1995

Colonial Scholar: Do Outsider Authors Replicate the Citation Practices of the Insiders, but in Reverse, The Symposium on Trends in Legal Citations and Scholarship

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

THE COLONIAL SCHOLAR: DO OUTSIDER AUTHORS REPLICATE THE CITATION PRACTICES OF THE INSIDERS, BUT IN REVERSE?

RICHARD DELGADO*

In two previous articles, I analyzed the citation practices of mainstream scholars writing in the areas of civil rights and equality. In *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*,[1] I showed that the major figures who were writing during the heyday of the Civil Rights Movement marginalized and ignored the writings of scholars of color to a surprising degree. In a follow-up article written ten years later, I showed that, although some majority-race scholars had changed their citation practices, and many of the newer scholars were avoiding the errors of their predecessors, much of the same preference for in-group recognition that I noticed earlier held true in 1992.[2]

One as yet unaddressed question is whether outsider scholars—crits, feminists, and critical race theorists ("CRTs")—are guilty of the same pattern of behavior. As I stated on another occasion, "all discourse marginalizes,"[3] hence it is a reasonable hypothesis that outsider scholars may be evidencing the same preference for the familiar that characterized their more mainstream counterparts in my two earlier studies. Might there not be a "colonial scholar" phenomenon, in which Black scholars, for example, exhibit a marked preference for works written by scholars from their same group, a similar one on the part of Chicano scholars, gay writers, and so on? At least one scholar has suggested that this is so. Arthur Austin, writing in the *Oregon Law Review*, finds in-group and self-citation rampant among the crits, a practice he attributes to preference for ones' friends, a dislike of patriarchy, and a "payback" mentality.[4]

* Charles Inglis Thomson Professor of Law, University of Colorado J.D., University of California at Berkeley, 1974. I am grateful to Jean Stefancic and Kim Quinn for invaluable assistance in preparing this article.

1. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

2. Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

3. *Id.* at 1372.

4. Arthur Austin, *Politcal Correctness Is a Footnote*, 71 OR. L. REV. 543, 555 (1992).

To test the hypothesis about in-group citation practices among outsider scholars, I selected three of the most characteristic works from the CRT corpus—Patricia J. Williams, *The Alchemy of Race and Rights*, Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, and Derrick Bell, *Foreword: The Civil Rights Chronicles*—and, in addition, seventeen articles and books chosen from two recent bibliographies of critical race theory, employing a table of random numbers. One of the articles so selected, Cornel West, *The Role of Law in Progressive Politics*,[5] turned out to contain no citations suitable for tabulating under the criteria set out immediately below, and was replaced by another randomly selected article. The final list of books and articles selected turned out to include six by women, fifteen by men, six by Whites, twelve by African Americans, two by Latinos, and one by a Native American scholar.[6] I then analyzed the footnote citation practices of this sample of twenty-two writers.

I. QUANTITATIVE ANALYSIS

The twenty articles contained over three thousand footnotes, many with multiple items. I eliminated from consideration items, such as cases and governmental reports, with no author. I also eliminated newspaper articles and other ephemera, leaving a sample consisting entirely of books and journal and law review articles, over nineteen hundred in total.

I then analyzed these citations by the cited author's ethnicity—White, Black, Latino, Asian-American, Native American or unknown. To determine the race of the author, I used his or her last name (e.g., Chang or Ramirez), the *AALS Directory*'s list of minority law professors, my own personal knowledge of and acquaintance with some of the authors, and in a few cases, reasonable inferences from the data.[7] I also benefited from the help of a well-known Critical Race writer who assisted me in classifying some of the authors. The results are summarized in Table 1.

5. Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1991).

6. Two of the articles were co-authored. (See Table 1, immediately below). One author, Erin Edmonds, was of unknown race.

7. For example, a known author, writing on a familiar subject but cited without his or her first name.

TABLE 1

ARTICLE OR BOOK, AND AUTHOR	AUTHORITIES CITED					
	White Authors	Black Authors	Latino Authors	Asian-American Authors	Native American Authors	Unknown
PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).	33	13	3	2	1	11
Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).	178	39	11	1	0	71
Derrick A. Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).	50	30	0	0	0	34
Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997 (1992).	2	0	0	0	0	0
Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy In an American Indian Cultural Context*, 24 GA. L. REV. 1019 (1990).	20	11	3	4	5	28
Derrick A. Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 MICH. L. REV. 2025 (1993).	10	17	1	1	2	5
Robin D. Barnes, *Realist Review*, 24 CONN. L. REV. 553 (1992).	1	5	0	0	0	0
Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992).	34	34	28	3	2	7
Derrick A. Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767 (1988).	3	2	0	0	0	3

ARTICLE OR BOOK, AND AUTHOR	AUTHORITIES CITED					
	White Authors	Black Authors	Latino Authors	Asian-American Authors	Native American Authors	Unknown
Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93 (1991).	1	10	5	2	0	11
Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979).	6	10	3	0	0	7
Duncan Kennedy, *A Cultural Pluralist Case For Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.	38	62	7	6	1	9
Sheri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).	10	0	0	0	0	17
Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.	78	138	5	8	2	159
Derrick A. Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 993 (1989).	2	2	0	0	0	2
Frances L. Ansley, *Stirring the Ashes: Race, Class and Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989).	108	121	12	8	1	29
STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY, (1991).	22	39	0	3	0	16
Derrick A. Bell, *After We're Gone: Prudent Speculations On America In a Post-Racial Epoch*, 34 ST. LOUIS L.J. 393 (1990).	5	2	0	0	0	2
Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991).	74	17	15	9	9	18

ARTICLE OR BOOK, AND AUTHOR	AUTHORITIES CITED					
	White Authors	Black Authors	Latino Authors	Asian-American Authors	Native American Authors	Unknown
Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992).	92	24	2	0	0	18
TOTALS	767	576	95	47	23	447

A number of patterns are immediately evident. As the reader will see from Table 1, White authors were the most-cited group, with 767 citations. Then followed Blacks with 576 cites, Latinos with 95, Asian-Americans with 47, and Native Americans with 23 cites. Authors whose ethnicity we were unable to ascertain totaled 447.

The total for White authors cited, 767, thus exceeds the total for all authors of color (Blacks, Latinos, Asian-Americans and Native Americans), which was 741. The aggregate numbers thus do not bear out the initial hypothesis that the outsider scholars cite each other more often than they cite Whites.

Six of the outsider scholars selected randomly turned out to be white (Kennedy, Johnson, Peller, Ansley, Stefancic, and Tushnet), providing an opportunity to compare the citation practices of white outsider scholars (crits and critical race theorists) to those of color. It turned out that there was little difference—outsider scholars who were White cited White authors 400 times, non-Whites 465 times. (See Table 2).

TABLE 2

Author	Citations to White Authors	Citations to Authors of Color
Kennedy	38	76
Johnson	10	0
Peller	78	153
Ansley	108	142
Stefancic	74	50
Tushnet	92	44
Total	400	465

A final hypothesis that I was able to test was whether Black authors in my sample tended to favor other scholars who were Black over those of other ethnicities, and so on for the other groups of color. As is shown in Table 3, this proved true, but only for Black authors. The Black authors in my sample cited Black authors 169 times; other

authors of color 35 times; and Whites 313 times. Latinos cited authors of their own ethnicity 43 times; other authors of color 74 times; and Whites 108 times. For Native Americans, I found 5 citations to other Native American authors; 18 to other ethnic, minority authors; and 20 citations to Whites. These figures must be interpreted cautiously, since there are many more Blacks in the world of scholarship than there are members of these other groups, thus it should not be surprising to find Black authors citing each other more frequently than they do members of groups whose representation in academia is very small, such as Native Americans. On the whole, however, the figures did not show critical race scholars relying unduly on scholars of like color.

TABLE 3

Authors	Citations to Authors of Same Ethnicity	Citations to other Authors of Color	Citations to White Authors
Black	169	35	313
Latino	43	74	108
Native American	5	18	20

II. QUALITATIVE ANALYSIS

In addition to the numerical analysis, I also performed a qualitative one. In this qualitative stage, I closely examined a sample of footnote references for general tone and approach. In particular, I was curious whether the outsiders were citing mainstream scholars dismissively, cavalierly, grudgingly, perfunctorily, or in a token fashion. In my *Imperial Scholar Revisited*,[8] I noted a variety of citation styles on the part of mainstream scholars that had the effect, subtle or not, of marginalizing the contributions of minorities and women. I was curious to see whether minority and critical race scholars were guilty of something similar.

I found little evidence that this was happening. Most string cites (ones containing a variety of authors and works) that referred to works by both Whites and non-Whites listed them in no particular or obvious order; in particular, White authors did not tend to be cited first or last. I, also, was not struck by any differences in strength of signal. The more general "cf." and "see also" signals, as well as the stronger signals such as "see," did not seem to correlate with any par-

8. Delgado, *supra* note 2.

ticular group. Vengeful or blatantly exclusionary citation of the sort mentioned by Professor Austin simply seemed not to occur.

LIMITATIONS OF MY METHODOLOGY

I should call attention to certain limitations of my methodology. My sample size, twenty items, is relatively small. Even though I used a randomizing instrument to arrive at the items, it is possible that the resulting sample is biased in some respect. The population from which I drew also could be criticized as skewed, in that it consisted of about three hundred law review articles and books I deemed, at an earlier time, to be significant and also characteristic of critical race theory. Moreover, I did not employ a control group, relying instead on my previous two studies dealing with majority-race scholars as a basis of comparison. It is possible that mainstream scholars' practices have changed since I last studied them in 1992, so that the relatively egalitarian citation patterns I found for the crits are now matched by non-crits. Finally, the "unknown" category, which accounts for about twenty-three percent of all cited items, may be a source of bias. It may be that authorities who are unknown to me may be dominantly white, or, for that matter, of color. Human error may have crept in.

Still, my admittedly limited survey begins to answer the question with which I began. There seems not to be any dramatic "colonial scholar" counterpart phenomenon to the imperial-scholar one I found earlier. Outsider scholars cited scholars of majority and nonmajority race almost evenly with a slight edge to authorities who are White. This held true among each ethnic group in my sample—Black, White, Latino, Asian-American, and Native American. Moreover, when outsider scholars did cite scholars of majority race, I found little evidence that they were doing so caustically, dismissively, or as an afterthought. Most of the citations were respectful and treated the white scholar or authority in much the same way the author treated other scholars of Critical orientation or minority hue.

A CONCLUDING COMMENT

Might it be argued that the outsiders' distribution of citations — about one-half to white authors, the other half to non-White authors — is nevertheless skewed, in that there are many more White than non-White authors and that an unbiased distribution for an article on civil rights would be, say, 70-30 or 80-20? I do not believe so. Since the advent of critical race theory, the top reviews have seen a great

infusion of articles by scholars of color. White scholars continue to write about civil rights, of course, some in a critical, others in a more mainstream vein. But the body of material waiting to be cited, in recent years at least, has been composed almost equally of works by White and non-White authors.

A second reason has to do with the theory and psychology of citation. Commonplace propositions, ones that accord with the reader's common sense, rarely are thought to require authority. Thus, most law review editors allow statements like "The United States system of civil justice is the best in the world," or "The United States has one of the highest standards of living" to pass uncited, while they would want to see authority for a proposition such as: "Black infant mortality in the United States is at Third World level and worsening," or "Interest convergence, not idealism, accounts for the many twists and turns of racial justice." Critical propositions, in short, are thought to require support since they go against the grain, while more moderate propositions are not. For both reasons, outsiders' citation practices as revealed in this survey strike me as about what they should be. Crits seem to display no undue favoritism toward other crits or minority scholars. Indeed, authors writing today about equality or civil rights whose footnotes deviated radically from the roughly equal distribution displayed by the twenty-two authors in my survey, may want to reflect on whether they are being fair and even-handed in their attribution and citation patterns.

OUTSIDER-INSIDERS: THE ACADEMY OF THE CLOSET

WILLIAM N. ESKRIDGE, JR.*

I

Women and people of color teach in unprecedented and increasing numbers in American law schools. Fred Shapiro's survey[1] demonstrates that these law teachers are publishing influential (much-cited) articles in the leading law reviews. Throughout this Symposium, the question is posed: Are these former outsiders now academic insiders? If that is too tough a question, consider this one: What outsider group is so marginalized that it is not only left out of analyses of outsider jurisprudence, but is so far out that it has been inside all along?

Fred Shapiro's "top one hundred" lists map the arguable transformation of two groups of law professor outsiders into possible new insiders. The all-time list includes only three articles by women and one by a person of color. Contrast their representation in the recent-years lists: women and people of color account for 39 of the 103 most-cited law review articles published between 1982 and 1991, and for 17 of 26 articles among the top five for the years 1987-91. This contrast leads Shapiro to claim that "outsiders in this [recent] period have achieved some kind of insider status in the law reviews." Lesbian, gay, and bisexual scholars go virtually unmentioned in Shapiro's account of outsiders-turned-insiders,[2] and for perfectly understandable reasons.

An important reason is that bisexual, lesbian, or gay authors have long been insiders, or at least outsiders who pass for insiders. By my count, several of the 103 articles on the all-time list were written by authors apparently having minority sexual orientations, as were twice as many of the 103 articles on the recent-years lists. The aggregate numbers would be surprising to most people,[3] because only one article on the all-time list and three on the recent-years list were written by authors who are now openly gay; none of the articles was written by

* Professor of Law, Georgetown University Law Center.

1. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent 751 (1996).

2. In his only mention of gay scholars, Shapiro observes that the latter figure rises to 19 of 26 if "openly gay scholars" are included. *Id.* at 758.

3. For reasons that will be set forth in Part III, I will not suggest exact numbers of gay authors even if I could determine them myself.

an author who was out in print at the time the most-cited articles were originally published. Homosexual and bisexual scholars have long been legal academic insiders, their minority sexual orientation—the mark of the outsider—literally invisible.

The phenomenon of the closet that allows gay people to be insiders might prevent them from being full outsiders. Hence, a woman or a person of color is considered an outsider scholar by Shapiro and others even if she never publishes work of feminist or race import, but few if any pundits consider a white-gay-male author an outsider unless he comes out as a gay man, preferably in print, or otherwise claims outsider status. This is not surprising. What is surprising is that so few of the lesbian, bisexual, or gay scholars have come out in print. Sexual orientation is a key element of most people's identity in this Freudian century, and especially so for gay people in the post-Stonewall era. It is true that minority sexual orientations are still heavily stigmatized, but with the exception of a few schools, legal academe is relatively tolerant. The large majority of the most-cited articles were written by professors with tenure. What do they fear?

There is no simple answer to this quandary, but an insight can exploit the insider-outsider difference as applied to article subject matter. Insider articles are those written about traditional regulatory topics and from a point of view internal to the system's goals; these articles explain why it is rational that the legal system has devised such-and-such rules or how the system can better achieve its goals by considering thus-and-so rules. Thirty years ago it would have been unthinkable for the author of an insider article to announce his or her sexual orientation; such a move would have discredited the article's analysis and possibly triggered police and FBI scrutiny. This impulse persists unabated since Stonewall, and for reasons that have to go beyond appropriateness.[4] An explanation must start with the paradox that America is both anxious about and obsessed with sexuality; both push the gay author of an insider article away from disclosure. If the imagined reader and the author are both anxious and indeed embarrassed about sexuality, then reasons of privacy will suggest to the author that she purge her article of sexual orientation; this impulse can

4. It will not do to say that the author's announcement of sexual orientation might not fit into most insider articles, for there are many inventive ways to write such articles. Even the most technical regulatory articles use hypotheticals, and there is no reason of ontological appropriateness to prevent a gay author from pointing such hypotheticals in a coming-out direction. A trust and estates article can use a hypothetical same-sex couple, and just as easily the author and her same-sex partner. Constitutional law articles would seem even easier to write with gay-friendly examples, including some from the author's own life.

operate even more drastically for people with minority sexual orientations. Although usually overstated, an author's fear of offending the reader, of appearing queer to the reader, is the most effective censor. Also important, however, is the author's repulse at sexualizing herself, of exposing herself to prurient outside interest. Even when the insider author does not have to worry about losing her job or her liberty by disclosing or hinting at her minority sexual orientation, she risks something just as important: the loss of credibility and the diminishment of influence that her ideas might have because they are overwhelmed by the disclosure of sexual preference.[5]

The totalizing feature of sexual orientation in a sex-anxious/sex-obsessed society also provides an explanation for why gay authors have not come out in their most-cited outsider articles. Outsider articles seek to destabilize the existing legal system, usually through critique of fundamental assumptions or presentation of excluded viewpoints. Most of the gay-authored articles in Shapiro's recent-years lists are outsider articles, yet the gay authors provide no hint of minority sexual orientation in any of them. While the authors of insider articles have at least a plausible subject-matter justification for closeting their sexual orientation, the authors of recent outsider articles have no similar justification, as the dominant methodology of the recent articles is personal narrative.[6] There would seem to be every reason for gay authors of outsider narratives to share their sexual orientation with the reader.

Yet this didn't happen in any of the most-cited articles on the recent-years lists. One reason it didn't happen is the privacy concern. Authors have little choice but to be out of the closet about their sex and race; the author's name usually gives away her sex. Authors have

5. Consider this thought experiment. An author writes a brilliant economic analysis of a trust problem; her aspiration is that this analysis will be adopted by judges, policymakers, and other academics. If she comes out as a bisexual in the course of the article, she risks that influence (though of course she might exercise a different kind of influence). Note that she runs no comparable risk if she comes out as a left-hander (a ho-hum confession these days), a Cubs fan (just evidence of emotional masochism), or an astrologist (really odd but shared by many intelligent people). None of these idiosyncracies has similar totalizing possibilities.

6. *E.g.*, Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992). *See generally* Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). Gaylegal scholarship is similarly infused with narrative methodologies. *E.g.*, Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883 (1989). *See generally* William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994) (responding to Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993)).

a great deal of choice about who knows their sexual orientation, and the sex negativity of so many others makes the closet most comfortable. A more interesting reason returns us to the totalizing features of sexual orientation. The authors writing outsider articles who make Shapiro's recent-years lists write articles about feminist and critical race themes, and they write as women and as people of color. To come out as a bisexual or lesbian or gay man, these authors would assume the risk that their sexual orientation would overwhelm and erase their sex or their race. Admittedly, this reason fails to appreciate that the most interesting theme in the new outsider scholarship is "intersectionality," the way in which different minoritizing characteristics (especially race and sex) combine to produce extraordinary disadvantages.[7] For the period 1982-91, however, the most-cited works on intersectionality slighted issues of sexual orientation. Why?

II

Shapiro's lists might be evidence suggesting the dominance of an academy of the closet, in which the most successful strategy for gay authors has been to be discreet and not to flaunt their minority sexual orientations. However one defines "successful," this is premature. To begin with, counting citations is just one way, and probably not the best way, to figure academic success. Another indicium of success is whether an author's work has changed the way lawyers look at an issue or area of law. Richard Posner, surprisingly low on the all-time list and virtually absent from the recent-years list, is a more significant legal scholar than all but a few names higher up on the lists, because his work has altered legal discourse and, indeed, created a whole new legal discipline, law and economics. Posner should have his own list. Consider another, less well-known exemplar.

Rhonda Rivera of the Ohio State School of Law was the first prominent openly lesbian or gay law professor. In the 1970s and 1980s, she produced a steady stream of articles on gaylegal issues.[8] Because such issues were completely marginal in legal education at the time, the fanciest law reviews had no interest in publishing them and aspiring tenure candidates (the grist for Shapiro's citation mill)

7. *E.g.*, Kimberlé 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; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (1993).

8. Starting with Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

had no reason to cite or even read them. Yet for those of us who were gay, lesbian, or bisexual law students or junior faculty during that period, these were informative, illuminating, inspirational articles. They showed us that gaylaw, a body of law and theory from our perspective, was possible and could be done with the greatest professional integrity.[9] Rivera even had a "big theory," equal citizenship for gays, as ambitious as, and more visionary than, the big theories that ensured other articles multiple citations. Any all-time list that does not include Rhonda Rivera articles is a list with huge gaps.

To be sure, the Shapiro lists are dynamic; the all-time list has been updated after ten years, and any new recent-years list will of course be completely different from the current set. Might Rivera appear on the next all-time list? Hard to say, but it seems likely that gaylegal articles will appear on Shapiroesque lists sometime within the next century. My hypothesis is that gaylaw is already enjoying some of the same efflorescence that feminism and critical race theory have been enjoying for the last half-generation. This is already apparent in the large number of excellent law review articles dealing with gaylegal issues from a variety of sophisticated theoretical perspectives, the extremely active AALS section of gaylegal scholars, and the new-found eagerness of fancy law reviews to publish gaylegal theory. Gaylaw is now a presence in legal academe; it remains to be seen how lasting a presence it will be.

Why is it that, after decades of scant interest, gaylaw is a boom industry for legal academics? The obvious starting point is *Bowers v. Hardwick*[10] and the intense discourse that precedent has triggered. Just as *Dred Scott v. Sanford*[11] was a shot in the arm for the abolitionists, so *Bowers* has been a shot in the arm for gay intellectuals as well as activists. The decision has been condemned from every perspective known to law professors, and scholars have used *Bowers* as a template against which to articulate a whole range of constructionist and deconstructionist theories. By sanctioning state sodomy laws in a way that threatens to criminalize a whole class of worthy citizens, *Bowers* has become the centerpiece for a whole new discourse about the legal role

9. The rights of gay people were never discussed, and the words "gay" or "lesbian" or even "homosexual" were never uttered, in any class I took in law school (1975-78). Until I read Rivera's articles after law school, I was not even aware that there was a body of law regulating the lives of gay people. (I, who had been in ROTC before the volunteer army, didn't even know that the U.S. military was supposed to interrogate and exclude me until I read Rivera!) Because of her work, I aspired to write in a similar vein at some point in my own legal academic career.

10. 478 U.S. 186 (1986).

11. 60 U.S. (19 How.) 393 (1857).

of bisexual, lesbian, and gay citizens. The decision has opened a Pandora's box of arguments and distinctions that feed into such otherwise dissimilar issues as the legality of the military exclusion of lesbian and gay and bisexual Americans, of state antigay initiatives, of new censorship of gay-friendly publications, of antihomosexual educational policies, and of state suppression of information to adolescents about safer sex. There is nothing like a big splashy, bashy Supreme Court decision to galvanize a field of legal debate.[12]

In the context of increasing recognition that gay people are actually citizens and not simple outlaws, the imperious tone of *Bowers*—Justice White's insistence that only "homosexual sodomy" was at issue and his flaunting an ignorance about even elementary features of law's regulation of gay people—raised the stakes of gay issues, elevating them to the level of political drama, a drama just deepened by the Supreme Court's gay-friendly decision in *Romer v. Evans*,[13] where the majority struck down an anti-gay initiative without any mention of *Bowers*. If the opinion is read broadly, is there anything the state cannot do to homosexuals? If homosexuals can be outlawed, are others (Jews? Women? Poor people?) safe from popular persecution? After *Bowers*, the legitimacy of the Supreme Court and of law itself has become connected with sexual orientation, a supposition that helps explain the Court's eagerness to balance the scales with *Romer*. *Bowers* involves many of law's great themes—privacy, equal treatment, punishment, tradition, citizenship—and bisexual, lesbian, and gay authors finally have a big topic where minority sexual orientation is not only relevant but is part of the argument: We are among you, and any war you declare on us is a civil war.

12. Of course, there were plenty of Supreme Court decisions bashing homosexuals before *Bowers*, 478 U.S. at 186, most notably Ginzburg v. United States, 383 U.S. 463 (1966) (nonobscene gay literature banned because viewed as "pandering"), Boutilier v. INS, 387 U.S. 118 (1967) (bisexual man kicked out of the country because of "psychopathic personality"), and Rose v. Locke, 423 U.S. 48 (1975) (laws severely criminalizing "crimes against nature" are not vague). These decisions are just as badly reasoned as *Bowers*, and indeed are analytically antic (they read almost like satires of Supreme Court opinions). But less was at stake in the earlier opinions, simply because homosexuals were universally thought to be simple sickos and outlaws, outside civilized law. These early antihomosexual opinions are like kicking Bambi, cruel in the ignorance that they are hurting human beings who can feel and think, but insulated from criticism (outside the relentless efforts of Rhonda Rivera and the ACLU) because Bambi was then too vulnerable to fight back or make its pain understood. By the time of *Bowers*, it was clear to everyone except poor Justice White and some of his colleagues that gay people could no longer be ignored and bashed with impunity. Romer v. Evans, 116 S. Ct. 1620 (1996), is evidence that the current Court wants to avoid the *Bowers* mistake.

13. *Romer*, 116 S. Ct. at 1620.

Gaylaw would be a bright but fleeting comet if sodomy law were its only locus of discourse, but that is far from the case. Two generations have now come of age after Stonewall. Our lives and political activism have generated many new intersections with the law that were scarcely thinkable before the 1970s. They are now not only thinkable, but are writable, and gaylegal scholars have many specialties about which they can write:[14]

* antidiscrimination law, which protects against sexual orientation discrimination in dozens of cities (including the District of Columbia) and eight states;
* family law, including adoption, surrogacy, artificial insemination, contractual rights of couples, and same-sex marriage;
* immigration and asylum of lesbian, bisexual, and gay people from other countries to the United States;
* hate crimes against sexual orientation minorities, as well as domestic abuse by same-sex partners;
* sex education, especially about HIV infection and AIDS, and counseling for adolescents anxious about their sexual orientation;
* state support for gay friendly artistic projects, AIDS research, and gay history.

Gay lives have been on the cutting edge of American society for decades; families of choice, shock art, racial integration, and safer sex are developments where gay culture moved much faster than straight culture. The legal issues presented by gay lives are equally avant-garde and provide a richer tapestry on which scholars can work.

Feminism and critical race theory have been pressing law's agenda toward issues of sexuality as to which openly lesbian, gay, and bisexual authors have much to contribute. The connection between gaylaw and feminism is a fruitful situs for intellectual as well as practical scholarship. Particularly if gaylaw is seen as contributing to a larger project of sexuality and the law, its agenda poses challenging questions for core feminist issues. Because much feminist theory assumes sex and gender essentialism, the social constructionism of lesbian and gay scholarship is destabilizing to feminism.[15] The pro-sex content of most gay scholarship challenges the regulation of sexuality favored by some feminists. Feminist critiques reconceiving the law of consent in sexual intercourse are confronted with unsettling examples

14. Articles on all these topics are collected in WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, SEXUALITY, GENDER, AND THE LAW (forthcoming 1997).

15. If a transsexual is fired for her orientation, is that "sex" discrimination? Is the firing of an effeminate man an example of "gender" bias? Can a male-to-female post-operative transsexual marry a man? A woman? Can a person with XY chromosomes but reared as a woman marry a man?

of leather sex, bondage and discipline, and intergenerational sex from lesbian, gay, and bisexual authors.[16] There are few, if any, issues of sexuality and the law that should not be of interest to feminists, and feminist treatments of most issues would be radically incomplete without considering minority orientation perspectives, especially the different range of narratives and factual matter we bring to bear.

If my hypothesis is correct, that gaylaw has already entered a growth stage, will openly bisexual, lesbian, and gay scholars become a new set of insiders? Would the closeted homosexuals then be on the outside? How much of this is just a shell game?

III

Kinsey numbers—Dr. Alfred Kinsey's quantification of sexual orientation along a sliding scale of zero to six—have been a big hit in America. Like Social Security numbers, all adults have them and they last for life. Although heterosexuals may be dismayed to learn that theirs is *zero* (a little Kinsey humor), the low number is a badge of honor for many, and some will repress evidence that would raise their scores. Openly gay people tend to be proud of their *fives* and *sixes*, and some of them repress evidence that would lower their scores. Both groups ultimately derive satisfaction from just knowing where they are (as might bisexuals with their centrist *twos* and *threes*). This is the common story about Kinsey numbers. I think it's wrong and that Kinsey numbers, like most-cited lists, are plastic, strategic, and obsessional.

Kinsey numbers have taken on a naturalness that is not entirely rational. When Robin West recently announced, in a review of Posner's *Sex and Reason*, that she didn't know her Kinsey number,[17] Posner was "floored."[18] I think she is on to something. Although most adults, including West, have fallen into recognizable Kinsey patterns, it seems likely that the same people could easily fall into other patterns under different circumstances.[19] Kinsey's own study provided

16. Feminist criticisms of rape as violence and not sex are in tension with the S&M literature exploring ways in which violence and dominance are sexual and productive. Although gaylegal authors shy away from defenses of sex between adults and adolescents, that topic too will emerge from the closet and bedevil both feminism and gaylaw. *See, e.g.*, PAT CALIFIA, PUBLIC SEX (1994).

17. Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413, 2433 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)).

18. RICHARD A. POSNER, OVERCOMING LAW 573 (1995).

19. If Kinsey *zeroes* of the same sex ended up isolated from the opposite sex, a great deal of homosexual affection, fantasies, and behavior would result. *See* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE (1991) (this phenomenon occurred during World War II). These are precisely the

evidence that the aggregate numbers of *sixes* and *zeroes* were different for different age groups.

This understanding of sexual orientation as plastic and situational rather than fixed and universal provides a robust reason why I refused in the first part of this Article to identify precise numbers of most-cited articles authored by gay people. On the one hand, it is not very clear what one means when one says that an author is gay. That people have dated or had intercourse with people of the same sex does not make them gay.[20] On the other hand, that people have dated people of different sex, married, and had children does not make them straight. Perhaps it makes little sense to talk of straight authors except those who have come out as straight in circumstances where it was risky to do so. These conundrums provide deeper insight into the phenomenon described in this Article: Much more so than female authors and somewhat more so than authors of color,[21] gay authors are outsider-insiders—insiders so long as they remain in the closet, and outsiders when it suits them, as when gaylegal issues become prominent enough to make it attractive for more authors to come out of the closet.

If one views sexual orientation primarily by what people declare, one must recognize the strategic features of sexual orientation. The closet is a fluid residence. During the McCarthy era, virtually everyone publicly presented themselves as Kinsey *zeroes*. Stonewall was an event that stimulated large numbers of queers to come out of the closet, but people presented themselves as Kinsey *fives* and *sixes* in part because they had seen others doing so and expected yet others to follow, and in part because they expected official persecution of homosexual activity to relent once large numbers of people came out. Although coming out surely had a connection to sexual feelings, it was also important as a social and political statement.

Others, from whom Kinsey inquisitors could surely extract confessions of homosexual fantasies and acts, have not come out. There is no reason to believe that they are any more or less attracted to

criteria for a Kinsey *six*. Conversely, the many rewards in our society for ostensible heterosexuality surely bend many people to lower Kinsey numbers.

20. Is it fair to say that everybody who has had intercourse with someone of the same sex is homosexual in orientation? Surely not. Everbody who has had same-sex fantasies? No. Fantasies plus sex? Not even that. One reason the military's exclusion of bisexuals, gay men, and lesbians is so irrational is that the military is chasing after a plastic characteristic.

21. For an excellent exploration of parallel identity politics for gays and people of color, see Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995). Karst shows how race and sexual orientation binarism are decaying in ways that sex binarism is not.

people of the same sex than out lesbians and gay men, because their decision not to come out is just as strategic. They don't want to sacrifice their other identity characteristics that would be at risk if they were openly gay.[22] Many see their professional careers or influence at risk if they came out. This helps explain why so few of the authors of either traditional or critical scholarship are willing to present themselves as gay. Even though most don't fear losing their jobs, they fear distraction from their ideas or from the identity stance they have assumed in their articles (economic man, woman of color). Now that gaylegal scholarship has attracted a critical mass of authors, issues of sexuality fill the courtrooms and legislatures, and the fancy law reviews are willing to publish on these and related topics, one would expect more people to come out as openly gay, bisexual, or lesbian scholars. One would expect this phenomenon to be affected by such charged variables as race and sex.

It is hard to characterize gay or bisexual-white-male scholars as either insiders or outsiders, for the accessibility of the closet allows potential outsiders to write as insiders and then to come out when it is safe or when the academic agenda offers genuine opportunities. Lesbians or bisexual women and gays of color do not have the same option that gay-white men have, for they will be some species of outsider even if their sexual orientation is secret. They too ought to come out in greater numbers when it is safe or opportune to do so, but one would expect relatively less coming out because some women and people of color will rationally fear their sexual orientation will erase their sex, gender, and race claims. I would, however, expect some lesbians and people of color to come out in the process of exploring intersectionality issues posed by sexual orientation, race, and sex.

Sexual orientation in our society is, finally, an obsessional discourse. Gay people did not create the idea of sexual orientation; it was thrust upon us by a striving bourgeois culture and generations of madcap medics. They created our identity and then put us in jails, hospitals, and asylums for it. Coming out has been our effort as a group to resist this depravity; in Foucauldian terms, we have reclaimed our subjectivity as human agents by defying the stigmatizing power of sexual orientation. But most of us (and almost all of us in the legal academy) have hedged our bets, coming out as vanilla-fla-

22. Hence the common phenomenon of being only partly out of the closet. One can be out at work, but not to one's parents. One can be out to one's friends, but not to one's coworkers. The decision of whom to come out to is in part a strategic decision, of how one wants others to perceive her.

vored homosexuals, virtually normal![23] We have not come out as transsexuals, leather dykes, masochists, drag queens, or pedophiles—all orientations shocking to middle class and even radical feminist society and even more totalizing in the creation of a singular identity. One would expect that if openly gay scholarship comes to be accepted in the legal academy, a process already under way, little waves of new outsiders will form. Every assimilation generates new lines being drawn and new outsiders being created.

The obsessional feature of sexual orientation has some similarity to the obsessional feature of most-cited law review article lists. Counting up citations contributes something to human knowledge, but it is also significant as a discourse of inclusion-exclusion. Who got on the list? works alongside, Who got left out? Are there people with AIDS on the lists?

23. Apologies to ANDREW SULLIVAN, VIRTUALLY NORMAL (1995).