennedy's criticisms reserved for state policies involving *black* children. He also challenges the Indian Child Welfare Act ("ICWA"),[21] which mandates a preference for placing Indian children with Indian families. Kennedy accuses Congress of having too readily deferred to claims by some Indians that the placement of Indian children with non-Indian families is one of the primary threats to the cultural existence of Indian tribes. The risks to Indian preservation lie elsewhere, Kennedy believes, in the social and economic problems that Indian people disproportionately experience, problems from which ICWA dangerously distracts society's attention. He also criticizes arguments for Indian cultural preservation as a "rhetorical bogeyman" (p. 513) that would freeze Indian cultures in time rather than afford them the benefits of transformation through interaction with the modern world. Whatever the long-term effects of transracial placement on Indian cultural concerns, the best interests of individual Indian children require finding them permanent homes as soon as possible.

Kennedy would thus prohibit the state from discouraging the placement of children of any race with parents of a different race. He

21. 25 U.S.C. § 1901 (2000).

would do so, moreover, even assuming black parents were in general better able to raise black children, although he would permit consideration of race where compelling evidence in a specific case justified it, such as where an older child insisted on being adopted by parents of a particular race. "Rigorous adherence to this antidiscrimination regime is an essential requirement for ridding society of the pernicious habit of submerging individuals in the racial group to which they are said to belong" (pp. 412-13). He also opposes race matching by *private* placement agencies, although the use of state power to enforce race-matching policies raises greater concern for him.

Kennedy recognizes the limited effect of legally proscribing race matching so long as placement workers and judges vested with broad discretion believe that transracial placement is harmful. Accordingly, in addition to legal reform, Kennedy would hope to educate the public to reduce race-matching practices: "[I]n the long run, the transformation of public opinion is even more important than the transformation of legal formalities. The judicial system, by itself, will never satisfactorily police the conduct of decision makers whose personal aims and sentiments are in opposition to the law" (p. 376).

Kennedy would, however, permit adoptive parents to pursue their own racial preferences in adopting, even when using state-sponsored agencies.[22] Although racial preferences by adoptive parents are regrettable and contribute to the underadoption of minority children, the interests of children and respect for the choices of adoptive parents counsel against requiring adoptive parents to accept children they do not want. At least by requiring neutrality toward transracial adoption on the part of the state, the changes Kennedy advocates would allow a number of adoptions across racial lines to proceed and may, in the longer term, contribute to parental interest in adopting black children by expressing the message that transracial adoptions are not second best.

Kennedy's recommendations regarding race and adoption are on the whole sound, including permitting adoptive parents to pursue their own racial preferences in order to avoid placing children with parents predisposed against them. Where he goes too far, however, is in his willingness to prohibit consideration of race even if it were true "that for the most part, black adoptive parents *are* better able to raise black children than white adoptive parents" (p. 412). My own opposition to race matching is premised on the conclusion that the serious and known costs to children of delayed adoption outweigh the speculative and unsubstantiated risks of transracial adoption, especially given that

22. *See* pp. 434-36 (responding to the thoughtful and provocative argument by Professor Richard Banks for prohibiting state child-placement agencies from accommodating adoptive parents' racial preferences, *see* R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998)).

transracial adoption may offer certain benefits over inracial placements. Were serious risks from transracial adoption persuasively substantiated, however, it would be difficult to justify ignoring such risks if the interests of children are to remain a central concern in child-placement decisions. Kennedy would reject reliance on such "generalizations" on the ground that children should be treated as individuals, and not as mere members of racial groups. The placement of children, however, which involves predicting the likely success of particular placements, necessarily involves generalizations about the circumstances of prospective parents and child. Factors routinely considered by placement agencies, such as the age, psychological fitness, financial stability, and home environment of prospective parents are based on generalizations grounded in experience and social science. Individualizing the assessment involves taking as much relevant information into account as possible, but the conclusions drawn from such information necessarily involve reliance on generalizations. Even the two exceptions in which Kennedy would permit race to be considered — where an older child or the adoptive parents express a racial preference — involve the generalization that holding such preferences today will likely affect the future success of the placement. Indeed, even the assumption that adoption is preferable to institutional care, an assumption Kennedy apparently endorses, involves a generalization about the benefits of adoption over transient care. Such a generalization may turn out to be inaccurate in particular cases, yet taking it into account in the placement of children is not only rational but commendable. Similarly, if transracial placements were generally more harmful to children than inracial placements, then the interests of those children would be served by taking race into account, provided the generalization may be overcome when other factors in a given case support a transracial placement. Nonetheless, given that race-matching proponents have failed to justify their opposition to transracial adoption (as Kennedy persuasively demonstrates), Kennedy's opposition to state-encouraged race matching is well founded.

C. *Identity*

Recurring throughout the chapters on sex, marriage, and adoption are issues related to racial identity, the definition and categorization of race by law, custom, and individual choice. Two chapters[23] focus more directly on racial identity by exploring the phenomenon of "passing."[24]

23. *See* chapters 7-8.

24. Kennedy's research consulted much of the rich literature on the phenomenon of passing. *See, e.g.*, p. 570 n.7 (citing LOUIS FREMONT BALDWIN, FROM NEGRO TO CAUCASIAN, OR HOW THE ETHIOPIAN IS CHANGING HIS SKIN (1929); MARJORIE GARBER, SYMPTOMS OF CULTURE (1998); SUSAN GUBAR, RACECHANGES: WHITE SKIN, BLACK

Kennedy defines passing as the practice by which a person intentionally deceives others, by misrepresentation or omission, into believing he is a different race from that into which societal conventions would define him (pp. 283-85). The practice of passing, overwhelmingly by light-skinned blacks passing as white, has occurred in nontrivial numbers throughout American history. A number of motivations lay behind the decision to pass, and other motivations are attributed to passers whether or not true. Such motives may, but need not, involve a desire to be white or to reject blackness as inferior. More common is the simple desire to gain the rights and benefits of being perceived as white.

The stories of passing recounted by Kennedy reveal the heavy burdens upon those who would pass and the families from which they came. Passers had to be ever vigilant in concealing their racial identities, often having to separate their lives from that of their biological families. In one story (p. 312), for example, a son wrote a letter to his mother in which he apologized for pretending not to recognize her while passing her on the street with his white paramour. Passers who were discovered faced hostile and often violent reactions, including from the white families into which they had married. In some cases, whites sought divorces or annulments after discovering the spouses they thought they loved turned out to be black.[25] Whites desperately sought to prevent such infiltration of their ranks, including by hiring blacks to help identify "white negroes" (p. 314). Blacks faced a dilemma whether to "out" passers, whose deception may reflect a rejection of blackness, given the risks to passers from revelation.

Although the great majority of passers were and are people of color passing as white, some cases of whites passing as black have recently emerged. Mark Stebbins, for example, a city council-member representing a Latino and black constituency in Stockton, California, was alleged by a political rival to be actually white (pp. 333-34). His birth certificate said he was white, but he had concluded as a young adult that based on certain physical features, he was black. He apparently held himself out as black thereafter, married twice to black women, one of whom he met at an NAACP meeting, and engaged

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FACE IN AMERICAN CULTURE (1997); ADAM LIVELY, MASKS: BLACKNESS, RACE, AND THE IMAGINATION (2000); WERNER SOLLORS, NEITHER BLACK NOR WHITE: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE (1997); EVERETT V. STONEQUIST, THE MARGINAL MAN: A STUDY IN PERSONALITY AND CULTURE (1937); GAYLE WALD, CROSSING THE LINE: RACIAL PASSING IN TWENTIETH-CENTURY U.S. LITERATURE AND CULTURE (2000); PASSING AND THE FICTIONS OF IDENTITY (Elaine K. Ginsberg ed., 1996); G. Reginald Daniel, *Passers and Pluralists: Subverting the Racial Divide*, *in* RACIALLY MIXED PEOPLE IN AMERICA 91 (Maria P. P. Roots ed., 1992); Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL'Y REV. 297 (2000); and Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998)).

25. *See* pp. 295-97.

in civil rights activism. Nonetheless, the allegations that he was only passing as black resulted in his electoral recall. In Boston, Massachusetts, two Malone brothers claimed to be black on employment forms for the fire department in order to benefit from affirmative action. Ruling against them, the personnel administrator determined that the biological evidence was inconclusive, the firefighters had never held themselves out as black elsewhere, and their identification as black was insincere. Kennedy approves the administrator's apparent willingness to credit the Malones' claim to blackness provided it was sincerely held, even if the biological evidence did not support it. Such an approach reflects "the healthy intuition that a free society ought to permit its members to freely enter and exit racial categories — even for the purpose of gaining access to public entitlement programs — fettered only by the bonds of good faith" (p. 336).

Kennedy's examination of passing reveals the extent to which America has sought to categorize people into fixed racial groups determined by nature, morality, and law, but not by choice. The very concept of passing is premised on the view that race is determined by immutable standards, and thus the attempt to identify inconsistent with those standards must reflect mistake or deceit. Whether understood as principally biological or socially constructed, conceptions of race have been collectively imposed on individuals and the relationships they form. There has been recent movement, however, to enhance personal choice over the definition of race. A multiracial movement has gained ground in which people of mixed racial ancestry assert the right to identify as such, the most prominent example of which is golf superstar Tiger Woods's self-identification as "Cablinasian."[26] Despite the erosion of the "one drop" rule,[27] people of mixed heritage, especially involving black ancestry, continue generally to be defined legally and socially as one race, and that of inferior status. Moreover, the notion of complete freedom to define one's race, such as a person with obvious black ancestry identifying as white, remains untenable in America. Nonetheless, achieving such freedom is Kennedy's aspiration. He argues that racial identity ought to be exclusively a matter of personal choice, regardless of biology or cultural convention, limited, if at all, by a requirement of good faith:

> A well-ordered multiracial society ought to allow its members free entry into and exit from racial categories, even if the choices they make clash with traditional understandings of who is "black" and who is "white," and even if, despite making such choices in good faith, individuals mislead observers who rely on conventional racial signaling. Rather than

26. Woods coined the term to reflect his Caucasian, Black, Indian, and Asian ancestry. *See* p. 143.

27. The widely followed "one drop" rule defined a person as black if he had any traceable black ancestry. *See* p. 223.

> seeking to bind people forever to the racial classifications into which they are born, we should try both to eradicate the deprivations that make some want to pass and to protect individuals' racial self-determination, including their ability to revise stated racial identities. (p. 333)

I am troubled by the potential effect, at the present time, of leaving racial identification exclusively to personal choice. A principal concern I have is that permitting self-definition could seriously undermine efforts to remedy past discrimination, and to monitor and deter present discrimination. Measured by traditional definitions of race, stark disparities persist between blacks and whites, most likely as a result of the historical discrimination against people classified as black. Only by using the same definitions can American society identify the people likely disadvantaged by historical discrimination and determine whether the effects of such discrimination have been remedied. If, for example, whites could freely identify as black, then affirmative action designed to benefit blacks as a means of remedying past discrimination would be undermined to the extent whites not burdened by past discrimination could claim opportunistically to be black. Additionally, complete choice over racial identity could undermine antidiscrimination laws. An employer could, for example, discriminate against people who are black according to conventional standards, while instead hiring whites who identify themselves as black. Under Kennedy's conception of race, however, the employer could claim accurately to have a racially diverse workforce.

Kennedy recognizes the risk to remedial policies, but notes that white claims to blackness have been rare. This is hardly reassuring, however, given that its rarity probably reflects an assumption on the part of most whites that it would be illegal and socially unacceptable to claim to be black, or that such claims might be socially irreversible along with the costs of being black in American society. If, in contrast, custom and law expressly permitted racial self-definition, then many more whites would likely claim to be black in order to receive preferential benefits, only to redefine themselves as white for other purposes.

Kennedy does suggest one condition on racial self-definition that may ameliorate these concerns — a requirement of good faith. But administering a good faith standard could create its own problems. For example, would good faith require consistency, *i.e.*, whatever race one chooses must remain one's race for all purposes? While this may reduce the risk of fraud, it would seem to undermine the freedom of choice Kennedy advocates. Individual sovereignty over racial identification should include the right to change one's race as one chooses. Alternatively, a condition of good faith could require courts and other governmental actors to scrutinize the declarant's life to determine whether he lived as the race he declared. This was part of the approach taken by the personnel administrator in the Boston

firefighters case (pp. 334-35). Again, however, this would seem to be inconsistent with the choice to change one's race as desired and, more troublesome, could involve courts in deciding whether particular lifestyles comported with particular races. In determining whether one lived as a black person, for example, would courts consider the kind of community one chose to live in, the church one attended, or the race of one's spouse? Indulging in such racial stereotypes would seem to violate Kennedy's rejection of state- and community-imposed notions of racial authenticity.[28] Kennedy himself sharply criticizes a proposal that birth certificates be required to include race to ensure against fraudulently obtained affirmative-action benefits, noting that he would prefer the elimination of racial preferences "if intrusive racial policing were to become part of their price" (p. 337).

The only way to protect freedom of choice over racial identity without intrusive governmental inquiries into the veracity of such choices would be to give no legal significance to race. Indeed, this would appear to be an implication of Kennedy's ideology, which he comes close to accepting in the adoption context in which "[r]ace-dependent decision making . . . strengthens a reflex that we should seek to overcome: the impulse to lump people together according to gross (in this case, racial) classifications, which tend to cloud rather than clarify our perception of the human virtues and vices in which we should be most interested" (pp. 411-12). Kennedy acknowledges that advocating colorblindness in the child-placement process could lend political support to those opposed to affirmative action. While believing the two race-conscious practices are distinguishable, Kennedy concedes the risks of his argument and is willing to eliminate affirmative action if necessary for the elimination of race-conscious adoption practices. And, as mentioned previously, Kennedy would abolish affirmative action if guarding against fraud required state-imposed racial identities. Ultimately, if personal choice over racial identity is to be unfettered, the maintenance of state-sponsored policies that award benefits according to race would seem to be untenable. No racial discriminations by the state could be permitted.

At a more fundamental level, Kennedy's theory of racial self-definition is a radical departure from the historical meaning of race in American society. Few Americans would accept that a person's race is truly whatever one chooses. Even conservatives, who have in recent

28. Illustrative of associating lifestyle with race is Kennedy's description of Mark Stebbins, the city-council member who was recalled for purportedly claiming falsely to be black. Kennedy notes that, after young adulthood when Stebbins claims he decided he was black, he devoted himself to civil rights causes and married twice to black women. P. 333. It is not clear whether Kennedy cites these facts as evidence of Stebbins's good faith. The reference to these facts nevertheless raises the question whether Stebbins's claim to blackness would appear less sincere if he had married only white women or never engaged in civil rights activism. Kennedy's aversion to group-based standards of racial authenticity would seem to require rejecting such an analysis.

years taken up the mantle of colorblindness, assume that those burdened by affirmative action are properly classified as white but argue that the government should not take race into account. Additionally, conservative support for racial profiling by law enforcement suggests a belief that government may sometimes treat people according to conventional racial categories regardless of the race people choose for themselves. Whatever one's views on state-sponsored race-conscious action, few Americans of any political persuasion would accept that people whose physical appearance and biological heritage by conventional standards would define them as exclusively a particular race could accurately claim to be whatever race they chose. Such a concept violates the common understanding of race as an objective, immutable, genetically inherited trait. Granted, as many race scholars have argued,[29] much of the significance of race is socially constructed, but that construction has been built upon a physiological reality of pigmentation and physiognomy. An understanding of race as a purely subjective identity, regardless of appearance or ancestry, is fundamentally different. At a minimum, Kennedy's views would require the complete separation of race and state and, taken to their logical end, would eliminate the concept of race altogether as a socially relevant marker. Because the full implications of his reconceptualization of race are not certain, I am unable to endorse it. Moreover, as previously stated, my desire to remedy past discrimination cautions against his position for the short term. Nonetheless, the potential effect in the long term of rendering race either irrelevant or, like religion, a matter for private choice is certainly intriguing. At the very least, the strong resistance his views will likely receive reveals the depth of America's conception of race as an essential and immutable classification into which we are born, . . . and die.

II. INTRASEXUAL INTIMACIES

Kennedy's critique of historic laws and attitudes toward interracial intimacies appears to be founded on a number of principles. They include that intimacy between consenting adults of different races should be valued and in any case is inevitable to the human condition; that punishing or otherwise discouraging such intimacy is destructive to people's lives; that scientific, religious, and moral justifications for opposing interracial intimacy are unfounded or otherwise inadequate; and that, ultimately, human flourishing and happiness are best

29. *See, e.g.*, 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, 7 (1994); Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 483 (2001); Judy Scales-Trent, *Women of Color and Health: Issues of Gender, Community, and Power*, 43 STAN. L. REV. 1357, 1363 (1991); Westley, *supra* note 24, at 307.

promoted by legal and social tolerance of individual choice and privacy in matters of intimacy and identity. The question suggested by Kennedy's inquiry is whether the mistakes made and lessons learned regarding interracial intimacies have implications for intrasexual intimacies. To the extent state and societal constraints on personal choice in this context are destructive to human happiness, Kennedy's inquiry at least suggests a reason to evaluate the basis of such constraints.[30]

Striking parallels between current opposition toward intrasexual or homosexual intimacies and historical opposition to interracial intimacies justify comparing the two contexts. Opposition to homosexual intimacy, like historical opposition to interracial intimacy, is rooted in an ideology of nature. Same-sex relationships are commonly rejected as unnatural or bestial, a violation of the biologically appropriate form of sexual relations between man and woman. Relatedly, same-sex relationships, like interracial relationships, have been considered a product of mental defect, including by the psychological profession. Although homosexuality has been declassified as a mental disorder, people continue to assume that homosexuality is a product of genetic defect or a result of traumatic childhood experience.

In addition to biological concerns are moral and religious objections. Just as miscegenation purportedly violated God's will, sex and marriage between homosexuals is commonly condemned as violating the Bible or otherwise blasphemous. Others, who may disclaim reliance on religious doctrine, nonetheless oppose same-sex intimacy as morally repugnant or inconsistent with deeply rooted tradition. Expressly linking the deviance of interracial sex with homosexuality, the protagonist in one novel explained, "[i]t is a tragedy if a black man lets himself love something in a white woman, just as it is if a man lets himself get fucked by another man."[31]

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30. I am not the first to observe similarities between discrimination against interracial and same-sex relationships, particularly in the context of marriage. For sources defending the analogy between antimiscegenation laws and bans on same-sex marriage, see, for example, WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE 153-63 (1996); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 66-67 (1997); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993). For sources criticizing the analogy, see, for example, David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998); Richard F. Duncan, *From* Loving *to* Romer*: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239 (1998); Lynn Marie Kohm, *Liberty and Marriage —* Baehr *and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253 (1998); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1. Kennedy also notes some of the ways in which attitudes toward interracial and intrasexual intimacies are similar, although he does not develop these points. My purpose in this Part is to draw principally on Kennedy's core observations and claims regarding interracial intimacies analyzed in Part I, and consider what lessons they suggest for analogous restraints on intrasexual intimacies that I identify.

31. P. 135 (quoting CECIL BROWN, THE LIFE AND LOVES OF MR. JIVEASS NIGGER 205 (1969)).

The strength and scope of opposition to same-sex intimacy is also reminiscent of antimiscegenation ideology. Recall that antimiscegenation laws were the most widespread and tenacious of segregationist laws. Similarly, although discrimination against gays and lesbians has diminished in recent decades, bans on same-sex marriage remain universal, with only one state recognizing marriage-like unions.[32] Notice, moreover, that while the Republican-controlled Senate in 1996 fell just one vote short of protecting homosexuals from employment discrimination, the same year saw Congress, with overwhelming support from both sides of the aisle, pass the Defense of Marriage Act,[33] which was signed forthwith by a Democratic President who had run as a gay rights supporter.[34] Animosity toward same-sex intimacy is also characterized by a visceral emotionality and tendency to violence. Illustrated most infamously by the murder of Matthew Shepherd, condemnation of those who would seek intimacy with people of the same sex has involved a degree of hatred and cruelty expressed through torture, mutilation, and castration, the brutality of which is matched only by the lynching of blacks that produced the "strange fruit" of the South. There is something about sex and intimacy in violation of accepted norms, whether across racial or within sexual lines, that provokes the deepest fears and violent rage.

Also apparent in the same-sex context, as with race, is the extent to which intimacy, particularly expressed through marital commitment, is more offensive than sexual conduct by itself. Consider, for example, the extent to which laws against sodomy have been repealed or have been rarely enforced against homosexuals compared to the political activism to deny homosexuals the right to marry. Consider also that in 1986,[35] although the Supreme Court upheld the criminalization of homosexual sodomy, it did so by a bare majority, with subsequent regrets by Justice Powell, and the Court firmly repudiated that precedent this past term.[36] A constitutional challenge to bans on same-sex *marriage*, in contrast, would most likely fall on deaf ears in the Supreme Court. Thus, as of this past term, homosexual adults have a constitutional right to consensual sex, but no constitutional or other legal right in any state to be married. Consider finally the military's "Don't Ask, Don't Tell" policy.[37] A service-member who has engaged

32. *See* Baker v. State, 744 A.2d 864 (Vt. 1999).

33. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000)).

34. *See* Carolyn Lochhead & David Tuller, *Gays Hoping Clinton Will Do Better In 2nd Term*, S.F. CHRON., Nov. 12, 1996, at A1 (describing enactment of Defense of Marriage Act and Senate defeat of Employment Non-Discrimination Act); Nancy Mathis, *President to Address Gay Rights Group*, HOUSTON CHRON., Nov. 8, 1997, at 1 (same).

35. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

36. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (overruling *Bowers* as incorrect when decided and incorrect today).

37. *See* 10 U.S.C. § 654(b) (2000).

in sexual acts with a member of the same sex may defend against expulsion by demonstrating his misconduct was out of character.[38] The mere attempt to marry a person of the same sex, however, with or without sexual consummation, is irrebuttable grounds for expulsion.[39] Sex is thus forgivable, provided it did not reflect an ongoing relationship or, worse, a desire to commit to each other for life.

Significant to both opposition to interracial and intrasexual marriage is a belief in the procreative purpose of marriage. Recall that resistance to interracial marriage was based in part on the concern that the offspring would be genetically or mentally defective. The concern regarding same-sex marriage is similar, although not identical. The concern is that same-sex unions are biologically incapable of producing offspring. In both contexts, however, the restriction of marital intimacy to heterosexual couples of the same race has been justified by defining a central purpose of marriage as the healthy procreation of the human species.

Although homosexuals are probably less likely to produce biological offspring, especially by both partners,[40] they can form families with children through adoption. Here too, however, the law discourages intimacy with homosexuals. Desires by homosexuals to adopt children have been legally prohibited or discouraged for reasons akin to traditional and contemporary opposition to transracial adoption. In addition to historical beliefs that interracial and same-sex intimacies were immoral, unnatural, and even criminal, and therefore inappropriate placements for children, opposition to adoption in both contexts has more recently emphasized potential difficulties for the children as a result of societal prejudice. With respect to race, transracial adoption raises concerns about the negative reactions from society to the interracial nature of the family, and to the adopted status of the family, a status more readily revealed by transracial adoption, and which continues to be viewed by some, misguidedly, as a second-best alternative to biological families. Race has also figured in custody disputes between biological parents, in cases where one parent subsequently enters an interracial relationship or where the disputing couple itself is interracial and it is claimed by the black parent that the child's interests would be served better by placement with the parent of the "same" and more appropriate racial identity.

Similarly, concerns over adoptions by homosexuals center on the potential difficulty to the child from societal prejudice toward the

38. *See* § 654(b)(1)(A).

39. *See* § 654(b)(3).

40. Whether advances in biomedical technology will enable homosexual couples in the future to produce biological children jointly is uncertain. If such technology were developed, the distinction between interracial and intrasexual marriage based on procreative grounds would be further undermined.

parents' sexual orientation. Having parents of the same sex also suggests stigmatically that the child is not biologically related to at least one of the parents. And in custody disputes between biological parents, the fact that one of the parents has become intimately involved with a person of the same sex has been grounds for preferring the other parent. Finally, consider the question of identity in the child-placement context. As Kennedy describes, opponents of transracial placement have complained that a black child raised by white parents will fail to develop a healthy racial identity or, worse, will develop a white identity. Adoption by homosexual parents has also been resisted on the ground the child may have difficulty regarding his sexual identity or, worse, may develop a homosexual identity.

Parallels can also be seen between race and sexual orientation regarding issues of identity, especially the desire by some to conceal their identities from others. Recall Kennedy's account of people who "pass" as another race. In the sexual-orientation context, gays and lesbians often "closet" their sexual orientation to guard against legal and social sanction, or otherwise to experience the rights and privileges of heterosexual supremacy.[41] Burdens similar to those faced by passing blacks in guarding against discovery and in experiencing reprisals when discovered continue to be experienced by homosexuals in significant ways. Indeed, the toll on homosexuals may be worse. Blacks who pass as white can express romantic affection for a white spouse or lover at social gatherings or in public without revealing their race or the interracial character of the relationship. For homosexual couples, in contrast, concealing their sexual orientation from others usually requires completely concealing the intimate nature of their relationship while in view of others.

The phenomenon of concealment also raises political questions for other members of the respective subordinated groups. Some homosexuals question the motives of those who pass as straight, question whether sexual assimilation reinforces heterosexism, and question whether "outing" them would serve the cause of gay rights. As Kennedy describes, blacks have also faced political dilemmas of a similar nature with respect to passing, including whether to reveal the identity of passers. In fact, the dilemma whether to reveal passers' identities in both contexts is prompted in part by the capacity of gays and blacks to identify those who are, respectively, in the sexual closet or racially passing. Many gays purport to be able to identify other gays even when straight people cannot by use of so-called "gaydar."[42]

41. For an interesting exploration of the phenomenon of "gay passing," see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 811-37 (2002).

42. *See* Mary Coombs, *Interrogating Identity*, 11 BERKELEY WOMEN'S L.J. 222, 232 n.57 (1996) (reviewing JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY (1995)) (referring to "lesbians, and gays, apparent ability to recognize each other by cues too subtle for heterosexuals — an ability sometimes referred to as

Similarly, blacks often claim superior ability to identify blacks passing as white. As Ralph Ellison explained, "most Negroes can spot a paper thin 'White Negro' every time."[43]

The burdens of discrimination have been so great in both contexts that some people have sought not merely to conceal their racial or sexual identities, but to alter them permanently. Gays have sought, with considerable difficulty, to make intimate relationships with the opposite sex succeed, and have even resorted to psychiatric treatment to become heterosexual. In the racial context as well, some blacks, especially those light-skinned enough to pass, have denied their blackness, even to themselves, and sought to change their race permanently through cosmetic treatments, and have even resorted to surgery to appear more white. Fred Korematsu, for example, the subject of the Supreme Court case upholding the military exclusion of Japanese-Americans, had undergone plastic surgery to westernize his appearance (p. 317).

Passing by homosexuals and blacks has also been motivated by a desire to serve in the military, a context in which both groups have been historically excluded. Gays continue to be excluded from military service, although since the Clinton Administration only if they engage in conduct that reveals their sexual orientation.[44] Thousands of gays nonetheless serve their country honorably by concealing their sexual orientation. Similarly, blacks were historically excluded from military service and later permitted to serve only on a segregated basis until 1948. Throughout American history, light-skinned blacks wishing to serve in the military on the same terms as whites have attempted to conceal their black identity. Kennedy recounts, for example, the experience of Albert Johnston, a black physician whose light skin enabled him to pass, who was interrogated by a suspicious naval intelligence agent about his racial lineage. Johnston evasively answered, "Who knows what blood any of us has in his veins?"[45] Dr. Johnston subsequently received a letter of rejection. Apparently, at least with respect to race, the military did not have a policy of "Don't Ask, Don't Tell."

A final parallel that Kennedy's inquiry helps to highlight is that opposition to interracial and intrasexual intimacy both involve conduct-based discrimination. This point is worth emphasis because discrimination against homosexuals is often distinguished from racial

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'gaydar' "); *see also Fine-tuning Your 'Gaydar,'* PHILA. DAILY INQUIRER, Nov. 5, 2002, at C2; *Turning the Gaydar on Survivor*, ADVOCATE: NAT'L GAY & LESBIAN NEWSMAGAZINE, Mar. 19, 2002, at 24.

43. P. 316 n.† (quoting RALPH ELLISON, SHADOW AND ACT 124 (1953)); *see also id.* (citing Amy Robinson, *It Takes One to Know One: Passing and Communities of Common Interest*, 20 CRITICAL INQUIRY 715 (1994)).

44. *See* 10 U.S.C. § 654(b) (2000).

45. P. 325 n.* (quoting W. L. WHITE, LOST BOUNDARIES 32 (1947)).

discrimination on the ground the former involves conduct whereas the latter involves status. Then Joint Chiefs of Staff Chairman Colin Powell, for example, made this point in distinguishing the military's exclusion of gays from racial segregation.[46] The ostensible distinction between race and sexual orientation is that race is a trait that one cannot choose or change, whereas homosexuality inherently involves conduct that one can choose to avoid. Even if sexual "orientation" itself is a status, provided discrimination against homosexuals is based only upon expressions or actions revealing their sexual orientation, it is purportedly distinguishable from discrimination against racial minorities. What Kennedy's inquiry reveals, however, is the extent to which America's racism included discrimination based on conduct, discrimination we rightfully repudiate today. Punishment of interracial relationships involved discrimination against those who engaged in conduct of an intimate nature with a person of a different race. Indeed, the reaction against people who engaged in interracially intimate conduct was often more severe than that directed toward blacks for simply being black. Similarly, in child-custody disputes in which courts have removed children from custodial parents who interracially married, the courts' actions were in response to the custodial parent's conduct. To make the point in the military context, imagine a policy that permitted the races to serve on an integrated basis but expelled anyone who attempted to marry interracially. While the policy would avoid discrimination based on race alone, we would nonetheless consider the policy racially discriminatory and wrong. Indeed, the Supreme Court upheld as compelling the government's interest in revoking Bob Jones University's tax-exempt status in response to the university's policy of prohibiting interracial relationships.[47] Consider finally antimiscegenation laws themselves, such as those invalidated in *Loving v. Virginia*.[48] Such laws constituted conduct-based discrimination. Criminal prosecution required proving the conduct of interracial marriage. Opposition to interracial and intrasexual intimacies thus both involve discriminations based on voluntary conduct of an interracial or intrasexual nature.

What insights can be gained from drawing the forgoing parallels? They do not, without more, suffice to condemn opposition to same-sex intimacy as comparably repugnant to segregationism. I acknowledge the parallels may not be exact. Perhaps the scientific, religious, and moral objections to same-sex intimacies are *really* justified, whereas

46. *See* 139 CONG. REC. 13,520 (1993) (statement of Sen. Coats) (quoting Colin Powell as stating, "Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.").

47. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

48. 388 U.S. 1 (1967).

the beliefs underlying antimiscegenation laws were unfounded, despite the depth of sincerity with which segregationists held them. Perhaps the fact that homosexuals cannot, as far as we know, create offspring together differentiates antimiscegenation policies that were based on faulty eugenics, although this justification is suspect to the extent the law does not require heterosexuals to have the desire or capacity to procreate as a condition of marriage and, indeed, the law could not constitutionally do so. And perhaps societal attitudes against gay couples justify legal restrictions on their right to adopt children, although this does not explain why similar attitudes against interracial couples "may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect,"[49] or why the predictable damage to children of parentlessness does not outweigh the speculative risks associated with adoption by homosexual parents.

Engaging these points is beyond the scope of this Review, but the parallels between interracial and intrasexual intimacies suggest, at the very least, that comfortable reliance on current notions of biological appropriateness, religious interpretation, and moral tradition may be tragically misguided or cruel. Consider that, despite the severe legal and social restrictions against same-sex intimacies, such relationships have developed throughout human history. Although not succeeding in eradicating homosexuality, society has succeeded in causing misery to those members of our national community with homosexual orientations. The extent to which science, religion, and morality provide, in hindsight, inadequate bases for punishing interracial intimacies between consenting adults calls into question the adequacy of such justifications for punishing intrasexual intimacies between consenting adults. The lessons learned from Kennedy's inquiry into interracial intimacies should at least shift the burden to those who defend society's punishment of same-sex intimacies, especially through the coercive power of the state. Unless justifications can be advanced for opposing same-sex intimacies that are more persuasive than those used to oppose interracial intimacies, we should recognize that such opposition may simply be a product of irrational fear and prejudice.

Perhaps the only real difference between interracial and intrasexual intimacies is time. Both ideologies may simply reflect the cultural norms of historical periods, not intrinsic moral truths. Antimiscegenation laws are wrong by present standards, bans on same-sex marriage are not. Perhaps, then, segregation was not wrong when practiced, it has only become wrong as society has changed its attitude towards it. For those who believe, however, that segregation, including the legal and social punishment of interracial intimacy, was

49. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (acknowledging that societal prejudice against mother's interracial second remarriage could harm child but holding that law could not give effect to such prejudice in determining child's custodial placement).

wrong when practiced, then the punishment of those who love intrasexually may likewise be wrong presently, whether or not society understands it. The question then is how much time will it take before societal attitudes toward intrasexual intimacies change, before America escapes the moral myopia of the present generation? Which generation will be able to claim, with the pride of the civil rights generation of the twentieth century, "we did it." Which generation will be able to ask, as Americans do today regarding slavery and segregation, "what was wrong with America then?"

CONCLUSION

Kennedy closes his book by re-emphasizing his optimism in matters of race:

> Commentary on race relations in the United States can be usefully divided into two broad traditions. One is a pessimistic tradition that doubts either the wisdom or the possibility of achieving racial harmony on the basis of racial equality. . . . Running counter to this current is an optimistic tradition that affirms both the wisdom and the possibility of bringing into being a racially egalitarian society in which individuals may enjoy their freedoms without racial constraint. . . . Although both of these traditions figure prominently in the stories I have told in the previous pages, it should be clear by now that I myself am firmly in the latter camp. (p. 519)

Kennedy's lesson of optimism also provides hope for the future of intrasexual intimacies in American society, a hope Kennedy shares:

> It is my own belief that the struggle to secure the right to marry regardless of the genders of the parties involved will be won in the not so distant future. That achievement, I am convinced, will represent a real step up in the moral elevation of American democracy — a step facilitated, in large part, by previous struggles over race relations. (p. 279 n.*)

Signs of progress are indeed evident. Just as restrictions on interracial intimacies have loosened considerably over the last half century, the rights of gays and lesbians to live free of violence and discrimination have gained ground in recent decades. Many local jurisdictions guarantee rights against discrimination on the basis of sexual orientation, and state-level protections are emerging as well. And the ability for gays and lesbians to express their intimacies openly is increasing significantly, especially in certain locales. That is not to discount the serious discrimination still directed against homosexuals, but to recognize the encouraging direction of change. *Interracial Intimacies* should serve to encourage further change in the direction of self-determination in matters of intimacy and identity with respect to race and, by implication, with respect to sexual orientation. I applaud the effort, and gladly add my voice to Kennedy's and to the many

advocates of equality who raised their voice, when the risks of doing so were much greater, to proclaim "Live and let live, live and let love."