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Islam and Homosexuality: Religious Dogma, Colonial Rule, and the Quest for Belonging

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ISLAM AND HOMOSEXUALITY:

RELIGIOUS DOGMA, COLONIAL RULE, AND THE QUEST FOR BELONGING

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INTRODUCTION

It is widely believed that homosexuality is forbidden in Islam. However, a distinction should be made between homosexual acts and homosexual persons. Under the laws of some Islamic countries, homosexual acts are considered a crime and are punishable by death or by isolation, if not actual criminal proceedings. Being a homosexual person and not publicly acting on homosexual feelings, however, is within the bounds of the law in many Muslim countries. These distinctions create a serious clash between Islam and homosexuality. Some argue that this clash is reconcilable, while others push to maintain the perceived severance. While there are liberal Muslims who accept homosexuality and consider it to be natural,[1] other Islamic writings on homosexuality consider this identity a perversion that needs to

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[1] *Homosexuality and Islam*, RELIGIONFACTS.COM, http://www.religionfacts.com/homosexuality/islam.htm (last visited Feb. 6, 2012).

be prevented or reformed in the same way that ex-drug addicts are reformed.[2] In late 2010, the news of the openly gay Saudi diplomat who was seeking asylum in the U.S. broke out. The diplomat's attorney argued that the diplomat would be put to death if he were to return to Saudi Arabia, because being openly gay is a crime punishable by death in Saudi Arabia. John Bradley, however, presents a different perspective by stating that in Saudi Arabia, there is an emergence of gay culture and in some areas homosexuality is "tolerated," if not accepted. Regardless of whether homosexuality in Islam is indeed a crime, the experience of gay, lesbian, bisexual, and transgender (LGBT) individuals must be viewed from multiple perspectives in how the LGBT community is treated differently within the Muslim community and by those outside of the Muslim community.

Analyzing discrimination through a single-axis framework marginalizes those who are multiply-burdened;[3] that is, analyzing Muslim LGBT individuals' experiences as just Muslims, or just LGBT, only marginalizes this community that is multiply-burdened by religion, sexual orientation, race/ethnicity, and gender identity and expression. This article's focus is the intersection of these identities and how our current understanding of Muslims who belong to the LGBT community is narrowly defined or, at times, non-existent. In order to give voice to this marginalized community, this article utilizes the concept of intersectionality as derived from Critical Race Theory (CRT).

The concept of intersectionality examines how systems of oppression based on separate social categories like race, religion, gender, and class, interact to create complex forms of inequality in society.[4] Intersectionality surfaced as part of the multiracial feminist movement's critique of radical feminism.[5] Critical race theorists and Black feminists like Kimberlé Crenshaw and Patricia Hill Collins challenged the notion that oppression experienced by middle class White women was the same as the oppression experienced by women of color or poor women. They asserted that race,

[2] *See, e.g., What is Islam's View of Homosexuality?*, INVESTIGATING ISLAM, http://www.islamic.org.uk/homosex.html (last visited Feb. 6, 2012).

[3] *See* 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, 140 (1989) (explaining that those who suffer from discrimination on multiple grounds find inadequate legal protection in antidiscrimination laws that address varying forms of discrimination as singular issues); *see generally* Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30, 33 (1981); *see also* Angela Harris, *Essentialism In Feminist Legal Theory*, 42 STAN. L. REV. 581, 583 (1990).

[4] *See* BELL HOOKS, FEMINIST THEORY FROM MARGIN TO CENTER xii (2d ed. 2000).

[5] *Id.* at 3.

class, and gender intersect to create unique forms of oppression that are overlooked when they are addressed separately.[6] The concept of intersectionality was originally applied to race, class, and gender, but soon became a staple of CRT and expanded to explore a multitude of other social categories and identities, including sexuality. CRT utilizes the concept of intersectionality to understand specific systems of oppression that affect people who possess membership in more than one marginalized group.[7] Using intersectionality as defined within CRT[8] is beneficial in examining the experiences of Muslim LGBT individuals who are multiply-burdened. Moreover, acknowledging these facets of their lives demonstrates multiple sources of disempowerment that affect the lives of this marginalized community.

Grounded in CRT's intersectionality, this article will explore how heterosexism,[9] patriarchy, cultural views on religion, and colonialism have influenced and continue to impact the distribution of power and how these beliefs and behaviors towards Muslim LGBT individuals have been institutionalized to support and sustain those in power.[10] This article further argues that Islam, as a religion of peace and as a religion that stands against oppression,[11] has the ability to ameliorate this perceived repression by providing a forum of acceptance for Muslims and voices of dissent against the punitive and overbearing historical perspectives on homosexuality. The view that homosexuality in Islam should not be criminal must be voiced. Thus, Part I of this article will provide an overview of CRT with historical and foundations of CRT, later interpretations of CRT, intersectionality within CRT and intersectionality as applied to the Muslim LGBT community. Part II will outline homosexuality from a Qur'anic perspective. Part III will discuss homosexuality from *Shari'a's*

6 *See* Crenshaw, *supra* note 3, at 140; *see also* Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 48 (2000).

7 *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION, 51 (2001) (defining the Critical Race Theory concept of "intersectionality").

8 *See id.* at 54.

9 *See generally* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195 (1988) (explaining Heterosexism is the pervasive cultural presumption that heterosexuality is the natural and normal and other forms of sexuality are deviant and rightfully marginalized); *see also* I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1159, 1187 (1991) (describing how heterosexism presupposes binary masculine and feminine identities and recognizes heterosexual coupling as the basis of sexual intimacy and family life; as such, it empowers people who fit the man/boy – woman/girl gender dichotomy and disempowers people outside of that gender dichotomy, and as a result, non-heterosexuals are underrepresented in institutions like law and also face attack and ridicule when visible).

10 DELGADO & STEFANCIC, *supra* note 7, at 55.

11 SCOTT SIRAJ AL-HAQQ KUGLE, HOMOSEXUALITY IN ISLAM: CRITICAL REFLECTION ON GAY, LESBIAN, AND TRANSGENDER MUSLIMS 8 (Oneworld 2010).

perspective. Part IV will explain colonial influence on Islamic laws against homosexuality. Part V will examine the influence of British laws on the American legal system and cultural views on homosexuality in the U.S. Part VI will explore the importance of and possibility of reconciling Islam and homosexuality and will conclude with a discussion and analysis of the experience of Muslim LGBT from the intersection to their religious, gender, and sexual orientation identities.

I. CRITICAL RACE THEORY

CRT examines the connection between race, racism, and power dynamics within our society in the hopes of finding ways to correct inequalities.[12] Although CRT traces its genesis to Critical Legal Studies (CLS)[13] and its critique of the American legal system, other scholars and intellectuals have applied CRT to the fields of Education,[14] Political Science,[15] and Ethnic Studies.[16] The foundational argument of CRT is that

12 DELGADO & STEFANCIC, *supra* note 7, at 2.

13 *Id.* at 3.

14 *See generally* Gloria Ladson-Billings & William Tate, *Toward a Critical Race Theory of Education,* 97 TCHRS. C. REC. 47, 47–68 (1998); Adrienne D. Dixson & Celia K. Rousseau, *And We are Still Not Saved: Critical Race Theory, in Education Ten Years Later*, 8 RACE, ETHNICITY & EDUC. 7, 7 (2005); Michael Omi & Howard Winant, *On the Theoretical Status of the Concept of Race, in* RACE, IDENTITY AND REPRESENTATION IN EDUCATION 3, 4 (Cameron McCarthy & Warren Crichlow eds., 1993). The application of CRT to the field of education has been used to examine and critique equitable access to educational resources. Ladson-Billings, *supra.* Education advocates employ CRT to the "notion of equal opportunity . . . [asserting] the idea that students of color should have access to the same school opportunities, i.e. curriculum, instruction, funding, facilities, as white students" as well as address past inequities that left many African-American students second-class citizens within social and educational systems. *Id.* at 17. Educators continue to use CRT to expose and dispel the features of institutional and structural racism that benefit White students yet fail to improve African-American and Latino students' suspension, expulsion, and drop-out rates. *Id.*

15 Barbara Luck Graham, *Toward a Critical Race Theory in Political Science: A New Synthesis for Understanding Race, Law and Politics, in* AFRICAN-AMERICAN PERSPECTIVES ON POLITICAL SCIENCE 212–31 (Wilbur C. Rich ed., Temple University Press 2007); *see generally* Jennifer Hochschild, *Race and Class in Political Science*, 11 MICH. J. RACE & L. 99 (2005); Darren Lenard Hutchinson, *Critical Race Studies: Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455 (2002); Pei-te Lien, *The Participation of Asian Americans in the U.S. Elections: Comparing Elite and Mass Patterns in Hawaii and Mainland States*, 8 ASIAN PAC. AM. L.J. 55 (2002). Despite the importance and prevalence of race and ethnicity within American culture and politics, traditional political scientists often fail to give scholarly attention to the structural disempowerment of racial and ethnic minority groups. Graham, *supra.* To combat this disinterest, scholars have borrowed from CRT's foundations to challenge rights-based individualism and hierarchy to develop new frameworks and directions for understanding multiracial politics in domestic, international, and comparative contexts. *Id.* CRT legal scholars and critical race political scientists share common goals and agendas, albeit in parallel courses of law and politics, to uncover and correct racial subordination in institutional, contextual, and behavioral areas. *Id.* Lawyers and political scientists can work in tandem to leverage CRT ideas and offer more inclusive political strategies, electoral processes, and grassroots organizing. *Id.*

16 Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411–4 1 (1989); *see generally* Neil Gotanda, *Failure of the Color-Blind Vision: Race,*

society's creation and perception of race influences the distribution of power and these beliefs have been institutionalized to support and sustain those in power.[17] Specifically, early critical race theorists sought to "understand how a regime of white supremacy and its subordination of people of color [had] been created and maintained in America. . .in particular. . .social structure and professed ideals."[18] For many, the goal of CRT was to expose racism as not merely individual acts deviating from the norm, but rather the symptom of a systematic and ingrained perspective on power allocation.

A. History and Foundations

CRT began in the 1970's in reaction to the undermining of civil rights advances of the 1960's. Lawyers and legal activists began to see the victories of the civil rights era come to a standstill and realized new perspectives on race relations were needed to combat the opposition to greater racial equality.[19] The two watershed events that led to the emergence of CRT as a movement to combat racism were the first boycott and creation of an "Alternative Course" on race and law at Harvard Law School in 1981, and the Critical Legal Studies National Conference in 1987.[20] These events provided the spark and forum for scholars to organize themselves around the common intellectual pursuit of race discourse that would ultimately become CRT.

Derrick Bell, a distinguished litigator within the civil rights movement and one of the only two African-American professors of law at Harvard, set himself apart from other legal scholars by teaching legal doctrine from a race conscious perspective. His course book, *Race, Racism, and the*

Ethnicity, and the California Civil Rights Initiative, 23 HASTINGS CONST. L.Q. 1135 (1996); Ian Haney Lopez, *White Latinos*, 6 HARV. LATINO L. REV. 1 (2003); ROSALIND S. CHOU & JOE R. FEAGIN, THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM (2008). Ethnic studies utilize CRT's principles of parables, chronicles, stories, counterstories, poetry, fiction, and revisionist histories to give a voice to traditionally repressed groups. Delgado, *supra* note 16, at 2413. Social reality is constructed and the stories an in-group creates perpetuate the reality in which that in-group is superior to other out-groups. *Id.* Ethnic studies and its scholars seek to subvert the in-group's feeling of superiority and out-group's feeling of inferiority by presenting narratives that "shatter complacency and challenge the status quo...showing us that there are possibilities for life other than the ones we live." *Id.* at 2414. Ethnic studies not only validate the histories, contributions, and experiences of the repressed out-group, they also provide members of the in-group to identify, examine, and hopefully correct their role as oppressor. Ladson-Billings & Tate, *supra* note 14.

17 DELGADO & STEFANCIC, *supra* note 7, at 3.

18 *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT XIV, XIX (Kimberlé Crenshaw et al. eds., 1995) (hereinafter KEY WRITINGS).

19 DELGADO & STEFANCIC, *supra* note 7, at 3–4.

20 KEY WRITINGS, *supra* note 18, at xix.

American Law,[21] provided some of the earliest theoretical foundations for what would later become CRT.[22] When Bell left Harvard to become Dean of the University of Oregon Law School in 1980, students at Harvard demanded a professor of color to replace him. Although Harvard prided itself on its progressive and liberal stance on racial discourse, the school administration struggled to understand why students would not prefer an "excellent white [sic] professor over a mediocre black one."[23] As a compromise, Harvard hired Jack Greenberg (a White individual) and Julius Chambers (an African-American individual) –both civil rights litigators–to teach three-week mini-courses on civil rights litigation.

In protest, students boycotted the courses offered by the administration and organized their own "Alternative Course," which was student-led and focused on Bell's course book *Race, Racism, and the American Law.*[24] Student organizers asked scholars of color from other schools to come and guest lecture on topics covered in Bell's course book, and this course signaled the first attempt to institutionalize CRT.[25] With funding from outside sources and support from other Harvard professors, the "Alternative Course" brought together students and scholars to examine racial power and its relationship to the law.[26] This 1981 "Alternative Course" and subsequent courses created networks of scholars, students, and legal activists committed to rethinking "color-blindness"[27] within the law and demanded a shift in how people framed racial discourse.

The second foundational event for the CRT movement came in 1987 with the Critical Legal Studies (CLS) National Conference, which

21 *See* DERRICK BELL, RACISM RACE AND THE AMERICAN LAW (Aspen Publishers 5th ed. 2008) (1973).

22 KEY WRITINGS, *supra* note 18, at xx.

23 *Id.*

24 *Id.* at xxi.

25 *Id.*

26 *Id.*

27 *See, e.g.*, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1063 (1991) ("In the colorblind world, race is an arbitrary factor -- one upon which it is doubly unfair to allocate benefits and impose burdens: one's race is neither voluntarily assumed nor capable of change. For nearly all purposes, it is maintained, the race of a person tells us nothing about an individual's capabilities and certainly nothing about her moral worth. Race-consciousness, from this perspective, is disfavored because it assigns a value to what should be a meaningless variable. To categorize on the basis of race is to miss the individual."); *but see* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (explaining that because race-oriented beliefs and attitudes are so pervasive in American life, "we are all racists"); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1345 (1988) (arguing that the belief in "color-blindness," which justifies elimination of antidiscrimination measures, does not advance equal opportunity).

symbolized a shift in the relationship between law and race.[28] Prodded by the initial critiques brought up in the 1986 Critical Legal Studies (CLS) conference—that power does not reside "out there" but rather in the very institutions and relationships that shape our lives—, scholars of color continued the debate of "racialism" at the 1987 CLS conference. Scholars of color challenged the idea that the law was merely a tool of White supremacy, asserting the "constitutive force of law, [and] the ways legal institutions constructed the very social interests and relations that cruder instrumentalist accounts of law thought [to] merely regulate[] and ratif[y.]"[29] After the 1987 conference, the CLS began to examine how the law shapes and is shaped by "race relations" across the social plane.[30] CLS scholars analyzed the ways in which law supports racialized power relationships in society by reflecting the prejudicial interests of wealthy and powerful "whites," thereby legitimizing injustices in society and promoting racism.[31] CLS addressed areas of law that utilized express racial distinctions like reparations, segregation, and miscegenation, as well as the ways in which general bodies of law are written for and by "whites," thereby favoring whites and silencing the experiences of minorities.[32] This investigation of interplay between the law and race within CLS points to the complexity of racial discourse that was later expounded in CRT.

B. Later Interpretations of Critical Race Theory

The initial architects of CRT recognized that ideas and inequalities of race were entrenched in the legal system and American society. CRT scholars discovered that the only way to begin to change institutions that sustained race dominance and subordination was to shine light on the self-perpetuating nature of racism.[33] CRT seeks to show that race and racism do not occur in a vacuum, but rather are influenced by and exert influence on legal structures, social hierarchies, political systems, and even interpersonal

28 KEY WRITINGS, *supra* note 18, at xiv, xix.

29 *Id.* at xxv.

30 Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333–34 (2006).

31 *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 326–27 (1987) (stating that CLS's central message is "that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power.").

32 *See generally* Matsuda, *supra* note 31 (discussing the CLS movement).

33 Gina J. Chirichigno, *Crying Wolf? What Can We Learn from "Misconceptions" about Discrimination: A Transformational Approach to Anti-Discrimination Law*, 49 HOW. L.J. 553, 575 (2006) (discussing systemic discrimination as a "self-perpetuating" cycle maintained by "discrimination, negative stereotyping, and organizational inertia") (internal quotation marks omitted).

relationships.[34] CRT asserts that it is only once we acknowledge and understand the enmeshed nature of race in American society that we will ever be able to improve the social framework we live and function within.

Though prominent CRT scholars such as Derrick Bell and Kimberlé Crenshaw wrote from the experiences of being African-American, other scholars of color have used CRT to further their own community's struggle for greater racial, ethnic, class, and gender equity.[35] Groups like Critical White Studies,[36] Critical Race Feminism,[37] Asian-American jurisprudence,[38] a Latino-Critical (LatCrit) contingent,[39] and a small group of American Indian scholars[40] applied CRT to their own experience of race

[34] *See* DELGADO & STEFANCIC, *supra* note 7, at 7 (explaining that racism is common and central to life in America and that various forms of social interaction promote white dominance).

[35] *See, e.g.*, Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing about Race*, 82 TEX. L. REV. 121, 127–28 (2003) (discussing that CRT splintered into a series of subgroups including groups headed by gays and lesbians, Latinos, and Asians); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 564–65 (1997) (using CRT to explore race and class subordination in the gay and lesbian community).

[36] Critical White Studies is concerned with the nature and history of white privilege and white identity and explores how whiteness relates to culture and racial equality. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 157 (1997); Maurice R. Dyson, *When Government Is a Passive Participant in Private Discrimination: A Critical Look At White Privilege & the Tacit Return to Interposition in PICS v. Seattle School District*, 40 U. TOL. L. REV. 145, 156–57 (2008); Barbara J. Flagg, *Foreword: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL'Y 1 (2005). Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970–71 (1993).

[37] *See, e.g.*, GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 1–23 (Adrien Katherine Wing ed., 2000); Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 188 (1994); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 886–88 (1989); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 115–16 (1989) (explaining that Critical Race Feminism (CRF) combines feminism and critical race studies and places women of color at the center of the analysis. CRF addresses theoretical frameworks of oppression as well as means of empowering women of color).

[38] *See generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 354 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (detailing the ways in which Asian American jurisprudence uses critical race theory to address the racial and ethnic experiences of Asian Americans and confront various issues including the impact of the model minority myth on Asian Americans and the history of anti-Asian sentiments in America); *see also,* Hsien Chin Hu, *The Chinese Concepts of "Face,"* 46 AMERICAN ANTHROPOLOGIST 1, 45–64 (1944).

[39] *See, e.g.*, Berta Esperanza Hernández-Truyol, *Building Bridges-- Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 371–73 (1994); Jerome McCristal Culp Jr., *Latinos, Blacks, Others and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479, 481 (1997); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1179 (1999) (using LatCrit to examine the deficiencies of a black/white binary paradigm of race and develop critical inter-disciplinary discourses centered on the experiences of Latinas/os. LatCrit scholars address issues like identity, immigration, media stereotypes, bilingual education, and historical documents, such as the Treaty of Guadalupe Hidalgo).

[40] *See, e.g.*, Patricia Monture-Angus, *On Being Homeless: One Aboriginal Woman's "Conquest" of Canadian Universities, 1989-98*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 274 (Francisco Valdes et al. eds., 2002) (demonstrating that American Indian scholars use CRT to

in America.[41] These subgroups still operate within a legal framework to create and expand greater legal protections for their communities. The initial goals of CRT have also been applied to other identities such as gender[42] and sexuality[43] to highlight male dominance and heterosexism the same way CRT exposed White supremacy. Further, the Feminist critique[44] of the late 1980s and Queer-Crit of the 1990s[45] have sought to bring heightened attention to the bias systems minority identities must operate within.[46]

C. Intersectionality within Critical Race Theory

Just as CRT sought to shine a light on how racism, sexism, and classism were ingrained in various facets of society, scholars also began to examine how identities intersected to create unique experiences of oppression.[47] These movements are especially significant because they encouraged theorists to analyze the intersection of identities and how current individual discussion of "just race" or "just gender" or "just sexuality" failed to capture accurately the experience of feminists of color or gays and lesbians of color.[48] In *Demarginalizing the Intersection of Race and Sex*, Kimberlé

examine racial and legal/political classification issues of Indigenous Peoples in America and build a theoretical framework that addresses relations between American Indians and the United States federal government).

41 DELGADO & STEFANCIC, *supra* note 7, at 51.

42 *See, e.g.*, Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender and Disability*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 161 (Francisco Valdes et al. eds., 2002).

43 *See, e.g.*, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 199–201 (1995); Devon W. Carbado, *Straight Out of the Closet: Race, Gender, and Sexual Orientation*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 221, 221–22 (Francisco Valdes et al. eds., 2002); Victoria Ortiz & Jennifer Elrod, *Construction Project: Color Me Queer + Color Me Family = Camilo's Story*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 258 (Francisco Valdes et al. eds., 2002).

44 *See, e.g.*, DONALD G. MATHEWS & JANE SHERRON DE HART, SEX, GENDER AND THE POLITICS OF ERA: A STATE AND THE NATION 3–27, 152–80 (1990).

45 *See, e.g.*, M. Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RTS. L. REP. 39 (1990) (critiquing the oppression of lesbian identity in feminist legal theory); D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991) (arguing that same-sex marriage would disestablish socially constructed gender differences); *see generally* HETEROSEXUALITY: A FEMINISM AND PSYCHOLOGY READER (Sue Wilkinson & Celia Kitzinger eds., 1993); SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988), *available at* http://suzannepharr.org/2008/01/30/download-homophobia-a-weapon-of-sexism/; Warren J. Blumenfeld, *Homophobia: How We All Pay the Price* (1992), *available at* http://www.heartofrichmond.com/PDF/homophobia.pdf.

46 Valdes, *supra* note 43, at 272.

47 DELGADO & STEFANCIC, *supra* note 7.

48 Hutchinson, *supra* note 35, at 566.

Crenshaw critiques the "tendency to treat race and gender as mutually exclusive categories of experience and analysis" and asserts that this practice distorts the experiences of Black women while theoretically erasing them from the discussion of sex or race discrimination.[49] Additionally, Crenshaw asserts that analyzing discrimination through a single-axis framework only marginalizes those who are multiply-burdened while distorting analysis of racism or sexism because it only represents a subset of a community.[50]

In a similar discussion, Darren Lenard Hutchinson discourages the exclusion of race and class from gay and lesbian legal theory because its exclusion would hinder the search for truth and render the theories (gay and lesbian legal theory) incomplete and inaccurate.[51] The goal of Queer theorists is to apply CRT to reveal heterosexist bias that marginalizes and excludes the rights of the queer community. However, discrimination based on sexual orientation cannot only be seen as a gay-lesbian issue. To the extent that the exclusion of race and class distorts the truth, it conflicts with this goal of revealing the intricacies of heterosexist bias. Multidimensional oppression must be included in order to fully address gay and lesbian issues. "To recognize multidimensional oppression, however, is not to suggest that every event of poor gay people of color results from a plethora of subordinating forces. Rather it merely acknowledges that in most instances multiple sources of disempowerment affect their lives in concrete ways."[52] Furthermore, even within the gay and lesbian community, awareness of how multiple identities, such as race, ethnicity, class, and gender expressions, affect discrimination is needed to minimize division within the LGBT community, just as the women of color are divided from the feminist community when their unique experiences are not acknowledged. As Francisco Valdes explains, "sexual minority communities are, in fact, thoroughly racialized and sexualized because sex and race are embedded in our bodies and minds . . . sexism and racism . . . affect and infect our communities."[53] The experiences of gays and lesbians of color represent experiences with multidimensional implications. Incidents of violence or discrimination cannot be investigated only through the lens of sexuality, race, or class, but rather the intersection of all of these

[49] Crenshaw, *supra* note 3, at 383.

[50] *Id.*

[51] Hutchinson, *supra* note 48, at 636.

[52] *Id.* at 638.

[53] Francisco Valdes, *Sex and Race in Queer Legal Culture*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 338 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

identities.

Although the interpretations and expressions of CRT continue to be expanded to include more identities and the interaction of those various identities, the goal continues to be legal protection for those most vulnerable.[54] As social structures and institutions continued to be examined, CRT remains a valuable tool in identifying and extricating bias and unequal distributions of power.[55] By acknowledging the ways in which racism, sexism, and heterosexism are created and sustained, we can begin the work of untangling facets of society that oppress minority populations.[56] Most recently, CRT has been applied to transgender individuals' struggles to obtain protected legal status outside the traditional gender or sexual orientation categories, given that both categories fail to accurately encapsulate their experiences.[57]

D. Intersectionality and Muslim LGBT

The intersection of multiple grounds of identity is pivotal for critical examination of underrepresented populations' experiences, and informs advocacy for legal protections of underrepresented populations.[58] When multiple grounds of identity appear, awareness of potential intersectional subordination is necessary. Intersectional subordination is more likely where an individual identifies with multiple disempowered groups. For instance, Muslim LGBT individuals do not fit into the one category "just Muslim" or "just LGBT," making them vulnerable to oppression based on their sexual orientation, gender identity and expression, and simultaneously falling outside the traditional religious (i.e. dogmatic views of Islam) protections. Similar to the struggles of women of color and gay and lesbian communities of color, Muslim LGBT individuals' multiple identities interact within the system of oppression.[59] Thus, Muslim LGBT individuals struggle against the burdens of intersectionality—they are both religious and sexual orientation minorities, with neither community offering

54 *See generally* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 274 (Francisco Valdes et al. eds., 2002).

55 *Id.*

56 Darren Hutchinson, *supra* note 35, at 640–43.

57 *See, e.g.*, Kristine W. Holt, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 311 (1997); Lee M. Peterson, *Workplace Harassment against Transgender Individuals: Sex Discrimination, Status Discrimination, or Both?*, 36 SUFFOLK U. L. REV. 227, 227–28, 285–86 (2002).

58 Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991).

59 DELGADO & STEFANCIC , *supra* note 7, at 51.

adequate legal protection for their specific needs. Moreover, the experiences of Muslim LGBT individuals who belong to underrepresented ethnic or racial groups are compounded by their multiple identities—multiple-burdens.[60]

Just as many Latino, Asian, and Native American scholars sought to expand the critique of political structures beyond the Black/White binary paradigm of race,[61] when analyzing the experience of Muslim LGBT, advocates must widen the understanding of this community's identities beyond "just Muslim" or "just LGBT." In addressing gender, Judith Lorber argues that gender is an institution that is embedded in all the social processes of everyday life and shapes our interactions with each other, because unless we see difference, we cannot justify inequality.[62] When examining Muslim LGBT's experiences we must follow the same logic and acknowledge that religion is embedded in all the social processes of everyday life and shapes our interactions with each other based on difference and helps us understand inequality. Just as violence against women of color has been examined as the intersection of racism, sexism, and discrimination, violence against the Muslim LGBT community also intersects with a Muslim LGBT individual's position outside of heterosexist gender identities,[63] as well as a marginalized religious practice post 9/11. The intersectionality of these various components of identity puts Muslim LGBT individuals at a greater risk of marginalization and discrimination because narrow definitions of what it means to be "Muslim," a "man," or a "woman" as well as "masculinity" and "femininity" exclude those who find themselves somewhere in between.

Critical race theorists have traditionally focused separately either on the struggles of the individual—what gender means in individual lives, or on the institutional structure that draws from social organization and deployment of gender.[64] Nancy Burns argues that these two types of analyses should be encouraged to engage each other more intimately.[65] In discussing gender politics, Burns states that: "This engagement would give [us] tools to say more about when, for whom, and for which outcomes gender matters. The conversation would give us better ways to understand

60 Hutchinson, *supra* note 35, at 603.

61 Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1184 (1999).

62 *See* JUDITH LORBER, PARADOXES OF GENDER 5–6 (Yale Univ. Press 1994).

63 Crenshaw, *supra* note 58, at 1241.

64 Nancy Burns, *Gender in the Aggregate, Gender in the Individual, Gender and Political Action*, 3 POL. & GENDER 104 (2007).

65 *Id.*

how context makes gender relevant."[66] The relevancy of gender identity, sexual orientation, as well as religious practices in political systems prominently illuminates the resulting institutional disadvantage in legal systems.[67]

Due to the rigid nature of traditional conservative Islam, colonialism and its impact on *Shari'a*, and traditional non-Muslim LGBT communities, Muslim LGBT are not adequately legally protected. Although advances within women's and gay rights movements have provided a greater understanding of gender and sexual orientation, both fail to capture the experience of Muslim LGBT individuals, who are dedicated to identifying as both Muslim and LGBT. The best way to ensure that the rights of the Muslim LGBT community are protected is to engage one another more intimately and to encourage thoughtful analysis of their religious, gender, and sexual orientation identities.[68] It is only once we examine the unique intersection of religion, gender and sexual orientation that we will truly understand the experience of the Muslim LGBT community and we will be able to offer this community the protection and civil rights it deserves. To better understand the Muslim LGBT community, an examination of *Shari'a* or Islamic law, the impact of colonization on *Shari'a*, theAmerican legal system and American views on homosexuality are needed.

II. HOMOSEXUALITY FROM THE QUR'ANIC PERSPECTIVE

Moral objections to homosexuality are common throughout the world's Islamic communities. Among the six million Muslims who reside in the United States, the majority of Islamic scholars view homosexuality as a "deviation of man's true (heterosexual) nature."[69] Homosexuals in Afghanistan are usually physically brutalized when discovered.[70] Egyptian authorities criminally convict people who patronize gay clubs because they see homosexuality as a sin against Islam.[71] Ironically, there are gay clubs in

66 *Id.*

67 *Id.*

68 *Id.*

69 *See* Immigration and Refugee Board of Canada, *Yemen: Situation for homosexuals in Yemen, including societal attitudes*, 16 July 2004, YEM42812.E, *available at* http://www.unhcr.org/refworld/docid/41501c7615.html.

70 Bureau for Democracy, Human Rights, and Labor, U.S. Dep't of State, *Annual Report on International Religious Freedom for 1999: Afghanistan*, (Sept. 9, 1999), *available at* http://afghanhindu.wordpress.com/1999/09/09/u-s-department-of-state-annual-report-on-international-religious-freedom-for-1999-afghanistan/.

71 *See* Natalia Tamawiecki & Hectar Tobar, *Response to Terror, Military Courts*, L.A. TIMES, Nov. 21, 2001, at A4.

Egypt and an emergence of gay culture in Saudi Arabia. In Saudi Arabia, homosexuality used to be a death sentence, but now the rigidity of the government has unraveled.[72] John Bradley emphasizes the development in Jeddah, a Saudi city that has become an asylum for gay men.[73] He writes, "[g]ay Saudi men now cruise certain malls and supermarkets, openly making passes at each other, and one street in Jeddah is said to have the most traffic accidents in the city because it is the most popular place for Saudi drivers to pick up gay Filipinos."[74] The article suggests that many gay-oriented chat rooms have become popular, and that Saudis discuss the best places to meet people for one-night stands.

Patriarchal heteronormativity is active in both the Western and non-Western worlds.[75] Asia and Africa are especially prone to retaining this oppressive regime because of the lingering influence of European colonialization as well as the strength of traditions and the slow progress of women's rights.[76] While state-sponsored violence toward sexual minorities is rare in the West, the postcolonial governments of South/Southwest Asia, Africa, the Caribbean, and Islamic governments of the Arab world, perpetuate state violence that flows from laws that criminalize homosexuality— many still preserving British laws now abandoned by the United Kingdom itself.[77]

Islam has strongly maintained its heteronormativity with moral arguments. Some scholars argue that this is because the Qur'an decries homosexuality even more unequivocally than the Hebrew and Christian scriptures do.[78] The most cited anti-gay passage in the Qur'an reads:

We also (sent) Lût: He said to his people: "Do ye commit lewdness Such as no People In creation (ever) committed Before you? For ye practice your lusts On men in preference To women: ye are indeed A people transgressing Beyond bounds." . . . And we rained down on them A shower (of brimstone): Then see what was the end Of those who indulged In sin

72 John Bradley, *Queer Sheik,* NEW REPUBLIC, March 15, 2004, http://www.tnr.com/print/article/queer-sheik.

73 *Id.*

74 *Id.*

75 Anthony R. Reeves, *Sexual Identity As A Fundamental Human Right*, 15 BUFF. HUM. RTS. L. REV. 215, 233–34 (2009).

76 *Id.* at 235.

77 Barry D. Adam, *Homophobia and Heterosexism*, BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed. 2007), *available at* http://www.blackwellreference.com/subscriber/tocnode?id=G9781405124331_chunk_g978140512433114_ss1-43.

78 Reeves, *supra* note 75, at 235.

and crime![79]

Confusion ensues over the meaning of the passage.[80] Nicole Kligerman argues that the Qur'an explicitly condemns homosexuality "with very few loopholes with which to theologically condone gays in Islam," even though in traditional Islamic societies, homosexual acts behind closed doors were not condemned.[81] Similarly, Marinos Diamantides argues that the social or public expression of homosexuality, rather than the state of being homosexual, is criminalized because Islamic law requires four male adults must be witnesses to the sexual act.[82] Muslim religious authorities cite the passage in relation to AIDS and homosexuality.[83] They point out that when homosexuality had spread among people in the past, God caused punishments to rain down from the sky upon them, and they argue that AIDS is the modern punishment for deviant homosexual behavior.[84] These arguments are similar to those made by other religious groups, such as Christian and Jewish, who argue that AIDS is a punishment from God upon the LGBT community generally, and gay men specifically.

Islamic scholar Scott Kugle argues that the divine punishment of Lut's people (that is, Lot of the Old Testament) is not a condemnation of homosexuality.[85] Kugle asserts that both thematic readings of Qur'anic passages and semantic examinations of particular words cast ambiguity on traditional interpretations of the story and states that the passage is about infidelity through inhospitality and greed, rather than about sex acts in general or sexuality of any variation in particular.[86] Additionally, in his book *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims*, Kugle offers an alternative interpretation of the Lot story, asserting that "some men of Lot's tribe were guilty of assault and rape, rather than consensual same-sex acts or homosexual orientation. [The passage about Lot's people] is based on reading the whole narrative of Lot,

79 THE HOLY QUR'AN 7:80-81, 84 (A. Yusuf Ali trans., 1983).

80 Arif Bulkan, *Democracy in Disguise: Assessing the Reforms to the Fundamental Rights Provisions in Guyana*, 32 GA. J. INT'L & COMP. L. 613, 647–48 (2004).

81 Nicole Kligerman, *Homosexuality in Islam: A Difficult Paradox*, 2 MACALESTER ISLAM J. 52, 53 (Mar. 28, 2007).

82 Marinos Diamantides, *Le Jugement En Action-Ethnomethodologie Du Droit, De La Morale et De La Justice En Egypte Baudoin Dupret (Geneva: Librairie Droz, 2006)*, 32 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 137, 142 (2009).

83 Ersilia Francesca, *AIDS in Contemporary Islamic Ethical Literature*, 21 MED. & L. 381, 384–85 (2002).

84 *Id.*

85 Scott Siraj al-Haqq Kugle, *Sexuality, Diversity, and Ethics in the Agenda of Progressive Muslims*, PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER AND PLURALISM 190, 204–05 (Omid Safi ed., 2003).

86 *Id.* at 213.

in all its details, rather than isolating the same-sex nature of the mob's attack as the reason for God's wrath against them."[87] Kugle goes on to attack traditional interpretations of the Qur'an, and argues that Islam does not address homosexuality specifically. In support, he states that no punishment is specified for same-sex behavior, nor is there even any word that means 'homosexual' in the Qur'an. The closest the Qur'an comes to mentioning homosexuals is by speaking of "men who are not in need of women," but even this phrase is used descriptively and without condemnation or other negative connotation.[88] Kugle concludes that far from condemning homosexuality, Islam acknowledges and respects diversity in all aspects and in sexuality and sexual practices.[89]

Kugle argues that the Qur'an has "oblique but potent scriptural reference to gay men, lesbian women, and transgender persons; the speech of God does not condemn but rather observes them as part of a diverse creation."[90] Kugle, along with other scholars, cites to the Qur'anic verse, which incites Muslims to increase their awareness of God and brings attention to the diversity within the Muslim community. The Qur'anic verse states:

> O people, we created you all from a male and female
>
> And made you into different communities and different tribes
>
> So that you should come to know one another
>
> Acknowledging that the most noble among you
>
> Is the one most aware of God[91]

This verse implies that no Muslim is better than another and that God has created a diverse community consisting of multiple social categories based on race, ethnicity, gender, socioeconomic status and sexual orientation by extension.[92] Moreover, in discussing diversity the Qur'an states:

> If God had willed, God would have made you one single community, but rather God brings whomever God wills within divine compassion

87 Kugle, *supra* note 11, at 57.

88 *See id.* at 50 (explaining that there is no term in the Qur'an for "homosexual," and that scholars later interpreted the story of Lot to condemn homosexuality).

89 *See id.* at 3 (introducing the argument that Islam focuses on the ethical nature of a sexual relationship, not the participants' sexual identity).

90 *Id.* at 10.

91 Kugle, *supra* note 11, at 1 (quoting THE HOLY QUR'AN 49:13 (A. Yusuf Ali trans., 1983)).

92 Kugle, *supra* note 11, at 1.

——yet the unjust oppressors have no guardian and no helper.[93]

This Qur'anic verse affirms diversity within the Muslim community and warns that those who oppress, marginalize, and exclude others to create a hierarchy of power to assert moral order are unjust.[94]

Ultimately, many sacred texts were written by humans and are therefore subject to interpretation by humans. Ambiguity is unavoidable given the various translations and changes in context that these texts are subjected to.[95] This ambiguity presents a critical dilemma for governments that legislate on the basis of religious doctrine: if the texts themselves are unclear how can they be used to justify laws that seek to regulate sexual behavior?[96]

III. HOMOSEXUALITY FROM *SHARI'A* PERSPECTIVE

In Arabic, *Shari'a* is defined as a "path." However, its meaning to more than 1.6 billion.[97] Muslims across the world is more complex.[98] Muslims generally understand *Shari'a* as guiding principles for how one should live day-to-day, attend to familial and religious obligations, and structure financial and business relationships.[99] While *Shari'a* can be taken simply as Muslim custom, it is often used as the basis for Islamic law; in that, the sayings, practices, and teaching of the Prophet Mohammed or the *Sunna*, as well as the Qur'an inform *Shari'a*.[100] In terms of its applicability and relevance to today's issues, Muslim scholars use *Shari'a* to identify precedent and construct analogies that influence the legal code regarding personal status law and criminal law in several Muslim countries.[101] However, the general consensus within the Muslim community also plays an important role in defining and emboldening relevance of this theological manual.[102]

After Prophet Mohammed's death in 632 CE, the use of *Shari'a* and its development over the next several hundred years took root primarily to

93 *Kugle, supra* note 11, at 44 (quoting THE HOLY QUR'AN 42:8 (A. Yusuf Ali trans., 1983)).

94 *See* Kugle, *supra* note 11, at 44.

95 Bulkin, *supra* note 80, at 648.

96 *Id.* at 648–49.

97 John Esposito & Sheila Lalwani, *No, Muslims are not Taking over the World*, THE GUARDIAN, Feb. 11, 2011, http://www.guardian.co.uk/commentisfree/belief/2011/feb/11/islam-population.

98 Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia*, COUNCIL ON FOREIGN RELATIONS, Oct. 24, 2011, http://www.cfr.org/religion/islam-governing-under-sharia/p8034.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

reconcile local customs with the adoption of Islam.[103] As the Islamic empire extended its reach east into China and west to the Northern edge of Africa, Islamic scholars began using examples of how Prophet Mohammed lived and behaved as a model for all other Muslims.[104] These practices, now known as the *hadith*, are the epitome of a Muslim way of life, since Prophet Mohammed is considered the most pious of all believers.[105] As the *hadith* literature grew by reconciling Islamic practice with local customs, distinct schools of Islamic thought also developed into the Sunni schools of Hanbali, Maliki, Shafi'i, Hanafi, and the Shiite school of Ja'fari.[106] These schools of thought, named after the scholars from whom they were derived, differ in the weighting of each of the four sources from which *Shari'a* is formed: the Qur'an, *hadith*, Islamic scholars' interpretation of the Qur'an and *hadith*, and community consensus.[107]

Shari'a is intrinsically more flexible in its edicts—often punishing behavior only where such behavior contravenes cultural norms.[108] Naturally this creates an inherent ambiguity; given that *Shari'a* literally means "a broad pathway," it is more a guideline of making decisions than a strict process regulating what the outcome of certain decisions should be.[109]

Scholars of the *Shari'a* generally regard homosexuality as a crime, rather than a mere sin.[110] However, in order for homosexuality to become punishable, it must manifest as a public nuisance.[111] According to Khalid Duran, where homosexuals do not publicly assert their homosexuality, they have relative autonomy to do as they wish.[112] Silence and repression will prevent prosecution. But is silence in and of itself not a punishment? This silence is imposed strictly given overt acts are still sometimes punished by death.

Yet, *Shari'a* clearly delineates that punishment for homosexuality is left to the discretion of authorities, and thus is considered *ta'zir*, the more flexible of the categories of punishment.[113] Fathi Uthman of the Islamic

103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 Kugle, *supra* note 11.
109 *Id.*
110 Khalid Duran, *Homosexuality in Islam*, HOMOSEXUALITY AND WORLD RELIGIONS 181, 183 (Anne Swidler ed., 1993).
111 *Id.*
112 *Id.*
113 *Id.*

Center of Southern California asserts that there is no definitive penalty—the matter was left to the discretion of Prophet Muhammad, and later to the discretion of the jurists to decide.[114]

A liberal interpretation of *Shari'a* permits responsiveness to evolution and debate. *Shari'a* can be interpreted either liberally, as an expression of ethical values contextually applied to each circumstance with flexibility and self-reflective critique to the purpose of justice, or more strictly, as rules and regulations that must be obediently applied, despite all circumstances, with rigidity and self-abnegation to the purpose of fidelity.[115] *Shari'a* could be considered an expression of God's will through revelation, or rather, the product of human debate and social evolution.[116] Unfortunately, scholarly calls for debate regarding current issues the Muslim community face today have gone unanswered. The doors to *ijtihad,*[117] a struggle for understanding, are yet to be formally reopened to consider these debates and reconcile homosexuality and Islam.

IV. COLONIALISM AND ITS IMPACT ON *SHARI'A AND MUSLIM COUNTRIES*

In 1871, the word "homosexual" was incorporated into the New Prussian Penal Code, Paragraph 175 ("Paragraph 175"), which outlawed unnatural sexual acts between men and punished the crime with a mandatory prison sentence of "no less than three years."[118] Today, although it is difficult to calculate an exact number, it is estimated that more than eighty countries around the world still criminalize consensual homosexual conduct between adult men, and often between adult women.[119] The majority of these countries inherited these laws as they were British colonies.[120] These laws were imposed on the colonies undemocratically and reflected "the British Judeo-Christian values of the time."[121] For instance, the Indian Penal Code incorporated Section 377 in 1860 and it "spread across immense tracts of

114 *Id.*

115 Kugle, *supra* note 11.

116 *Id.*

117 *Id.*

118 GUNTER GRAU, HIDDEN HOLOCAUST: GAY AND LESBIAN PERSECUTION IN GERMANY, 1933-45 (Fitzroy Dearborn, 1995); *see generally* Richard Plant, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS 206 (Henry Holt & Co. 1986).

119 Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, Dec. 2008, *available at* http://www.hrw.org/en/reports/2008/12/17/alien-legacy-0 (hereinafter HRW); *see* Daniel Ottosson, *State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults,* ILGA, April 2007, *available at* http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf.

120 HRW, *supra* note 119, at 5.

121 *Id.* at 1.

the British Empire"[122] without debate or "cultural consultation."[123] In exerting their power, the British believed that the "laws could inculcate European morality into resistant masses."[124] They believed that the "native" cultures did not punish "perverse" sex enough; thus they needed compulsory re-education in sexual mores.[125] According to the Human Rights Watch,

> Section 377 was. . .a colonial attempt to set standards of behavior, both to reform the colonized and to protect the colonizers against moral lapses. It was also the first colonial "sodomy law" integrated into a penal code—and it became a model anti-sodomy law for countries far beyond India, Malaysia, and Uganda. Its influence stretched across Asia, the Pacific islands, and Africa, almost everywhere the British imperial flag flew.[126]

The imposition and spreading of the sodomy laws by other colonial powers had far less impact. Although France imposed sodomy laws on some French colonies as a means of social control, it decriminalized consensual homosexual conduct in 1791.[127] Germany's notorious Paragraph 175 punished homosexual acts between men from Bismarck's time until after the Nazi period. East Germany eliminated it in 1957 and West Germany in 1969.[128] German colonies were few, however, and the legal traces of its presence are evanescent as most German colonies passed to Britain, France, or Belgium after the First World War.[129]

It has only been forty-four years since England and Wales decriminalized most consensual homosexual conduct.[130] In the 1950s and 1960s, as the British colonies won independence, they did so with the sodomy laws still in place.[131] Victorian morality and negative views on sex largely influenced the penal codes in nations where Islam was practiced like India, Pakistan, and Bangladesh inherited from the British and other colonial powers.[132] These moral constructs and efforts to police morality

122 *Id.* at 5.
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.* at 6.
128 *Id.*
129 *Id.* at 7.
130 *Id.*
131 *Id.*
132 Symposium, *Sacred: Religion, Sexuality, and the Law*, 16 CARDOZO J.L. & GENDER 637, 672, 698 (2010).

did not reflect the cultural attitudes towards sexuality and homosexuality through Islamic history.[133] In some of these countries homosexuality was tolerated and at times celebrated in many cultures.[134] Generally, many current laws criminalizing same-sex relations relate directly to its enacting country's history. State sanctioned and extra-judicial persecution of sexual minorities is manifested in different ways, yet is directly linked to that state's history. For instance, during Stalin's era, the former Soviet Republic passed laws prohibiting sodomy in order to raise the declining birth rate in the face of World War II.[135] In January 2004, Uzbekistan, a majority Muslim country, employed these very laws to imprison and subject a gay rights activist to extreme abuse, including the threat of rape with a bottle.[136] Asian nations that were former British colonies have had sodomy laws that can be traced to colonization.[137] For example, India, Maldives, Burma and Nepal have prohibitions on sodomy reminiscent of British colonization, which continue today.[138] In August 2005, Human Rights Watch accused the Nepalese police of mistreating thirty-nine members of the Blue Diamond Society, an organization that campaigns for gay rights under these laws.[139] The Supreme Court of Nepal struck down the sodomy laws 2007. In January 2006, police in India detained men from two HIV/AIDS outreach organizations, the Naz Foundation International and Bharosa Trust, for forty-seven days in atrocious conditions. The police arrested the activists, consistent with India's sodomy laws; India released the men after pressure from international human rights groups.[140]

The 20th Century post-colonialism, where there is discussion of sexuality or homosexuality in particular, moves away from the culture component and into the "bully pulpits of the Mullahs."[141] After the colonizers left and after religious revival movements in many of these countries, governments were formed and connected directly to the clergy.[142] As a result, discussion

133 *Id.* at 698.

134 *Id.*

135 *See* Pratima Narayan, *Somewhere Over the Rainbow...International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. INT'L L.J. 313, 320 (2006).

136 *Id.*

137 *Id.*

138 *Id.* at 320–21.

139 *Id.* at 321.

140 *Id.* A large number of the Indian population is Muslim.

141 Geneva Summit for Human Rights and Democracy, *Session III: Torture and Cruel and Inhuman Treatment—Parves Sharma*, April 19, 2011, *available at* http://www.genevasummit.org/uploads/speaker_speach/ba0771a5f8083fb4b2f04afcffd110139187dfb5.pdf.

142 *Id.*

moved from the culture into the mosque and it influenced *Shari'a*. This is considered to be a relatively modern phenomenon in Islam.[143] This phenomenon is continuing and is often expressed in the media: the spokespersons for Islam now are those people in conservative mosques, who prefer to impose their version of Islam and *Shari'a* on Muslims in general and on Muslim LGBT specifically. The religious conservatives are the Muslim who are given a voice and therefore dictate the modern perception of Islam, Muslims, and their sexual behaviors.

Arguably, the majority of Muslims in the world are not living under *Shari'a*.[144] The world's largest Muslim population is in Indonesia and large populations also exist in India, Pakistan, and Bangladesh. India, Pakistan, and Bangladesh have Section 377 of the Penal Code, which criminalizes homosexuality as sodomy or carnal intercourse against the order of nature. This is British law that was left behind for those populations. In Pakistan, there is a parallel system of *Shari'a* where homosexuality is frowned upon, but there has never been great clarity about what to do with the homosexual community. In countries like Iran and Saudi Arabia, more complexity exists. Iran, being a theological state that inherited its constitution from ideas of Islamic revolution and is deeply rooted in the Shia interpretations of *Shari'a*, criminalizes homosexuality. But that criminalization is open to debate and question. For example, for the act of *fahisha* or adultery, four adult male witnesses must be present in order to prove in a *Shari'a* court of law that adultery was committed. It is unlikely that one would have those four male witnesses present who would want to testify in court. In the United Arab Emirates, Yemen, and countries that border Saudi Arabia, there has recently been increased controversy around the criminalization of homosexuality. But culturally speaking, men have had sex with men and women have had sex with women throughout Islamic history and continue to do so in very large numbers.[145] Problems arise when governments attempt to carry out a policing of morality and, specifically, sexual acts. This is especially true when a religious argument is used, which is not specifically grounded in the Qur'an or *Shari'a*.

In most Islamic nations, homosexual conduct remains a crime and the penalties range from isolation, fines, and flogging to death.[146] Reports

143 Symposium Transcript, *supra* note 132.

144 *Id.* at 672.

145 *Id.* at 671–72.

146 *See* Daniel Ottosson, *State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults*, ILG REPORT (2008), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf

show that no predominantly Islamic nation joined the December 2008 historic statement in the United Nations General Assembly that condemned human rights abuses against sexual minorities.[147] Instead, immediately after that statement, the Syrian delegation presented an opposing statement on behalf of fifty-seven nations, most of which had a significant Muslim population, condemning "all forms of stereotyping, exclusion, stigmatization, prejudice, intolerance and discrimination and violence directed against peoples, communities and individuals on any ground whatsoever, wherever they occur," but specifically excluded "the so-called notions of sexual orientation and gender identity."[148] Although homosexuality is not new,[149] being "gay" is a modern political concept that has emerged in response to the deprivation of rights on the basis of sexual orientation.[150]

V. THE INFLUENCE OF U.S. LAWS AND VIEWS ON HOMOSEXUALITY ON THE MUSLIM COMMUNITY IN THE U.S.

American laws are also derived from England. Thus, it is critical to review how English law on sodomy has impacted the American legal system, and how these laws contribute to and impact the Muslim American community's views on homosexuality. American colonies of England were created four decades after the Elizabethan statute reestablished "buggery" as a crime.[151] Although twelve of the thirteen states had either a sodomy law or the adoption of either English statutory or common law on the books at the time of the adoption of the Bill of Rights in 1791, in only one—Maryland—had there been an unquestioned prohibition of consensual same-sex relations throughout its history.[152] In all twelve colonies, religious bias was the catalyst for enactment of laws against sodomy, since

147 Press Release, International Gay & Lesbian Human Rights Commission (IGLHRC), 66 States Condemn Violations Based on Sexual Orientation and Gender Identity (Dec. 19. 2008), *available at* http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/826.html.

148 Michael Nugent, *UN Split on Protecting Gay Rights*, MICHAEL NUGENT: ATHEISM, REASON, SKEPTICISM, HAPPINESS, Dec. 21, 2008, *available at* http://www.michaelnugent.com/2008/12/21/un-split-on-protecting-gay-rights/.

149 Given that there have always been—and will always be—people who engage in homosexual relationships and activities.

150 *See* ERIC HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT 37 (Kluwer Academic Publishers 1995); *see generally* CHUCK STEWART, GAY AND LESBIAN ISSUES (ABC-CLIO, Inc. 2003) (1951).

151 *See* George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States, (1991-2005)*, *available at* http://www.glapn.org/sodomylaws/sensibilities/introduction.htm#fn11.

152 *Id.*

Puritan laws quoted Leviticus in one form or another.[153] Numerous courts made religious arguments in reference to sodomy.[154] Death was the penalty of choice by statute and, in some cases, by usage.[155] The Bill of Rights' outlawing of government-established religion in the First Amendment and protection of unenumerated rights in the Ninth Amendment was the basis for the "right to privacy" in later court decisions, which would seem to establish the unconstitutionality of these laws.[156] However, in 1986, the U.S. Supreme Court decided otherwise in the case of *Bowers v. Hardwick*.[157] Hardwick was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home.[158] Hardwick brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[159] The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights of privacy. In an unfortunate decision, the Supreme Court held the Georgia statute constitutional.[160]

In 2003, the Supreme Court reversed itself and struck down the sixteen remaining sodomy laws in the nation in the case of *Lawrence v. Texas*.[161] The Court confessed error in *Hardwick*, noting that it was in violation of the Court's precedents on privacy at the time it was decided and chided the majority in that case for its conclusions, stating that the "historical premises are not without doubt and, at the very least, are overstated."[162] The Court stated that the "petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[163]

Although sodomy laws are no longer on the books in the U.S. to be used by states in criminalizing private consensual sex between two males or between

153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*
157 478 U.S. 186 (1986).
158 *Id.* at 187-88.
159 *Id.* at 188.
160 *Id.* at 190-96.
161 Painter, *supra* note 151.
162 *Id.*
163 *Id.*

two females, societal views on homosexuality have yet to change. This is evidenced by the negative stereotypes of homosexuality and protection of conservative religious values, such as the arguments put forth for "the sanctity of marriage" and restricting the definition of marriage to a man and a woman. While these arguments took center stage in the 2012 election, the majority of voters in some states appear to stand against restricting marriage to one man and one woman. For instance, voters in Maine and Maryland approved marriage equality, Washington State passed a same-sex marriage initiative, and in Minnesota, voters rejected a ballot measure that would have enshrined the state's existing ban on same-sex marriage in the State Constitution.[164]

There is still much work to be done,the Defense of Marriage Act[165] is still in effect and by the end of November of 2012 the Supreme Court will decide if it will grant review of the case on Proposition 8 (or the California Marriage Protection Act) and the "sanctity of marriage." These laws continue to discriminate against same sex couples at the federal as well as state level. The LGBT community in the U.S. is relegated to a second-class citizenship status and prohibited from the rights that the non-LGBT community enjoys.

CONCLUSION

It is important to reconcile Islam and homosexuality by analyzing the experience of Muslim LGBT from the intersection of their religious, gender, and sexual orientation identities. Both spiritual identity and sexual/gender identity are fundamental elements of individual identity and an intimate aspect of an individual's private life.[166] In examining the identities of Muslim LGBT, we must understand that power exerted over this community and oppression of this community does not reside "out there" but is embedded in the very institutions and relationships that shape our lives. Religious dogma, legal institutions, cultural practices, and traditions that promote or prohibit homosexuality are influenced by and exert influence on legal structures, social hierarchies, political systems, and even interpersonal relationships.[167] *Shari'a*, colonial sodomy laws, and the

164 A Big Leap for Marriage Equality, The New York Times, (Nov.7, 2012), available at http://www.nytimes.com/2012/11/08/opinion/a-big-leap-for-marriage-equality.html?_r=0.

165 1 U.S.C.S. § 7 (1996) (defining "marriage" and "spouse").

166 *See id.*

167 DELGADO & STEFANIC, *supra* note 7, at 2 (explaining that racism is common and central to life in American and that various forms of social interaction promote white dominance).

American legal system shape and are shaped by race relations, religious, cultural, and political views on homosexuality across the social plane.[168] As a result, how homosexuality is viewed and interpreted within the context of Islam is multifaceted and multi-dimensional.

Given that the Qur'an does not specifically address homosexuality, that there is an ambiguity with *Shari'a* and its interpretation of the Qur'an and *hadith*, and that *Shari'a* adapts to community standards yielding to the political tides of a community, it is imperative that the global Muslim community openly address the status of homosexuality in Islam. It is necessary for the Muslim community to engage in understanding and acceptance of the LGBT Muslims because silence exacerbates its taboo status and results in harsh punishments of isolation, imprisonment and, at times, death.

Instead of demonizing and demeaning LGBT Muslims and their private lives, Muslim countries, particularly those that are former British colonies should examine their sodomy laws based on the legal, social, and historical burdens left behind by colonialism and colonial laws that were applied undemocratically and served as a form of social control. These countries should consider striking down these laws in order to provide full citizenship to all of their citizens regardless of their sexual orientation and gender identity.

Muslims immigrating to the U.S. bring their religious-cultural views, which often reflect the socio-historical legacy of colonial views on homosexuality embedded within their respective countries; these views are supported, compounded, and exacerbated by the homophobic culture in America and by the U.S. legal system in its treatment of the LGBT community. Thus, the American Muslim community's views on homosexuality are impacted from within the Muslim community and from outside of the community by *Shari'a* and its interpretation of the Qur'an and *hadith*, colonial sodomy laws forced on Muslim countries, and the U.S. legal system and homophobic culture in America. In order to reconcile Islam and homosexuality, American Muslims must also engage in a discussion regarding homosexuality, address heterosexist and homophobic views towards the Muslim LGBT community, and support this community.

It is imperative that we analyze the ways in which law supports power relationships in society by reflecting the prejudicial interests of religious, wealthy, and powerful groups and individuals, thereby legitimizing injustices in society and promoting religious, racial, and gender

168 Crenshaw, *supra* note 3, at 139.

discrimination.[169] Thus, individual discussion of "just religion" or "just gender" or "just sexuality" fails to accurately capture the experience of Muslim LGBT individuals.[170] We must move away from the tendency to treat religion and sexual orientation as mutually exclusive categories of experience and analysis because this practice distorts the experiences of LGBT Muslims while theoretically erasing them from the discussions of religious and sexual orientation discrimination.[171] Moreover, analyzing discrimination through a single-axis framework only marginalizes Muslim LGBT who are multiply-burdened while distorting analysis of religious discrimination or discrimination based on sexual orientation because it only represents a subset of a community.[172] Multidimensional oppression must be included in order to fully address Muslim LGBT issues. We need to acknowledge that in most instances, multiple sources of disempowerment, such as not being accepted by family, community, and mosques specifically, and viewed as a criminal deviants under some penal codes and a social deviants under the U.S. laws generally will affect the lives of Muslim LGBT in concrete ways."[173] Even within the non-Muslim LGBT community, awareness of how multiple identities, such as religion, race/ethnicity, class, and gender expression/gender/identity affect discrimination is needed to minimize division within the larger LGBT community that should be inclusive of Muslims. The experiences of Muslim LGBT represent experiences with multidimensional implications. Incidents of violence or discrimination cannot be investigated only through the lens of religion, sexuality, race, or class, but rather the intersection of all of these identities. Once we acknowledge and understand the enmeshed nature of homophobia within Islam, American society, and globally, then we will be able to improve the social framework we live and function within.

169 Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U.L. REV. 329, 343 (2006).

170 Darren Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 608 (1997) (discussing the recentering of gay and lesbian political discourse toward multidimensionality).

171 Crenshaw, *supra* note 3, at 139.

172 *Id.*

173 *Id.*