

DECONSTRUCTING SODOMY

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INTRODUCTION

What you could'a done instead was show me the Point of Pittsburgh. You could'a told me Spelman College was made for smart black folks like me. You could'a helped me complete my college applications. You could'a taken me fishing or to Africa. You could'a shown me any college campus. You could'a come to hear

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me sing, or read my poems, essays, or short stories with delight. You could'a watched me graduate with honors. You could'a taught me to make cracklin' bread. You could'a held me close, called me Beloved, and that's all. You could a let me know Baldwin, Malcolm, Haley at your knee. You could'a let me watch you work. You could'a listened, advised, fussed, admonished, chastised, bragged, comforted, cajoled, encouraged, or inspired me. You could'a done anything, anything, anything at all instead of fucking me.¹

This paper explores the meanings and implications of sodomy represented in American jurisprudence through common law, common sense, nonsense, and constitutional interpretation. Specifically, *Deconstructing Sodomy* exposes the impact of sodomy laws on the rights of lesbian² citizens. However, *Deconstructing Sodomy* is not the usual journaled exploration of legal analysis. More than mere legal analysis, I intend this paper to be multidisciplinary.³ It includes political analysis and explores the politics of the everyday lives of people classified by sexual orientation. Moreover, *Deconstructing Sodomy* is not a solipsistic⁴ discussion of supposed universal⁵ lesbian interests

1. LESLYE M. HUFF, *What You Could'a Done Instead*, in BLACK LESBIANS DO NOT EXIST 24 (1995) (Unpublished manuscript on file with the author at P.O. Box 93644, Cleveland, OH 44101).

2. When referring generally to lesbians, to bisexual men or women, and to gay men, I have chosen to use the term "lesbigay" for its ease and at least partial collectivity. It is only partially collective since it does not expressly include our transgender community. I apologize to the transgender community for my lag in developing a more completely inclusive term; it will come.

3. Another student, Melissa Dean, and I co-presented a preliminary draft of this work at John Marshall Law School's *Sex, Law, Society, Interdisciplinary Conference - The Tenth Anniversary of Bowers v. Hardwick*, March 14-16, 1996. The conference afforded scholars the opportunity to present their work in an integrative context. Many of the presentations at the conference synthesized the information gleaned from a variety of disciplines to speak of law within a context of our lives as a whole. I would like to acknowledge the important contribution that Melissa Dean made to the creation of this paper. Members of our newly-formed LesBiGay Law Students Association entertained the notion attending this conference. Because of fear of homophobic retaliation, most of the students from our organization did not attend the conference. However, Melissa remained actively supportive as I envisioned not only attending the conference, but also offering a formal presentation on a panel at the conference. Melissa drafted a section titled "Privacy, Prerogative, and Privilege." I conceptualized, researched, and drafted the remaining sections. I have made substantive changes in the text, including the "Privacy, Prerogative, and Privilege" section. Therefore, the published text is quite different than the preliminary draft that we originally presented. The personal voice represented in both text and notes is my own. I use my voice to clarify, to amplify, or to proclaim. I have used the personal pronoun "I" to indicate that I am speaking for myself only as I wrestle with my own aporia. I take full responsibility or blame for all sections of this text as it stands or sits today. But of course, the text is changing even as you read it; such is the life of the deconstructed text.

4. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1276 (3rd college ed. 1988). This term is based on the theory of solipsism, meaning that "the self can be aware of nothing but its own experiences and states" and is the only thing really existent. *Id.*

5. See ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 299-310 (1979). First, Rich defines "white solipsism: To think, imagine, and speak as if whiteness described the world." *Id.* at 299.

unrelated to any factors of existence other than sexual orientation. The parallels and intersections that exist between racism, genderism, ageism, classism, and heterosexism⁶ are not ignored, although the scope of the work is limited by time and expertise. *Deconstructing Sodomy* is a call to decipher the multifaceted components of a dominating culture for the sake of justice.

As a pattern of discrimination, heterosexism pervades most dimensions of our cultural life. This system shapes our legal, economic, political, social, interpersonal, familial, historical, educational, and ecclesial institutions. *Heterocentrism* lies at the heart of this system of prejudice. Heterocentrism leads to the conviction that heterosexuality is *the* normative form of human sexuality. It is the measure by which all other sexual orientations are judged. All sexual authority, value, and power are centered in heterosexuality.⁷

Racism is useful as an analogue for a fully developed and pervasive mode of abuse and oppression. The habit of domination was perfected in the United States in a unique form of slavery using a racist motif. The American form of slavery was unique in that the State authorized the transfer of the entire bundle of property ownership rights of the corporeal, spiritual, and intellectual self of one human being into the hands of another for a price. Over time, the State justified this authorization using a variety of reasons. In the history of the United States, racism has been juxtaposed to highly complex

Rich also states that individuals

raised white in a racist society, are often ridden with *white solipsism*—not the consciously held *belief* that one race is inherently superior to all others, but a tunnel-vision which simply does not see nonwhite experience or existence as precious or significant, unless in spasmodic, impotent guilt-reflexes, which have little or no long-term, continuing momentum or political usefulness.

Id. at 306. The parallels and intersections between racism, classism, gender bias, and homophobia are apparent here. The white, upper-middle-class, gay male is often mistaken for the “universal” gay person both within lesbigay communities and in the larger dominating cultures of the United States of America. Thus, lesbians, gay men, and bi-sexual men and women who are working class, poor, and/or people of color are often silenced and made invisible to the degree that they diverge from the somewhat mythological one-dimensional “universal” gay person. *See id.*

6. PATRICIA BEATTIE JUNG & RALPH F. SMITH, HETEROSEXISM: AN ETHICAL CHALLENGE 13 (1993). In this text, the authors define heterosexism as follows:

Heterosexism is a reasoned system of bias regarding sexual orientation. It denotes prejudice in favor of heterosexual people and connotes prejudice against bisexual and, especially, homosexual people. By describing it as a *reasoned* system of prejudice we do not mean to imply that it is rationally defensible... . Rather we mean to suggest that heterosexism is not grounded primarily in emotional fears, hatreds, or other visceral responses to homosexuality. Instead it is rooted in a largely cognitive constellation of beliefs about human sexuality.

Id. at 13.

7. *Id.* at 14.

countervailing social responses.⁸ In this paper, by exploring the silenced uncharted areas of the legal, political, and social analysis of race, I will look at the parallels and intersections between racism and other forms of oppression, particularly sexualized oppression. Exploring racism and its environs should facilitate efforts to eradicate the hegemony that is heterosexism, and especially to rout its virulent tool: homophobia.⁹

Although heterosexism is often accompanied by *homophobia*, no logical or necessary connection exists between the two. People who are homophobic may not be heterosexist; those who are heterosexist may not be homophobic. Heterosexism is analogous to racism and sexism. Homophobia finds appropriate analogies in racial bigotry and misogynism. Whether gay or straight, people might be homophobic because they cannot think of male same-sex activity without also imaging men as physically vulnerable, as potentially subject to rape. They cannot think of female same-sex activity without imaging women as powerful, as potentially free of male control. Such images of male vulnerability and female strength challenge the heterosexist myth to which we have all grown accustomed.¹⁰

I devote three sections of this paper to discussing aspects of *Dred Scott v. Sandford*.¹¹ That infamous 1857 Supreme Court case addressed constitutional issues related to slavery and the official status of African-originated people in the United States. Recently, commentators stressed the need to take a fresh look at this pivotal case with a "focus [] on the eye of the hurricane: the quiet, silent family members whose lives were at stake in that litigation."¹² Specifically, these authors reconstruct¹³ the circumstances of Dred Scott's Supreme Court challenge by looking at the other plaintiff in the case: Mrs. Harriet Robinson Scott.¹⁴

Conventional accounts of the particulars of Dred Scott's challenge do not discuss the issues from the perspective of the plaintiff, Harriet

8. See generally, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

9. See SUZANNE PHARR, HOMO-PHOBIA: A WEAPON OF SEXISM 53-64 (1988).

10. See JUNG & SMITH, *supra* note 6, at 14.

11. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

12. Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

13. *Id.* at 1091. The authors indicate that "[b]y the time the case reached the Supreme Court, Harriet's case had been completely submerged in her husband's... [The Court] never considered Harriet Robinson Scott as a candidate for freedom in her own right." *Id.*

14. *Id.* at 1059. Having distinct legal claims that were arguably stronger than her husband's, Harriet Robinson Scott brought her own suit for freedom in 1846.

Robinson Scott, who filed her own freedom suit in 1846.¹⁵ Harriet Scott's voice has been silenced in historical accounts of this Supreme Court case, making it likely grist for the deconstructive mill. However, at first blush, it is less clear how relevant Harriet Scott's story is to issues raised for analysis in this text such as the meaning and justness of sodomy laws or the constitutional rights of lesbians. This paper will demonstrate that connection. The necessarily tenuous nature of intimate familial relationships within the slavery context may be compared to the tenuous nature of intimate familial relationships among lesbians under heterosexism.

Very few United States citizens know anything about the life of Dred Scott beyond the effects of racism on his legal status as slave. Moreover, Dred Scott's name itself has become synonymous for the United States Supreme Court's racist denial of citizenship perpetrated against Dred Scott, his family, and all African-originated peoples living in the United States. I will provide a statement of the facts of the *Dred Scott v. Sandford* case. Then I will compare *Dred Scott* to *Bowers v. Hardwick*,¹⁶ the Supreme Court's 1986 ruling on same-sex consensual sodomy.

This paper is about the process of deconstruction. I attempt to model a deconstructive process in the writing of this text, and I hope readers commence their own deconstructive process as they read the text. In a deconstructive context, the reader is not merely a passive recipient of the writer's intended meaning; the reader is required to actively ferret out the silent messages of the text and to consciously remix¹⁷ the text to include those messages. To be sure, this multi-layered approach to reading and writing text is work and it can be confusing, but I am convinced that it is well worth the effort. As you will see throughout the text, I link the deconstructive process to the possibility of justice. In fact, Jacques Derrida, a primary developer of deconstructionist criticism, has said that deconstruction *is* justice.¹⁸

Based on the idea that "[e]very text, through interpretation, can be shown to contain a multiplicity of meanings, [so, the deconstructive critical process attempts to carefully dismantle] the intended meaning of the text and expose [inherent, inconsistent] meanings

15. *Id.* at 1040.

16. 478 U.S. 186 (1986).

17. According to my son, Kahlil Seren, a musician, the term remix denotes generally, in hip-hop, rap, or popular music, the same lyrics may be recorded with a different accompanying beat or instrumental background. According to my son, Daudi Hashim, the meaning of the music, its flavor, is subtly or radically changed by the remix. Remix is a shift in musical perspective.

18. See *infra* text accompanying notes 212-234.

within the work.”¹⁹ Deconstructionists have developed techniques for “outing”²⁰ these inconsistent meanings. Some of these techniques are used within this text and may also be used upon this text in the reader’s attempt to deconstruct it. Let the reader be cautioned, there are no concrete rules of deconstruction akin to rules of syntax or grammar. Deconstruction techniques unfold pragmatically. However, as an introduction to this complex process, here are some commonly used techniques in deconstruction:

1. comparing that work to other works by the same [writer];
2. analyzing internal contradictions in the work;
3. using the [writer’s] life history and social, political, and class background to contradict claims of the work;
4. using statements made by the [writer] in interviews, reviews, and so on to expose inconsistencies between the [writer’s] claims and statements in the work;
5. analyzing the actual language used and its relationship to the attitudes, emotions, ideas, and so forth that the [writer] is communicating in the work.²¹

As indicated by this list of deconstruction techniques, the deconstructive reader uses the author’s life to deconstruct the text. The

19. HERBERT KOHL, FROM ARCHETYPE TO ZEITGEIST: POWERFUL IDEAS FOR POWERFUL THINKING 29 (1992).

20. In this case, the metaphor, “outing” is extended to include the act of exposing or revealing any true, but hidden nature of a person, place or thing. This expression is derived from lesbian culture. Compare and contrast it to the lesbian expression, being in the closet. To be “out” means that the lesbian person has intentionally revealed the fact that he or she is lesbian. “Outing” refers to an action by an externalized force or by internal motivation that reveals to one or more people the lesbian sexual orientation of a person who is not known to be a lesbian individual. A person who intentionally avoids disclosing his or her lesbian sexual orientation is said to be “closeted” or in the closet. Being in the closet is a strategy for protection against heterosexism similar to the strategy of passing for white that is used by African-Americans from the time of slavery until today. It is also similar to the syncretization of religious acts to mask one’s faith when religion is under attack e.g., the conversos Jews of Spain who masked their Jewish worship with Catholicism during the Inquisition; the Yoruba people of West Africa masked their religious practice with Catholicism in Central and South America and Protestantism in North America during slavery so that they could continue to worship Ifa or Orisa without being punished harshly; and the Wiccan pagans who masked their religious practices in various forms of Christian practice to avoid being burned or otherwise tortured as witches. A lesbian person can “come out of the closet” by “outing” him/herself, or sometimes closeted people are outed by others either intentionally or inadvertently. Although these terms suggest polarities, they more often reflect a range of self-disclosing activity as when a generally closeted lesbian person may disclose to an associate or small group of friends. Having revealed to a small group of people that she is a lesbian, it is easy to see how an otherwise closeted lesbian could be outed by one of her confidants inadvertently. Another example of the complexity of the closeted/out continuum is when a lesbian person who is said to be generally out: that is, his or her family, friends, or neighbors are privy to his or her sexual orientation, but in the workplace the person is in the closet. Additionally, there are lesbian political activist groups that view the use of intentional outing as a viable political strategy to encourage closeted public officials and other closeted public figures to assist lesbian struggle for equal rights under the law.

21. See KOHL, *supra*, note 19, at 29.

author's entire selfhood may function as a tool to dismantle intended or voiced meaning toward the goal of uncovering alternative, unvoiced meaning.

This paper is also a personal, artistic rendering. In this writing, I use poetry to explicate, to illuminate, to obscure,²² to deconstruct. I do not pretend to have an obligatory distance from the subject area. My life is personally affected by the very existence of wanted or unwanted sodomic acts, on the one hand, and the press of unjust sodomy laws, on the other hand.²³ The fact that I am an out²⁴ lesbian, not gay nor bi-sexual or heterosexual, makes a difference in my writing of this text. Likewise, the fact that I am an African-American woman from a small town also informs this writing. That my family of origin is hard-working class, also affects my word choice and may even shade the meanings of the words I choose to write. I am also a birth-parent, co-parenting two sons, with my long-term partner in a monogamous lesbian relationship. My partner, Amina Mary Ostendorf, is a second-generation adopted person; we presume that she is European-American. One of our sons is bi-racial; the other one is black; both are African-American identified.²⁵ As a non-traditional

22. By its nature, language reveals particular meaning and intent while necessarily masking or hiding from view alternative meanings and intentionality. Therefore, one could argue that included in a particular word is the expression of all of its alternatives. Because of the inherent compactness of poetic processes such as the metaphor or the simile, this revealing/obscuring effect is intensified. Both metaphor and simile are implied rather than explicit comparison; also they are expansive ways of thinking. Moreover, they form complex wholes, more than the sum of their parts; and like a hologram, like *chiaroscuro*, or like an Escher painting, they depend upon the perspective of the perceiver for their very existence. The juxtapositioning of terms expands meaning and suggests broader and deeper meaning than the language on its face would reveal.

23. See LESBIANS, GAY MEN, AND THE LAW 80 n.1 (William B. Rubenstein ed. 1993). As of 1996, the following twenty-three states still had sodomy laws: Alabama (ALA. CODE § 13A-6-63 (1994)); Arizona (ARIZ. REV. STAT. ANN. § 13-1411 (West 1989)); Arkansas (ARK. CODE ANN. § 5-14-122 (1993)); Florida (FLA. STAT. § 800.02 (1991)); Georgia (GA. CODE ANN. § 16-6-2 (1996)); Idaho (IDAHO CODE § 18-6605 (1987)); Kansas (KAN. STAT. ANN. § 21-3505 (1988)); Louisiana (LA. REV. STAT. ANN. § 14:89 (West 1986)); Maryland (MD. CODE ANN. art. 27, §§ 553-554 (1996)); Michigan (MICH. COMP. LAWS §§ 750.158, 750.338-338(b) (1991)); Minnesota (MINN. STAT. § 609.293 (1987)); Mississippi (MISS. CODE ANN. § 97-29-59 (1994)); Missouri (MO. REV. STAT. § 565.090 (1979)); Montana (MONT. CODE ANN., §§45-2-101, 45-5-505 (1987)); Nevada (NEV. REV. STAT. § 201.190 (1987)); North Carolina (N.C. GEN. STAT. § 14-177 (1993)); Oklahoma (OKLA. STAT. tit. 21 § 886 (1992)); Rhode Island (R.I. GEN. LAWS § 11-10-1 (1994)); South Carolina (S.C. CODE ANN. § 16-15-120 (Law Co-op. 1985)); Tennessee (TENN. CODE ANN. § 39-2-612 (1991)); Texas (TEX. PENAL CODE ANN. § 21.06 (1994)); Utah (UTAH CODE ANN. § 76-5-403 (1988)); Virginia (VA. CODE ANN. § 18.2-361 (1996)).

24. In this case, the word "out" is used as shorthand for the fact that I readily acknowledge that I am a lesbian.

25. Our bi-racial son reasons that, based on breeding practices perpetrated against enslaved African-originated people and because of the pervasive sexual misuse of African-originated people regardless of the degree of servitude, nearly all African-Americans today could loosely describe ourselves "bi-racial" or "mixed."

law student,²⁶ I bring to bear on the subject of this paper particular insights, and both traditional and unique investigative tools. Like all legal critical analysts, my investigative style is informed, and perhaps limited, by my perspective and life experience. Unlike many analysts, I admit it. These admissions and disclosures are intended to assist the reader in engaging in the reader's own deconstructive process with this text and with me.

Still, this is a paper about sodomy. A large portion of this paper discusses state sodomy laws. My analysis includes references to Judeo-Christian mythology, Colonial, and Early American definitions and treatment of sodomic acts. This paper discusses consensual adult sexual relationships; however, the paper does not avoid discussion of non-consenting sexualized sodomic acts whether overtly violent, coercive, or more subtly manipulative.

Heterosexism finds a powerful tool in these laws which hamstring, thwart and endanger lesbian and gay day to day existence. These are perilous and pivotal times for lesbian and gay people.²⁷ The effect of the infamous *Bowers v. Hardwick*²⁸ Supreme Court decision of 1986, at its core, is frighteningly reminiscent of the effect of the *Dred Scott*²⁹ decision of over a century earlier. As Supreme Court Justice Brennan once said, "We remain imprisoned by the past as long as we deny its influence in the present."³⁰

Deconstructing Sodomy suggests that privacy rights are insufficient tools for dismantling heterosexism and in fact, may actually serve to perpetuate heterosexist oppression. Most importantly, in the following pages, I am calling for a new reading of the nature of lesbian and gay intimate relationships for the sake of justice.

26. Dominating culture defines me as "non-traditional" because I am outside the status quo. I am not a twenty-something, European-American, heterosexual, male - this perspective marginalizes me. From my perspective, putting myself at center, I believe that as a result of extraordinary efforts, my school has released enough race, class, gender and heterosexual biases for me to accept membership as a student.

27. See, e.g., HUFF, *Black Ministers Declare War Against Lesbians and Gay Men: Your Silence Will Not Protect You*, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 92.

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

29. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Justice Taney asked, "[c]an a negro [sic] ... become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen[?]" *Id.* at 403 (emphasis added). He answered with a resounding No! *Id.* The ramifications of his opinion included the granting of tacit permission to further abuse, disrespect, and disenfranchise Negroes in the United States. Hence, "free Negro" or "free Black" citizen was oxymoronic and non-existent according to federal law. See Dean, *infra* note 90.

30. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) (5-4 decision).

BOWERS V. HARDWICK: THE TUNNEL

The little-known facts of *Bowers v. Hardwick*³¹ are significant. After working all night putting in insulation to renovate a gay bar where he was a bartender, a co-worker handed Michael Hardwick a beer as he stood by the door of the bar.³² Hardwick took one sip of the beer, then pitched the beer can in a waste basket positioned at the door of the bar and proceeded on his short walk home.³³

Officer Torick, a police officer known for his frequent ticketing of gay people in the area, drove by, turned around, and stopped Hardwick a block from the bar.³⁴ The officer forced Hardwick to sit in the back seat of the police car while he argued with Hardwick about what he said he saw.³⁵ Finally, after refusing to look for Hardwick's beer can in the trash, the police officer gave Hardwick a ticket for traveling with an open can of beer.³⁶

At the top of Hardwick's ticket, the officer wrote Wednesday, as the court hearing day, in bold, underlined lettering.³⁷ However, the court date that he wrote in smaller print in the column was for Tuesday, instead.³⁸ Hardwick did not notice the discrepancy between the day and the date of his required court appearance until it was too late.³⁹

Tuesday afternoon, a mere two hours after Hardwick unintentionally missed the actual court date, the police officer came to Hardwick's home with a warrant for his arrest because Hardwick had neither paid his fine nor appeared in court that morning.⁴⁰ Hardwick

31. 478 U.S. 186 (1986).

32. Peter Irons, *Interview with Michael Hardwick*, in *LESBIANS, GAY MEN AND THE LAW* 126 (William Rubenstein ed. 1993).

33. See Irons, *supra* note 32, at 126.

34. See Irons, *supra* note 32, at 126.

35. See Irons, *supra* note 32, at 126. He questioned Hardwick about his activities for over twenty minutes. *Id.* Hardwick insisted that he had merely tossed the beer can in the trash and offered to prove it to the police officer. *Id.* He explained that he was exhausted and simply wanted to go home to rest, but even when the officer drove back to the bar, he refused to get out of the squad car. *Id.*

36. See Irons, *supra* note 32, at 126.

37. See Irons, *supra* note 32, at 126. Later, Hardwick speculated that the officer's objection to a beer can that had already been deposited in the trash was merely a pretext; the officer was actually interested in harassing a gay man under the color of law. *Id.* Torick had a reputation for monitoring the gays to whom he gave tickets, picking up warrants issued against them in such cases, and actually serving the warrants himself. *Id.* Hardwick decided to simply pay the fine so that he would have no more trouble from the officer. *Id.*

38. See Irons, *supra* note 32, at 126.

39. See Irons, *supra* note 32, at 126. Ordinarily, it takes the clerk of courts at least forty-eight hours to process such a warrant, but Officer Torrick had processed the warrant himself. *Id.*

40. See Irons, *supra* note 32, at 126.

was not at home.⁴¹ Upon discovering the day and date error on the ticket, Hardwick promptly went to the court, exposed the police error on the ticket, and paid the fine.⁴²

At work, a few weeks after the hearing, Hardwick took the car keys from an inebriated customer and sent him to Michael's nearby home in a cab to sleep off the effects of alcohol before driving.⁴³ Hardwick let him sleep it off on his living room sofa until morning.⁴⁴ On the same evening, Michael Hardwick's male lover came to town to see Hardwick.⁴⁵

It was a hot August morning in Atlanta, Georgia.⁴⁶ Hardwick left his front door ajar.⁴⁷ At about 8:30 the next morning, in spite of the court clerk's assurance over three weeks earlier, Officer Torick entered Hardwick's home through an unlocked door and partially roused the person sleeping on the sofa.⁴⁸ This groggy guest pointed to the back bedroom when Torick asked for Michael Hardwick.⁴⁹ Using a warrant that had not been valid for nearly four weeks, Officer Torick walked through the house and entered Hardwick's bedroom while Hardwick and his partner were having mutual oral sex.⁵⁰ Hardwick heard a noise, looked up, and saw Officer Torick standing in his bedroom watching as they made love.⁵¹ After being observed, the officer identified himself, stated that he had a warrant for Hardwick's arrest, and arrested Hardwick and his lover for sodomy.⁵²

After placing Hardwick and his lover under arrest, Officer Torick refused to leave the bedroom while they dressed, stating, "there's no reason for that because [he] had already seen them in their most intimate aspect."⁵³ When he brought Hardwick and his friend into the

41. See Irons, *supra* note 32, at 126. Officer Torrick identified himself to Hardwick's roommate, and after he left, the roommate immediately informed Hardwick about the officer's visit. *Id.*

42. See Irons, *supra* note 32, at 126.

43. See Irons, *supra* note 32, at 126.

44. See Irons, *supra* note 32, at 126.

45. See Irons, *supra* note 32, at 126.

46. See Irons, *supra* note 32, at 126. The customer was so drunk that he did not even notice when Hardwick came home nor that his lover had come with him. *Id.*

47. See Irons, *supra* note 32, at 126.

48. See Irons, *supra* note 32, at 126.

49. See Irons, *supra* note 32, at 127. Hardwick said he heard a noise as the door moved from a cracked to an open position, but when he looked up there was no one visible, so he thought a breeze blew the door. *Id.*

50. See Irons, *supra* note 32, at 127.

51. See Irons, *supra* note 32, at 127.

52. See Irons, *supra* note 32, at 127. Officer Torick said that the fact that the warrant was invalid did not matter, because he was acting under good faith. *Id.*

53. See Irons, *supra* note 32, at 128. In the squad car, Torick handcuffed them to the floor,

police substation, Officer Torick announced to the guards, everyone processing documents, and all of the detainees in the holding cell that they had been arrested for "cocksucking and [they] should be able to get what [they] [were] looking for in the holding cell."⁵⁴

Hardwick's lover chose to remain anonymous after police released him.⁵⁵ Because he was in Atlanta to land a government job, Hardwick's partner pled no-contest, paid the imposed fine, and quickly left town to avoid further trauma including the notoriety of any public accounting.⁵⁶ As for Hardwick, an American Civil Liberties Union (ACLU) attorney contacted him to ask if he would consider taking his case to trial to challenge the sodomy statute.⁵⁷ Hardwick's circumstance made him an ideal candidate to be used as a test case to challenge the constitutionality of the Georgia sodomy law for several reasons. First, Hardwick was making love in the privacy of his own bedroom when the police officer entered. Many other gay men had been discovered by police officers sexually engaged in secluded yet relatively public areas such as parks or automobiles where there is a lower expectation of privacy.⁵⁸ Secondly, Hardwick did not hide the fact that he was gay, so he had no sexual orientation secret to protect.⁵⁹ Thirdly, he was a bartender at a gay bar, so he did not fear losing his job because of his sexual orientation.⁶⁰ Lastly and perhaps most importantly, Hardwick had the loyal support of family and friends.⁶¹ Hardwick agreed to be a test case.⁶²

took them to a police substation, and left them sitting in the back of the squad car for over twenty-five minutes. *Id.*

54. See Irons, *supra* note 32, at 128. Within an hour of being placed in the holding cell, someone came to post bail for Hardwick, however the police officers took an additional twelve hours to process his release. *Id.* After four hours, the police removed Hardwick and improperly placed Hardwick in an area of the jail that held convicted criminals. *Id.* Again Torick announced to these criminals that Hardwick was in jail for cocksucking. *Id.*

55. See Irons, *supra* note 32, at 128.

56. See Irons, *supra* note 32, at 128.

57. See Irons, *supra* note 32, at 128.

58. See *United States v. Chadwick*, 433 U.S. 1, 12 (1977). The Court determined that there is a "lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects... . It travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)).

59. See Irons, *supra* note 32, at 128.

60. See Irons, *supra* note 32, at 128.

61. See Irons, *supra* note 32, at 128.

62. See Irons, *supra* note 32, at 128. Affiliated with Georgia's ACLU, Clint Sumrall searched Georgia courts daily for five years looking for a sodomy test case. *Id.* When constitutional rights are at issue, advocacy organizations such as the ACLU or National Association for the Advancement of Colored People (NAACP) often seek the optimal aggrieved party who can best present a prevailing case.

When it became apparent that Hardwick and the ACLU, intended to challenge the law, prosecutors refused to set a court date, and dropped the charges.⁶³ By dropping the state felony sodomy charges,⁶⁴ prosecutors attempted to thwart Hardwick's challenge and avoid ensuing public critique of the statute.⁶⁵

Hardwick filed a complaint, however, in District Court, against Atlanta's police commissioner and Georgia Attorney General, Michael Bowers,⁶⁶ challenging the constitutionality of Georgia's sodomy statute.⁶⁷ An anonymous heterosexual married couple, John and Mary Doe, joined in the complaint and claimed that Hardwick's arrest⁶⁸ harmed their marriage by creating a chilling effect on their own sexual expression.⁶⁹

On its face, Georgia's sodomy statute is sexual-orientation neutral and draws no distinctions between married or unmarried sexual encounters. The Georgia anti-sodomy statute provides as follows:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.⁷⁰

At best, the Georgia sodomy statute offers only a muddied distinction between consenting sodomic acts between adults and non-consenting acts perpetrated against another. In the first section, the statute distinguishes "sodomy and aggravated sodomy."⁷¹ Using plain meaning interpretation, "sodomy," in Georgia, is necessarily a consensual encounter, that is, non-coerced, with a person who is capable

63. See Irons, *supra* note 32, at 128.

64. See Irons, *supra* note 32, at 128. After the preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed. *Id.* (emphasis added).

65. See Irons, *supra* note 32, at 128.

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

67. *Id.* at 190.

68. *Id.*

69. *Id.*

70. GA. CODE ANN., § 16-6-2 (1992) (emphasis added). See *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11 Cir. 1985); *but see Bowers v. Hardwick*, 478 U.S. at 188 (citing only what the Court deemed to be the "pertinent part" of the statute).

71. GA. CODE ANN., § 16-6-2 (1992).

of consent. Conversely, "aggravated sodomy" is by definition non-consensual; in many jurisdictions, aggravated sodomy so defined is rape.⁷² These two activities are qualitatively different. However, the second section of the Georgia sodomy statute fails to adequately distinguish the penalties associated with these qualitatively disparate acts. For example, under Georgia's sodomy statute, it is possible for a person who has been convicted of *non-consensual* sodomy, like anal rape, to receive a shorter prison term than a person who engaged in acts of *consensual* sodomy as innocuous as oral sex with another adult.⁷³ A person convicted of sodomy involving non-consensual anal penetration of a disfavored other, for example, a transvestite, a gay man, a lesbian, a transsexual person, or a prostitute, could receive a one year sentence if found guilty, while two *consenting* same-sex adult partners who are convicted of sodomy could be sentenced to the twenty-year maximum.⁷⁴

Although Georgia's sodomy statute is sexual-orientation neutral on its face, the Supreme Court did not rule on the entire statute.⁷⁵ Avoiding confrontation with the inequities inherent in the statute, the Supreme Court decision excerpted the statute, citing only what it termed the "pertinent part."⁷⁶ Nevertheless, the Court let stand the entire statute.⁷⁷

Significantly, the District Court ruled that John and Mary Doe had no standing to present a claim, since they were "in no *immediate danger of sustaining injury* based on the statute."⁷⁸ The trial court reasoned that no heterosexual married couple need worry about having a police officer enter their bedroom and arrest them for engaging in a consensual sexual activity.⁷⁹ The trial court dismissed Hardwick's claim for "failure to state a claim upon which relief may be

72. *Id.*

73. *Id.* I am not suggesting here that *consensual* anal sex is any less innocuous than consensual oral sex.

74. Under the Georgia statute, aggravated sodomy, or rape involving the sexual organs of one person and the mouth or anus of another person, bears the penalty of one to twenty years or life while consensual sodomy bears a one to twenty years penalty. Conceivably, a sympathetic rapist of a disfavored victim could get a mere one or two years sentence, while two consenting adults could receive the maximum sentence allowed, i.e., twenty years in prison.

75. See *Bowers*, 478 U.S. at 186.

76. In *Bowers v. Hardwick*, the Court noted the pertinent parts of the statute as follows: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another ... (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years..." 478 U.S. at 186.

77. *Id.* at 190.

78. *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985) (emphasis added).

79. *Id.*

granted."⁸⁰ Hardwick and the Does appealed to the Eleventh Circuit Court. The Eleventh Circuit reversed the trial court's decision regarding Hardwick's claim,⁸¹ but affirmed the District Court's dismissal of John and Mary Doe's claim.⁸² The standing of each of the "plaintiffs ... depend[ed] on whether the *threat of prosecution* under this statute is *real* and immediate or *imaginary* and *speculative*."⁸³ The court reasoned that the heterosexual couple were in no apparent danger of being arrested based on this facially neutral statute.⁸⁴ When the defendants appealed to the United States Supreme Court, the Court reversed the appellate decision in its five-to-four split decision against Hardwick.⁸⁵

Implying that the *Bowers* decision is imprudent and unjust, Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, admonished the five justice majority because "in its haste to reverse... the Court relegates the statute being challenged to a footnote and ignores the procedural posture of the case."⁸⁶ Moreover, Justice Blackmun accused the Court of distorting the question presented.⁸⁷ The Supreme Court ruled "against Mr. Hardwick and against justice."⁸⁸ Unfortunately, *Bowers* is not the first case to acquire a reputation of having an unjust outcome with far-reaching implications.

DRED SCOTT V. SANDFORD: THE DARK-TIME

The story usually told about Dred Scott is over-simplified and incomplete.⁸⁹ Recently, researchers have called for a new reading of *Dred Scott*, having plumbed the depths of its documented history and revealed buried facts of the case.⁹⁰ The significance of these newly emerging facts resonates for those of us who seek to understand the parallels and intersections of oppression that defy our attempts to

80. *Id.* (quoting FED. R. CIV. P. 12(b)(6)).

81. *Id.* at 1212-13.

82. *Id.* at 1204-06 (describing the jurisdictional issue of standing).

83. *See Bowers*, 760 F.2d at 1205 (emphasis added) (citation omitted).

84. *Id.*

85. *See Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting). *See* Irons, *supra* note 32, at 130.

86. *See Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

87. *Id.*

88. *Id.*

89. *See generally*, Vandervelde & Subramanian, *supra* note 12 (telling the little-known story of Dred Scott's wife, Harriet Robinson, who filed "her own case for freedom, a case that was submerged in his." *Id.* at 1034.).

90. *See* Vandervelde & Subramanian, *supra* note 12; Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, 60 U. CIN. L. REV. 713 (1992); Simeon C.R. McIntosh, *Reading Dred Scott, Plessy and Brown: Toward a Constitutional Hermeneutics*, 38 How. L.J. 53 (1994).

eliminate racism, heterosexism, classism, sexism, and other forms of systemic abuse. Originally, the infamous Dred Scott case was not one case but two, because Harriet Robinson Scott filed her own claim for freedom in 1846.⁹¹ Consider Harriet Scott's claim.

She was hiding when I found her
 in the dark
 crouched down deep, still
 but the light shone
 from her eyes closed against
 the blackness
 a rhythmical pulse beat
 drumming
 for justice
 Just once
 In time
 to be heard seen in the silent shade
 as my syncopated intuition
 guided my heart like sonar
 to a place certain
 to synchronize
 with unintended
 reverberations
 of her elegant essence
 Oh yes,
 She was hiding
 the darkness
 when
 I found her
 when I found her.⁹²

HARRIET ROBINSON SCOTT: THE SHADOW'S SHADOW

Harriet Robinson was about seventeen years old when her owner, Major Lawrence Taliaferro, performed a formal public ceremony of marriage.⁹³ He united Dred Scott, a post surgeon's forty-year-old slave, and Harriet Robinson, whom he said he "gave" to Dred.⁹⁴ Also,

91. See Vandervelde & Subramanian, *supra* note 12, at 1040 (exploring several legal claims she could have raised at that time).

92. HUFF, *Linda*, in *BLACK LESBIANS DO NOT EXIST*, *supra* note 1, at 5.

93. See Vandervelde & Subramanian, *supra* note 12, at 1050 (noting that the ceremony took place "sometime between May 8, 1836, and September 14, 1837").

94. See Vandervelde & Subramanian, *supra* note 12, at 1054 (referring to LAWRENCE

Taliaferro referred to Harriet as his "servant girl," not his "slave," which is significant because "if a slave married a free woman, with the consent of his master, he was emancipated."⁹⁵ At Fort Snelling, Taliaferro conducted *legal* marriage ceremonies between and among the Sioux, the Ojibwa, African-originated people, and other fort personnel.⁹⁶ In a newspaper interview, Taliaferro recalled "marrying the two and giving the girl her freedom."⁹⁷ In fact, Taliaferro released all of the enslaved people that he had owned.⁹⁸ It is ironic that Taliaferro referred to Harriet's marriage and freedom in the same sentence, because married women in those days were actually *chatel*, the property of their husbands. Indeed,

by marriage, the husband and wife [were] one person in law: that is, the very being or legal existence of the woman [was] suspended during the marriage, or at least [was] incorporated and consolidated into that of the husband; under whose wing, protection, and *cover* she performs everything; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*; it is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *cover-ture*.⁹⁹

By legally marrying Harriet Robinson to Dred Scott, Taliaferro actually jeopardized the freedom he had conferred upon her. To a great extent, mid-nineteenth century United States was still bound to the doctrine of marital unity which "affirmed the inferior status of wife; but it was under attack."¹⁰⁰ This doctrine was based on a reading of Biblical dogma and included common law, metaphysical, and religious canons.¹⁰¹ By the 1830s, isolated state statutes conferred upon married women a variety of new rights, privileges, and responsibilities mainly related to their ability to own property, the ability to contract with another, and the ability to file suit separately from her husband.¹⁰² Although Harriet's legal counsel filed her distinct claim, new counsel filing in federal court ignored Harriet Robinson Scott's complaint, dissolving it into her husband's suit for acknowledgment

TALIAFERRO, AUTOBIOGRAPHY OF MAJOR LAWRENCE TALIAFERRO (1864).

95. See Vandervelde & Subramanian, *supra* note 12, at 1099, 1105.

96. See Vandervelde & Subramanian, *supra* note 12, at 1054.

97. See Vandervelde & Subramanian, *supra* note 12, at 1099 (citation omitted).

98. See Vandervelde & Subramanian, *supra* note 12, at 1099.

99. WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES, in KATHARINE T. BARTLETT, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY 2-3 (1993).

100. *Id.* at 4-5.

101. *Id.* at 5.

102. *Id.* at 5.

of his freedom.¹⁰³

African-originated people who were enslaved were considered to be "chattel" and therefore, could not be legally married nor make any other legally binding contracts.¹⁰⁴ In slavery, there could be only one head: the slave master; in marriage, there could be only one head of household: the husband. These patriarchal institutions - slavery and marriage - present a conflict of interest and are mutually exclusive. The familial relationships established among these enslaved people were precarious and dependent upon the permissiveness of the slave owner. With some provisos, however, African-originated people who were not enslaved were permitted to be married.¹⁰⁵

The Scotts had four children: two boys who both died as infants and two girls who were alive during the twelve-year legal battle for their right to live as a free family.¹⁰⁶ The Scotts knew that fertile female children and young adult females brought in a high price in the slave market as breeders.¹⁰⁷ Just as the owner of a bitch owns the pups born to a dog, and just as the owner of a heifer owns the calves born of the cow; so the owner of an enslaved female owns the children born by virtue of a sexual liaison between two enslaved people.¹⁰⁸ A child possessed the same status of freedom as did his or her mother.¹⁰⁹ Children who were born of a free mother were also considered free.¹¹⁰ By claiming her freedom, Harriet Scott sought to secure her daughters' freedom as well.¹¹¹

Slave owners were probably interested less in emancipating females like Harriet and her daughters than they were interested in marketing them as breeders.¹¹² Dred Scott, on the other hand, died less than a year after the Supreme Court rendered its decision on the

103. See generally, Vandervelde & Subramanian, *supra* note 12.

104. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

105. See, e.g., Vandervelde & Subramanian, *supra* note 12, at 1034 (stating the Harriet Robinson Scott lived "at the intersection of multiple oppressions" invoking race, class, gender, and enslavement).

106. See Vandervelde & Subramanian, *supra* note 12, at 1050.

107. See Vandervelde & Subramanian, *supra* note 12, at 1050.

108. See *Carruth v. Easterling*, 150 So. 2d 852 (Miss. 1963).

109. See generally, Vandervelde & Subramanian, *supra* note 12, at 1076.

110. See generally, Vandervelde & Subramanian, *supra* note 12, at 1076.

111. See Vandervelde & Subramanian, *supra* note 12, at 1116 (stating that because Harriet could argue that she was free at the time of her marriage, any "children she had with Dred would follow her status, and would thereby be free as well").

112. See Vandervelde & Subramanian, *supra* note 12, at 1076 (noting that "[a]dolescent girls, sold in slave markets, were priced for their child-bearing potential").

case.¹¹³ Exerting ownership over the Scott family was simply a matter of white lawmakers' economics: to breed females or sell them as breeders.

Harriet Scott's claim to freedom made for an even stronger plaintiffs' case than Dred Scott's case. Harriet Scott's claim could have been based on the fact that she had long resided in a free territory or on the fact that Taliaferro had manumitted her at the same time that he performed the formal, legal marriage between her and Dred.¹¹⁴ Moreover, Harriet Scott's two daughters, born of a free woman, would have also been free.¹¹⁵

Further, her claim to freedom could have encompassed Dred Scott as well. Some research suggests that "[b]efore 1857, when the Supreme Court decided Dred Scott, marriage and slavery were viewed as sufficiently incompatible in most *Northern* states [,and] a slave's marriage to a free woman was deemed to emancipate the slave."¹¹⁶ In Southern states, enslaved people were simply not permitted to have legally binding marriages, although enslaved parties could ask for permission to cohabit at the pleasure of their owners.¹¹⁷ Occasionally, this permission granted was marked by a celebration which could include "jumping the broom" and other festivities that give social sanction to the coupling, but no legal status.¹¹⁸ The law in Southern states afforded the slave marriage no respect or priority in the face of the slave owner's decision to transfer ownership of one or all of the enslaved, shattering the family of the enslaved.¹¹⁹

Although Fort Snelling was in free territory where slavery had been prohibited since 1787, the federal government directly participated in the spread of slavery into the Northwest Territory The

113. See Vandervelde & Subramanian, *supra* note 12, at 1034 (reporting that during the trial, at fifty-one years of age, Dred had already lived eleven years beyond the life expectancy of an enslaved man and was sick with tuberculosis. He died in 1858.).

114. See Vandervelde & Subramanian, *supra* note 12, at 1050.

115. See Vandervelde & Subramanian, *supra* note 12, at 1116.

116. See Vandervelde & Subramanian, *supra* note 12, at 1041 (emphasis added).

117. See Vandervelde & Subramanian, *supra* note 12, at 1041 (explaining how Southern states denied "the institution of marriage as a civil contract to slaves who married other slaves or even free persons").

118. One common ceremony used to note that two enslaved people had decided to and been granted permission to keep house together, was to have the committed persons to literally jump over a broom stick together. Once on the other side of the stick, they were said to be married. No one knows the origin of jumping the broom. However, it sounds like a horribly disrespectful joke that a sadistic master played on an enslaved couple. Ironically, today, in Afrocentric marriage ceremonies, couples often choose to jump the broom to commemorate their ancestors' struggle to maintain families in spite of the tribulations of slavery. See Vandervelde & Subramanian, *supra* note 12, at 1041.

119. See Vandervelde & Subramanian, *supra* note 12, at 1041.

Army would pay any officer an additional allowance, often the same amount that a private would earn, for the keeping of one servant since officers were expected to uphold a certain class status while in service even on the frontier... . [W]hen an officer married, he frequently availed himself of a servant allotment to buy or rent a slave of his own [T]he officers apparently solved the problem of a domestic labor shortage by importing slaves... . The presence of this entire community of enslaved people at the federal fort presents an obvious legal contradiction.¹²⁰

While racism and classism maintained their enslavement, genderism, heterosexism, and classism occluded the view of Harriet Robinson Scott's case and silenced her claim for freedom not merely for herself, but for the freedom of her entire family to remain intact, in intimate association, by subsuming her case under *Dred Scott*.

DRED SCOTT: A SHADOW ON AMERICAN CITIZENSHIP

The usual telling of the *Dred Scott* story reads as follows. A slave in the State of Missouri, *Dred Scott* was taken by his master, Surgeon Emerson, into a "free" territory of the United States, and as a result of his foray into the land of freedom, *Dred Scott*, presuming himself to be free, "brought this action in the Circuit Court of the United States for that district, to assert the *title* of himself and his family to freedom."¹²¹ *Dred Scott* filed his claim as an action in diversity, meaning that he claimed he and the defendant were citizens of two different states.¹²² He appealed all the way to the Supreme Court, where in 1857, Chief Justice Taney stated that there were "two leading questions by the record: [First,] had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties?; and [second,] if it had jurisdiction, is the judgment it has given erroneous or not?"¹²³

In *Dred Scott*, the Court, in a seven to two decision, explained that federal jurisdiction defines the federal court's constitutional capacity to hear a claim and cannot be consented to nor waived by the parties.¹²⁴ According to the majority, the question of the federal courts' jurisdiction to hear the arguments in *Dred Scott*'s case rested on the Supreme Court's interpretation of the Constitution framers' original intent regarding the Negro race.¹²⁵ The Court made inferences re-

120. See Vandervelde & Subramanian, *supra* note 12, at 1047-48 (citations omitted).

121. See *Dred Scott*, 60 U.S. at 400 (emphasis added).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 400-402.

garding the intent of the Constitution's framers based solely on literal elements.¹²⁶ To determine the framers' original intent, Justice Taney compared and contrasted the status of the Negro race with Native Americans, whom he called "the uncivilized ... yet free and independent people ... who were situated in territories to which the white race claimed the *ultimate right of dominion*."¹²⁷

Justice Taney averred that although subject to white sovereignty,

Indian political communities have always been treated as foreigners ... in a state of pupilage[, and may be] naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual [Indian] should leave his nation or tribe, and take up his abode among the white population, he would be *entitled* to all the rights and privileges which would belong to an emigrant from any other foreign people.¹²⁸

Justice Taney then turned his focus to the Negro race, and asked,

Can a negro [sic], whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the constitution.¹²⁹

Specifically, in the majority's view, the phrase "people of the United States" and the word "citizens" are "synonymous terms[,] that denote the political body who collectively hold the power and conduct the Government through their representatives."¹³⁰ According to our republican institutions, the people are the sovereignty.¹³¹

According to the majority's perception of the original intent of the framers of the United States Constitution, a slave or a free Negro could not be a citizen of the United States.¹³² Justice Taney reasoned that if the framers had wanted Negroes to be citizens, they would

126. See *Dred Scott*, 60 U.S. at 404-405 (stating that Negroes were not intended to be citizens under the Constitution and that at the time the Constitution was drafted, Negroes were considered a "subordinate and inferior class of beings who had been subjugated by the dominant race, and whether emancipated or not ... had no rights or privileges but such as those who hold the power and Government might choose to grant them.").

127. *Id.* at 403-404 (emphasis added).

128. *Id.* at 404 (emphasis added).

129. *Id.* at 403.

130. *Id.* at 404.

131. See *Dred Scott*, 60 U.S. at 404.

132. See *id.* at 404 (stating that Negroes are not citizens, nor were they intended to be regarded as citizens who receive the benefits of such status).

have expressly said so.¹³³ Justice Taney emphasized the silence of the framers on this issue and the fact that nearly every jurisdiction in the Colonies and later in the Union had laws that limited the activity and freedom of African-originated people who were not slaves.¹³⁴ In fact, he cited several jurisdictions in northern states as well as southern states that prohibited Negroes from performing certain activities, such as getting married¹³⁵ or serving in the military,¹³⁶ that white American citizens took for granted as a right or obligation of citizenship. For example, a colonial Maryland law forbade interracial marriage between free male Negroes and white women and also forbade interracial marriage between white men and free Negro or mulatto women.¹³⁷ The penalty for entering into an interracial marriage forced a free Negro spouse into slavery for life and mulatto spouse into seven-year servitude, at the court's discretion.¹³⁸ For a similar offense, in colonial Massachusetts, courts heaped a fifty pound fine upon those who transgressed.¹³⁹ Moreover, these laws remained in effect after the Revolutionary War.¹⁴⁰ Neither the Declaration of Independence nor the various state constitutions substantially changed the tone of the relationship between the white race of citizens

and the [race] which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes [sic] or mulattoes were regarded as *unnatural and immoral, and punished as crimes*, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro [sic] or mulatto and the slave, but this stigma, of the *deepest* degradation, was fixed upon the whole race.¹⁴¹

133. *Id.*

134. *See generally id.* at 405 (discussing the legal limitations on Blacks throughout the Union).

135. *See id.* at 416 (explaining that in 1822, Rhode Island passed a law strictly prohibiting marriage between people of different races).

136. *See Dred Scott*, 60 U.S. at 415 (noting that in 1815, New Hampshire passed a law allowing only free white men to serve).

137. *Id.* at 408.

138. *Id.*

139. *Id.* England seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world. The colonies continued the tradition. *Id.*

140. *Id.*

141. *Dred Scott*, 60 U.S. at 409 (emphasis added). The Court used the term "unnatural" to describe the act of interracial marriage with similar disdain as Blackstone's Commentary used the term "unnatural" to describe the love relationships between same-sex partners.

Justice Taney surmised that the framers believed that Negroes were inferior to white people, and that being of an inferior breed, the Negro has no right that a white man must respect.¹⁴² Therefore, Taney concluded that founders of the United States in general and the Constitution's framers specifically, did not intend that Negroes would be citizens regardless of the Negro's condition of servitude.¹⁴³

The *Dred Scott* decision had a lasting social impact on the United States long after the Civil War.¹⁴⁴ During Reconstruction, "Congress frequently stated that the purpose of constitutional reform was to cure, as they called it, 'Dred Scott-itus'."¹⁴⁵ "Dred Scott-itus" was not cured, however. Instead, the affirmation of the inherent inferiority of African-originated peoples, nurtured so vociferously by the Taney Court, was like raw sewage poured into the stream of civic, economic, social, and political consciousness in the United States. Dred Scott-itus seeped into every aspect of African-American life regardless of Congress' passing apparently radical legislation¹⁴⁶ and in spite of ratifying the Thirteenth,¹⁴⁷ Fourteenth,¹⁴⁸ and Fifteenth¹⁴⁹ Amendments

142. *Id.*

143. *Id.* Having determined that Negroes could not be citizens of the United States, Justice Taney offered his infamous holding in a seven-to-two split decision. A comprehensive and succinct reading of the holding in *Dred Scott* is found in Harriet Scott's dismissal, which reads:

1. Congress had no authority to eliminate slavery in any of the federal territories;
2. Dred Scott was not a citizen of the United States, nor was he permitted to use the courts of the United States to sue for his freedom;
3. Because Congress had no authority to eliminate slavery in the federal territories and because Dred Scott was not a citizen of the United States, the federal courts did not have jurisdiction over Dred Scott's claim;
4. Dred Scott's residency in free territory did not make him free because the 1820 Missouri Compromise violated the Fifth Amendment Due Process Clause by depriving slaveholders of their property;
5. Scott's residence in another state, Illinois, had no effect on his status as a slave once he returned to Missouri, at which point Missouri law, not Illinois law, applied.

Id. The case itself makes only passing mention of Dred Scott's wife and children. *Id.* The case makes no reference to the strong arguments of Harriet Scott's case. The *Dred Scott* opinion does not take into consideration the state of Dred Scott's health, nor the likelihood that the family would be broken apart and each member sold to the highest bidder.

144. See Vandervelde & Subramanian, *supra* note 12, at 1033.

145. See Vandervelde & Subramanian, *supra* note 12, at 1033 n.3 (citation omitted).

146. For example, after Congress passed the Thirteenth Amendment, "Black codes" were adopted by southern states. These codes effectively nullified the Thirteenth Amendment's prohibition against slavery. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 369 (5th ed. 1995). In response, Congress passed the Civil Rights Act of 1866, which granted citizenship to all people, regardless of race. See *id.* at 369 n.1.

147. The Thirteenth Amendment prohibited involuntary servitude and was ratified in 1865. *Id.* at 369. It reads as follows: "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII.

148. The Fourteenth Amendment prohibited states from abridging "the privileges or immunities of citizens of the United States." See NOWAK & ROTUNDA, *supra* note 146, at 370 n.9

to the United States Constitution.

DRED SCOTT V. SANDFORD AND BOWERS V. HARDWICK COMPARED

Ironically, in the *Dred Scott* decision, the United States Supreme Court determined that, because the nation's founders had not envisioned the inclusion of a certain class of people, Negroes, as members of the community of citizens, "the *special rights and immunities guaranteed to citizens* do not apply to them."¹⁵⁰ The similarities to *Bowers v. Hardwick*, are indeed startling. In *Dred Scott*, Justice Taney used history and tradition as proof that the class of persons in question do not deserve citizens' rights.¹⁵¹ First, Justice Taney emphasized that northern states had prohibitions or restrictions on marriage, serving in the military, attending school, and/or voting rights leveled against African-originated people.¹⁵²

Secondly, Justice Taney held that, in his interpretation of the original intent of the Constitution framers, their silence essentially dis-included Negroes from citizenship.¹⁵³ The Court violently absconded with the Negro's full citizenship and replaced it with unenviable prospects of periodic gratuitous dispensations from those who are empowered by the violence of its law. The *Dred Scott* decision reflects the attitude that Negroes have no rights that a white man is bound to respect. That is, Negroes have no enforceable rights under federal law.¹⁵⁴

Similarly, the *Bowers v. Hardwick* opinion specifically, and anti-sodomy laws generally, have become acceptable rationale for lesbian and gay disenfranchisement, and codes for the official, if tacit, approval of the denigration of lesbian and gay people.

It is a travesty of justice, but well within Taney's reading of the law, that the name, *Dred Scott*, now reflects the very textual reading which systematically silenced him as a plaintiff. This is a lingering

(explaining and citing to U.S. CONST. amend. XIV). The amendment further provided that equal protection and due process of the laws, as stated in the Fifth Amendment, shall apply to the states. *Id.* at 370 n.10.

149. U.S. CONST. amend. XV. "The right of citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.*

150. See *Dred Scott*, 60 U.S. at 422 (emphasis added).

151. See generally, *id.* at 407-27.

152. See generally, *id.* at 407-16.

153. See *id.* at 416-20. The Court further explained that Southern states would never have agreed to ratify the Constitution if Blacks were given citizenship, because the South was so economically dependent on slavery. *Id.*

154. See *id.* at 421 (explaining that Blacks are "marked and stigmatized" and could not possibly enjoy the rights and privileges of citizens because to apply such a label to Blacks would be an "abuse of terms").

and ironic consequence of at least three judgment errors by the *Dred Scott* Court. First, the Court presupposed that it understood the founders' original intent toward African-originated people and the possibility of full citizenship. The second judgment error occurred when the Court automatically applied its perception of the founders' intent to Scott's particular case, even assuming that the Court could know the intent of the framers. The Court's third error occurred when it inaccurately re-read constitutional text, suspending judgment long enough to particularize this case in controversy.

Jacques Derrida's¹⁵⁵ deconstructive concept of "differance" could have been useful to the *Dred Scott* Court in making a just decision. Traces of the violence perpetrated against Dred Scott, his family, and other African-originated people continues. However, the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution partially mitigate the effects of the Taney Court's reading.¹⁵⁶ The Civil Rights Act of 1964, as amended, is also an attempt to ameliorate.¹⁵⁷

A LIGHT SIGNALS THE DARK TUNNEL'S END

Hopefully, the recent *Romer v. Evans*¹⁵⁸ Supreme Court decision will diminish the effect of *Bowers v. Hardwick* and spark its ultimate demise.¹⁵⁹ Quoting Justice Harlan's dissent in *Plessy v. Ferguson*,¹⁶⁰ Justice Kennedy's opinion in *Romer* admonished that the "Constitution neither knows nor tolerates classes among citizens... .

155. See generally, SHARON CROWLEY, A TEACHER'S INTRODUCTION TO DECONSTRUCTION (1989). Jacques Derrida is a professor of philosophy at the Ecole Normale Supérieure in Paris, France. Derrida developed a style or strategy of critical analysis called deconstructionism: a not wholly formalizable ensemble of rules for reading, interpretation and writing. *Id.* at 1 (citation omitted).

156. See *supra* notes 147-149 (discussing U.S. CONST. amends. XIII, XIV, and XV). At least nominally, these amendments forbade slavery, offered citizenship, regardless of history of servitude, and provided - to males - the right to vote. Sandford's attitude as sanctioned by the Taney Court is still heard in some of the so-called "Welfare reform" rhetoric, in English-only debates, in affirmative action debates, and reapportionment decisions. Aspects of *Dred Scott v. Sandford* are still considered good law, in that the decision was never directly overturned. A more complete discussion is beyond the scope of this text.

157. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. 21). This Act expanded voting rights, provided for "injunctive relief against discrimination in places of public accommodation," forbade segregated facilities, and contained provisions against discrimination in employment. *Id.*

158. 116 S. Ct. 1620 (1996). Justice Kennedy wrote for the 6-3 majority, "[a] State cannot so deem a class of persons a stranger to its laws." *Id.* at 1629 (emphasis added).

159. The decision in *Bowers*, was split by a 5-4 vote, signaling a rift in the Court over the issue of lesbian rights. Even Justice Powell, in his concurrence with the majority, went to great lengths to opine that an anti-sodomy law that classified sodomy as a felony might constitute a serious violation of the Eighth Amendment's prohibition against cruel and unusual punishment. See *Bowers v. Hardwick*, 478 U.S. at 215.

160. 163 U.S. 537 (1896).

[Justice Harlan's admonition] state[s] a commitment to the law's neutrality where the rights of persons are at stake."¹⁶¹ As I shall explore later in this text, by restating Justice Harlan's century-old admonition, Justice Kennedy voiced one of Jacques Derrida's requisites for a just judgment.¹⁶²

In *Romer v. Evans*, a proposed amendment to the Colorado Constitution, "Amendment 2," would have denied legal recourse for discrimination against lesbian citizens.¹⁶³ The Court held that the amendment was unconstitutional on equal protection grounds.¹⁶⁴ Justice Kennedy emphasized that "[i]f the adverse impact on the *disfavored class* is an apparent aim of the legislature, its impartiality would be suspect."¹⁶⁵ Moreover, after careful analysis, the *Romer* Court found that Colorado's Amendment 2 was simultaneously "too narrow and too broad."¹⁶⁶ The Court accused proponents of Amendment 2 of "identif[ying] persons by a *single trait* and then deny[ing] them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is *unprecedented in our jurisprudence*."¹⁶⁷

we were not the first

Black woman white woman

altering course to fit our journey.

In this treacherous sea

even the act of turning

is almost fatally difficult

coming around full face

into a driving storm

putting an end to running

161. See *Romer*, 116 S. Ct. at 1623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In *Plessy*, the majority upheld an Oregon statute requiring Blacks and Whites to ride in separate railway cars. 163 U.S. at 550.

162. CORNELL, *infra* note 214, at 112-13.

163. See *Romer*, 116 S. Ct. at 1623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

164. *Id.* at 1629.

165. *Id.* at 1627-28 (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (emphasis added)).

166. *Id.* at 1628.

167. *Id.* (emphasis added). The Court used the term "single trait" as opposed to a single behavior or a set of behaviors. The Court suggests that it has noted and is responding to the personhood of lesbian citizens, not merely referring to a set of presumed actions, for example, sodomy, but rather a state of being. Sodomy is often erroneously truncated into the lesbian orientation, becoming synonymous with it. Also, HIV/AIDS is often collapsed onto lesbian orientation for a similar purpose.

before the wind.¹⁶⁸

The *Dred Scott* decision may be compared to Colorado's proposed Amendment 2. The similarity between *Dred Scott* and *Romer* is in their common strategies for acquiring the total disenfranchisement of a class of persons. On the other hand, while the *Dred Scott* Court's rationale was by nature retroactive to gain popular acquiescence, if not respect, whereas Colorado's rationale in *Romer* was proactive to gain the popular vote. Overall, despite similarities with *Dred Scott*, however, the *Romer* Court emphasized the importance of the "absence of precedent for Amendment 2."¹⁶⁹ Why did the *Romer* Court take steps to avoid the obvious comparison between issues inherent in *Dred Scott* and those fundamental to Amendment 2? Are the proffered alternative resolutions to the *Bowers v. Hardwick* opinion (notably the question of privacy) any less malevolent?

Another set of questions sit in this author's lap, awaiting their turn on the computer screen. Most of these questions were posed by intimate lesbian friends and are as follows: "Why are you writing about 'sodomy'? I thought that it was a 'guy-thing'." "What does sodomy have to do with us, anyway? It's not illegal in Ohio, is it?" I dislike these questions more than I despise shepardizing or cite-checking. These questions are perilously close to the heart of the matter. Like RuthAnn Robson,¹⁷⁰ I am studying and writing about how the rule of men and law impacts upon lesbian survival.¹⁷¹ "By survival [Robson] means: First, the very daily survival that depends on the necessities of life like food, shelter, work, safety, and love... . Second, survival *as* lesbians."¹⁷² I am also studying and writing for the planet's survival; for our children; for justice. I believe that the process of deconstruction can assist us in ferreting out these questions and *raison d'être* of sodomy. Toward this end, there is a huge amount of deconstructive re-reading to do.

I trace the curve of your jaw
with a lover's finger
knowing the hardest battle
is only the first
how to do what we need for our living

168. AUDRE LORDE, *OUR DEAD BEHIND US* 8-9 (1986).

169. See *Romer*, 116 S. Ct. at 1628 (emphasis added).

170. RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW*, 11 (1992).

171. See *id.* (explaining that the United States legal system is a product of men's limited grasp of the concerns of women, such that "their rule of law mirrors the concerns of the ruling men").

172. See *id.* (emphasis added).

with honor and in love¹⁷³

I am a student of justice, not merely law, though I am not yet a legal expert. Nor do I claim particular expertise or uncommon knowledge of philosophy, rhetoric, or critical analysis from which spring Jacques Derrida's notions of deconstruction.¹⁷⁴ I am merely and *especially* a seeker on a lesbian-feminist jurisprudential path. Feeling the call of the winds of change flit by, momentarily lifting the caul from our eyes, I tossed high in the air this text which may be seeds of justice; such is my gift to the refreshing breeze. I hope to find blooming wild flowers of justice in a fertile bed of law somewhere as we continue to traverse our destined to be chosen paths.

OYA

OYA, iyáâmi

You have claimed me.

How shall I serve you such that you will be pleased?

How shall I honor you such that you will bless me?

How shall I remember you such that you will never forget me?

Show me, Sweet OYA,

Bearded Warrior Mother that you are
teach your child.

Show me in a flash of your lightning

Show me in a whirl of your wind storm and
in your gentle breeze

Rend from me all my chaff

Gently, Yansa. Gently.

Reward me with gifts from your opulent pocket

Olóya dé kosi ìjì, OYA, Heepa-Hey!

Please, do not blow your blessings away

Wrap me in your rainbow

Let me know the quiet center of your storm

Protect me, OYA, I am your child

I am your child, OYA, bless me.

Modupué-ó¹⁷⁵

What is especially interesting about Oya in human context is her refusal to stay out of the enclaves of cult and culture preempted by

173. See LORDE, *supra* note 168, at 13.

174. See *infra* Section entitled *Philosophy of the Limit* (explaining deconstruction).

175. HUFF, OYA, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 6.

male authority. "She has, potentially, a sharp tongue, which occasionally she wields like a sword She's a revolutionary."¹⁷⁶ Who is likely to invest in this deconstructive process? Who on earth would want, would advocate, would appeal and pray for such catastrophic change? The spoilers? The non-sportsman-like losers? The disenfranchised?

Deconstruction

Deconstruction is aligned with the marginalized.¹⁷⁷ Whether the marginalized should remain so is a question addressed via deconstruction as justice.¹⁷⁸ The term *deconstruction* refers most often to a method or style of analysis in the field of criticism, although it originated in the field of architecture, and literally means "the undoing, piece by piece, of a building or other construction such as a bridge or a monument."¹⁷⁹

One essayist defines deconstruction as a method of criticism within the context of critical legal studies.¹⁸⁰ Using techniques reminiscent of psychoanalysis, a deconstructive reading looks for moments when the "text deceive[s] the mind... . [D]econstruction interrogate[s] a text, breaks through the defenses and reveal[s] a set of binary oppositions, or conceptual dualisms : public/private, masculine/feminine, same/other, true/false, central/peripheral."¹⁸¹ The text "implicitly favour[s] the validity of one of the poles of these dualisms at the expense of the other."¹⁸² A deconstructive reading exposes the favored, uncovers the hidden poles, and is obliged to do more.

176. JUDITH GLEASON, *OYA IN PRAISE OF THE GODDESS* (1987). *Oya*, the Yoruba orìṣà of sudden structural change - earthshaking change - windstorm change. Deep transformation is called upon and called for here. In a private place, *Oya* transforms into an African water buffalo to explore the forest. She scratches her hide against a tree to remove this garment before she goes into town. *Oya* is said to have grown a beard because of war. Often called Yansa, mother of nine, *Oya* has nine aspects, and rides the Odò *Oya*, (the River Niger). *Oya* is a twister, a tornado; She twists off the tops of trees. *Oya* means "She tore." She, the Great Tearer, rips things, texts apart. Barriers are broken down. "[S]he tears out the intestines of the liar... *Oya* guards the road into the world and out of it." *Id.* at 2-12.

177. DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE ix (Drucilla Cornell et al. eds., 1992).

178. *Id.*

179. See KOHL, *supra* note 19, at 29.

180. David Jabbari, *Critical Legal Studies: A Revolution in Legal Thought?*, in REVOLUTIONS IN LAW AND LEGAL THOUGHT 153 (Zenon Bankowski & Neil MacCormick eds., 1991).

181. *Id.* at 155.

182. *Id.*

The Philosophy of the Limit¹⁸³

After developing an ethical reading of deconstruction, relating it to the philosophy of alterity, and exploring deconstruction's relationship to questions of ethics, justice, and legal interpretation, Professor Drucilla Cornell renamed "deconstruction" as "the philosophy of the limit."¹⁸⁴ This new name

affords more precision and focus regarding the philosophy, and more clearly articulates its significance to law... . [Cornell has renamed deconstruction in order to show] the significance for legal interpretation of Derrida's own understanding of justice as an aporia¹⁸⁵ that inevitably serves as the limit to any attempt to collapse justice into positive law.¹⁸⁶

Cornell's second reason for renaming deconstruction is to avoid its typical classification as postmodern philosophy.¹⁸⁷ Because of its origins in aesthetics, deconstruction has been categorized and identified as postmodern.¹⁸⁸ Postmodernity, from a philosophical perspective beclouds and may misrepresent the complexity of Derrida's work.¹⁸⁹ Perhaps a re-reading of *deconstruction* as the philosophy of the limit could help us think about justice and legal interpretation differently from the conceptions that have dominated analytic jurisprudence and critical social theory. As I will argue, for marginalized groups, this is a difference that makes a difference.¹⁹⁰

I remember studying cases in property class which taught us that to capture, to control, to kill a thing was great!¹⁹¹ To compete in order to capture enhanced society.¹⁹² If a person was cagey enough to let others compete to capture and that person was present only for the timely kill and ensuing possession, that was great, too.¹⁹³ But, if

183. DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992).

184. *Id.* at 1. Cornell relates that she felt compelled to rename deconstruction because negative connotations are attached to it and misinterpretations of its meaning are common.

185. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 101 (Philip Babcock Gove ed., 1993) [hereinafter WEBSTER'S]. An aporia is a problem or difficulty arising from an awareness of opposing or incompatible views on the same theoretical matter; especially one giving rise to philosophically systematic doubt. An aporia is also a "passage in speech or writing incorporating or presenting a difficulty or doubt." *Id.* Both definitions apply to Derrida's expressed understanding of justice.

186. See CORNELL, *supra* note 183, at 2.

187. See CORNELL, *supra* note 183, at 2.

188. See CORNELL, *supra* note 183, at 2.

189. See CORNELL, *supra* note 183, at 2.

190. See CORNELL, *supra* note 183, at 12.

191. See, e.g., *Pierson v. Post*, 2 Am. Dec. 264 (N.Y. 1805).

192. See, e.g., *Ghen v. Rich*, 8 F. 159 (Dist. Mass. 1881).

193. See, e.g., *Pierson*, 2 Am. Dec. at 264.

someone warned and chased those geese away before they were captured by another, well that person was a spoiler, and that is bad.¹⁹⁴ I also learned in property class that the power to own resides only in the sovereign.¹⁹⁵ And therefore, only the sovereign, could say who or what could own anything. No matter whether someone was in possession, guarding, nurturing, improving, sharing, using an entity, that person did not, could not own it unless the sovereign gave permission.¹⁹⁶ The sovereign alone classified. Under this hierarchical system, some of my ancestors were deemed *ineligible to own property*, some of my ancestors were deemed *to be property*, and some of my ancestors were *permitted to own property* by this sovereign - property included the two formerly described classes of ancestors. The audacity of the sovereign gives one pause. Consequently, property class had particularly personal meaning for me.¹⁹⁷

It really matters where you are standing as to how a legal principle looks - what the text means in context can make a difference in your life. Deconstruction is a strategic device for reading texts in such a way as to rewrite them to give voice to that aspect of the text that has been systematically silenced.¹⁹⁸

SILENCE

Interrupt

Change the subject

cry

apologize

Deny deny deny

sometimes

silence

ain't Quiet¹⁹⁹

Deconstruction offers a strategy for exposing a fraud.²⁰⁰ In this way, my grandmother deconstructed the daily newspaper and the

194. See, e.g., *Keeble v. Hickeringill*, 11 East 574 (Q.B. 1707).

195. See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

196. *Id.*

197. This middle-aged student offers a note of gratitude to Professor Steven Lazarus and Dean Frederick White for sharing their knowledge about property, from "adverse possession" to "easements," and from the "Rule Against Perpetuity" to "the Rule in Shelley's Case." Professor Lazarus, thanks much for the history and the conversation. Dean White, thanks much for teaching me to keep on moving in a timely fashion.

198. See CROWLEY, *supra* note 155, at 9.

199. See HUFF, *Silence*, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 13.

200. See CROWLEY, *supra* note 155, at 7.

evening news. By necessity, she re-read each news item to give voice to an other side. She systematically filled in the blank spaces in the broadcast and wrote "other" news in the margins of the newsprint from the places where our lives and those of folks we knew resided. Like Derrida, but for her own survival and mine, my grandmother pointed out "the necessity with which what [the author] *does see* is systematically *related* to what [the author] *does not see*."²⁰¹ It is important to notice that deconstruction does not merely "point out the flaws or weaknesses of an author."²⁰² Many lesbians deconstruct family and the history of homosexuality for a similar purpose.²⁰³ Without deconstructive strategic processes, dichotomous hierarchical principles would render the systematically silenced into oblivion. In my unpublished manuscript, *Black Lesbians Do Not Exist*,²⁰⁴ the title poem deconstructs some conditions that have systematically silenced lives of African-American lesbians. These ways of knowing are contextual. Difference matters; differences make for a more complete knowing.

When women make love
beyond the first exploration
we meet each otherknowing
in a landscape
the rest of our lives
attempts to understand.²⁰⁵

I remind the readers and myself that a deconstructive critical analysis should not be confused with more traditional analytic or critical readings of a text. A deconstructive reading seeks "places in the text where a writer's language mis-speaks her, where she loses control of her intention, where she says what she did not mean to say."²⁰⁶ The reader must always aim at a certain relationship unperceived by the writer, between what he commands and what he does not command of the patterns of the language that he uses.²⁰⁷

I learned to be honest
the way I learned to swim
dropped into the inevitable...²⁰⁸

201. See CROWLEY, *supra* note 155, at 7 (quoting Barbara Johnson, Derrida's translator).

202. See CROWLEY, *supra* note 155, at 7.

203. See ROBSON, *supra* note 170, at 11.

204. See HUFF, *Black Lesbians Do Not Exist*, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 33.

205. See LORDE, *supra* note 168, at 11.

206. See CROWLEY, *supra* note 155, at 7.

207. See CROWLEY, *supra* note 155, at 7.

208. See LORDE, *supra* note 168, at 39.

Addressing the terms law and justice in a deconstructive context, Jacques Derrida exposes the reader to notions of force, enforce, violence, impotence.²⁰⁹ Justice without force is impotent, but the mere force of law is not justice.²¹⁰ According to Cornell, Derrida distinguishes law-making or founding violence from law-preserving or conserving violence.²¹¹ Derrida ponders force without justice; justice without force; just-ness as right-ness; just-ness as necessity.²¹² As a starting point, Derrida states that it seems just to render justice:

[I]n a language in which all the 'subjects' concerned are supposedly competent, that is, capable of understanding and interpreting—all the 'subjects,' that is, those who establish the laws, those who judge and those who are judged, witnesses in both the broad and narrow sense, all those who are guarantors of the exercise of [law].²¹³

Cornell asks, for example, is it just to require that a woman "translate her harm into the terms of [a male-oriented] system" like pregnancy or breast cancer into hernia or prostate cancer text?²¹⁴ Cornell's example brings to light the fact that the United States legal system is a product and tool of white patriarchy.²¹⁵ Law is deconstructible. For those who are not white, heterosexual, christian males, justice can come through deconstruction. Derrida reasons as follows:

The structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable or transformable textual strata (and that is the history of law [*droit*], its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded. The fact that law is deconstructible is not bad news. We may even see in this a stroke of luck for politics, for all historical progress. But the paradox that I'd like

209. See generally, CORNELL, *supra* note 183, at 155-58.

210. See CORNELL, *supra* note 183, at 157 (suggesting that law is transcendent and is dependent on who is before the law, who uses it, and who creates it. Derrida also suggests that since law is often presently made, interpretation of the law is often left to those who apply it in the future. *Id.*).

211. See CORNELL, *supra* note 183, at 157-58 (contrasting Derrida from other philosophers who see law as consenting violence).

212. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 17-36 (Drucilla Cornell et al eds., 1992).

213. *Id.* at 16.

214. CORNELL, BEYOND ACCOMMODATION 114 (1991). Cornell provides this example: women must often draw analogies of female-oriented health issues, such as pregnancy, with a male-defined health disorder to receive the same health benefits as men. *Id.* She also suggests that one reason women must explain themselves as they relate to men is often simply an issue of cost-effectiveness. *Id.*

215. See generally, ROBSON, *supra* note 170, at 11.

to submit for discussion is the following: it is the deconstructible structure of law (*droit*), or if you prefer of justice as *droit*, that also insures the possibility of deconstruction. Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists.²¹⁶

Justice occurs in the context of freedom - an act cannot be just or unjust without freedom, but a just act also must follow law. This constitutes the first of three aporias, identified by Derrida.²¹⁷ Only a fresh judgment is just. That is, the judge must not merely follow a rule of law, but must also "assume it, approve it, confirm its value, by a reinstating act of interpretation as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case."²¹⁸ Derrida's second aporia is related to the first—that a just decision is one that divides.²¹⁹ It is the *obligation* to "give itself up to the impossible decision, [the undecidable,] while taking account of law and rules."²²⁰ It is the travail of the undecidable that makes a free decision instead of a merely preset automated unjust judgment.²²¹

A Black woman and a white woman
in the open fact of our loving
with *not only our enemies' hands*
raised against us
means a gradual sacrifice
of all that is simple...²²²

Derrida's third aporia is the "urgency that obstructs the horizon of knowledge."²²³ Justice doesn't wait.²²⁴ "[A] just decision is always required immediately, right away."²²⁵ According to Derrida, justice *must* not wait.²²⁶ Rather than a gratuitous response to a mis-perceived failure or inadequacy of the other, judgment without translation is

216. See CORNELL, *supra* note 214, at 14-15..

217. See Derrida, *supra* note 212, at 22.

218. See Derrida, *supra* note 212, at 23-24.

219. See Derrida, *supra* note 212, at 24.

220. See Derrida, *supra* note 212, at 24.

221. See CORNELL, *supra* note 214, at 114-15 (explaining that the ideal situation is never possible. Moreover, there is great injustice in so subjecting one who does not understand the language of the law, as it was created by white men in a white man's world.)

222. See LORDE, *supra* note 168, at 9 (emphasis added).

223. See Derrida, *supra* note 212, at 26.

224. See Derrida, *supra* note 212, at 26.

225. See Derrida, *supra* note 212, at 26.

226. See Derrida, *supra* note 212, at 26.

the *obligation* of the just judge and all who participate.²²⁷ Justice seems to be a leap into that moment of fresh judgment - the future.²²⁸

Yet, the ideal eludes at the limit. Cornell argues that it is the philosophy of the limit which "gives us the politics of utopian possibility. [T]he philosophy of the limit, and more specifically the deconstruction of the privileging of the present, protects the possibility of radical legal transformation."²²⁹ But there is no guarantee; only a projection; only a possibility. Cornell explains that "[l]aw *never* can catch up with its projected justification."²³⁰ To recapitulate, while law is deconstructible, justice is deconstruction, and hence optimistic and future-focused.²³¹

i keep the pleasures of my life from me.

Not

this

time.

This time I will not take my joy from me.²³²

As discussed earlier, Derrida conceptualizes two distinct yet mutually contaminating forms of violence - violence that serves to create law and violence that conserves law.²³³ Derrida refers to this as the "mystical foundation of authority."²³⁴ For the sake of justice, the nature of this foundation must be admitted; once admitted, it must be remembered. Cornell warns, however, that collapsing justice into law would create a monstrous self-replicating machine that seeks to erase the knowledge of the mystical foundation.²³⁵ The possibility of justice remains if "deconstruction does not reduce itself to the most recent and sophisticated brand of legal positivism which ... asserts

227. See CORNELL, *supra* note 214, at 114-116 (emphasizing that lawyers and law professors are essential to meeting this obligation of justice).

228. See Derrida, *supra* note 212, at 23.

229. See CORNELL, *supra* note 183, at 156 (distinguishing "philosophy of the limit" from the evolution of the existing legal system).

230. See CORNELL, *supra* note 183, at 157-58 (explaining that even anti-deconstructionists readily admit that the law can never catch up with its justifications).

231. *But see* CORNELL, *supra* note 183, at 158-59 (contrasting her view with that of legal theorists who believe justification for decisions should be based on two precursors. First, "original foundation," which relates to the intentions of the founding fathers. *Id.* The second is the "idea of full readability," or interpreting laws in the plain meaning of their language. *Id.*).

232. See HUFF, *Sometimes I Keep*, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 25.

233. See CORNELL, *supra* note 183, at 156 (distinguishing "lawmaking or founding violence" from "law preserving or conserving force").

234. See Derrida, *supra* note 212, at 12.

235. See CORNELL, *supra* note 183, at 158 (disagreeing with the notion that the legal system should set the limits of relevance).

that might does indeed make right."²³⁶ The deconstructive process is not destruction.

WAKE UP!

Ògún,²³⁷
 even you who prepares the road
 Clears the path
 creates the tools and dominates their use
 Even you,
 Great Forger of Iron
 With your Badd Blacksmith-self
 arms bulging from here to yonder
 sweat pouring down your face
 while your hammer and anvil reshape history
 Even you
 Gun neatly polished;
 trigger at the ready
 wars erupting; swords clashing;
 Ikú²³⁸ standing by
 Even you, Ògún,
 The Great Hunter, the first to eat;
 blood dripping down your chin
 spraying your scar-covered body.
 Even you, Ògún,
 must recognize
 and honor
 OUR MOTHERS²³⁹

In this Ògúnland, when some people think of sodomy they think of the Bible, but when I think of sodomy, I think of slavery. The ultimate whip against men, women, boys, girls. A veritable smorgas-

236. See CORNELL, *supra* note 183, at 158.

237. JOHN MASON, ORIN ORISÀ 88 (1992). Ògún is an òrìṣà of the Yoruba Religion. An òrìṣà is a diety; most òrìṣà have more than one aspect.

238. DICTIONARY OF MODERN YORUBÁ 298 (1st ed. 1958). In the Yorubá language, Ikú means "death." For the Yorubá, ikú is an Orìṣà.

239. See HUFF, *Wake Up, in* BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 7. See HENRY JOHN DREWAL & MARGARET THOMPSON DREWAL, GELEDEART AND FEMALE POWER AMONG THE YORUBA 9 (1990). Our Mothers - Awon Ìyá Wa, is the Yorubá term for the power of the feminine life force which transforms itself into birds that fly at night into your bed, into the unconscious, or where ever else they please. This morally neutral power, àjé, is wielded by women, particularly by older women, iyá àgbà, and is highly respected by all.

bord of abuse. “[F]olks that commanded and demanded whatever, whoever they wanted, whenever wherever it pleased.”²⁴⁰

SODOMY

Blackstone described ‘the infamous crime against nature’ as an offense of deeper malignity than rape, a heinous act, the very mention of which is a disgrace to human nature, and ‘a crime not fit to be named.’²⁴¹

The original title of this paper was “A Poetic Deconstruction of Sodomy: What the Fuck Is It?” This fantasized title was born while I was in a Women and Law class at Cleveland-Marshall College of Law. While discussing the ramifications of *Bowers v. Hardwick*²⁴² on the lives of women, a student whispered in an agitated, if not excited utterance, “What the fuck is sodomy, anyway?” A hush filled the classroom of fewer than twenty students. Noting the discomfort of nearly everyone including the professor, I explained that in the particular case of Michael Hardwick, Officer Torrick entered Hardwick’s home on a summer morning, found his bedroom, and observed Hardwick engaging in mutual oral sex with a consenting adult male friend.²⁴³ A student in the back of the class mumbled incredulously, “Oh, man. Is that all?” Muted nervous laughter filled the room and the tension of the moment dissipated.

The fact that individuals define themselves in a significant way through their sexual relationships suggests, in a Nation as diverse as ours, that there may be many right ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.²⁴⁴

That our professor was temporarily taken aback at the prospect of enunciating the elements of the crime of sodomy is not surprising. This extremely competent professor was up for tenure and her otherwise relaxed classroom was being observed by two rather reserved, tenured, European-American male (and presumably heterosexual) law professors. One misplaced word about sodomy in this setting

240. HUFF, *Poems for a Man Who Isn't Really My Uncle: Nine Questions From Oya - Question # 1: Who Did It?*, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 50.

241. See *Bowers*, 478 U.S. at 197 (Burger, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 215). Chief Justice Burger also noted that Roman Law prohibited homosexual sodomy and that such acts were against Judeo-Christian morals and ethical beliefs. *Id.*

242. See *id.* at 186.

243. See Irons, *supra* note 32, at 125, 127.

244. See *Bowers*, 478 U.S. at 205 (1986) (Blackmun, J., dissenting) (reiterating his view that the case was not about homosexual sodomy, but the right to be let alone).

may have placed her at risk of losing her opportunity to gain the tenure that she deserved, despite the fact that Ohio has no statute prohibiting sodomy.²⁴⁵ In a Derridan sense, we were all "before the law"²⁴⁶ as our class attempted to make sense of sodomy. And what does sodomy have to do with women and the law?

Consider the following Biblical passage:

[4] But before they lay down, the men of the city, *even* the men of Sodom, compassed the house round, both old and young, all the people from every quarter: [5] And they called unto Lot, and said unto him, Where *are* the men which came in to thee this night? Bring them out unto us, that we may know them. [6] And Lot went out at the door unto them, and shut the door after him, [7] And said, I pray you, brethren, do not so wickedly. [8] Behold now, *I have two daughters which have not known man; let me, I pray you, bring them out unto you, and do ye to them as is good in your eyes: only unto these men do nothing; for therefore came they under the shadow of my roof.*²⁴⁷

Women are marginalized in discussions regarding sodomy. Based on biblical mythology, rape, even gang rape, perpetrated upon virginal daughters who have been offered up by their father, is a lesser crime or no crime at all.²⁴⁸ Actually, it is unclear from the biblical text to what acts Lot's daughters would have been subjected had the crowd accepted Lot's offer. It is clear, however, that Lot had the prerogative to make the offer. Based on this same mythology, incest between a father and his two daughters is also less infamous.²⁴⁹

Sometimes I hold
my warm seed
up to my mouth
very close
to my parched lips
and whisper
I'm sorry,
before I turn my hand

245. OHIO REV. CODE ANN. § 2905.44 (Baldwin 1996) (repealing an anti-sodomy statute).

246. See CORNELL, *supra* note 183, at 159 (describing how the two men in *Bowers* were caught engaging in sodomy without realizing they would be subject to judicial scrutiny).

247. Genesis 19:4-8 (King James version) (emphasis in original).

248. This phenomenon is implied in Lot's words, when he offered to sacrifice his virgin daughters to the men. *Id.*

249. See Genesis 19:30-38 (King James version). The story of Lot continues with his two daughters "laying down" with their father to "preserve seed" so that Lot could have male children through them. The story contains an eerie twist, in that Lot gets drunk and supposedly sleeps with his daughters without considering the incestuousness of his actions.

over the toilet
 and listen to the seed
 splash into the water.
 I rinse what remains
 down the drain,
 dry my hands -
 they return
 to their tasks
 as if nothing
 out of place
 has occurred.
 I go on being,
 wearing my shirts
 and trousers,
 voting, praying,
 paying rent,
 pissing in public,
 cussing cabs,
 fussing with utilities.
 What I learn
 as age advances
 relentless pillager,
 is that we shrink
 inside our shirts
 and trousers,
 or we spread
 beyond the seams.
 The hair we cherished
 disappears.
 Sometimes I hold
 my warm seed
 up to my mouth
 and kiss it.²⁵⁰

A common misperception persists that sodomy is an *act* that women simply do not or cannot perform.²⁵¹ The following defini-

250. ESSEX HEMPHILL, *Rights and Permissions*, in CEREMONIES: PROSE AND POETRY 67 (1992).

251. See ROBSON, *supra* note 170, at 80.

tions of sodomy support this perception: "the crime of Sodom;" "sexual intercourse between men;" "sexual intercourse between a man and an animal;" and "buggery."²⁵² Other definitions include, "any sexual intercourse held to be abnormal, especially bestiality or anal intercourse between two male persons."²⁵³ However persistent the misperception, neither case law nor statutory law support a female exemption from the rule of law regarding sodomy.²⁵⁴

Confusion as to the meaning of sodomy is not new. It was evident in perhaps the first debate in American law over the scope of its definition: in the winter of 1641 - 1642, a sodomy case arose in the Massachusetts Bay Colony. Three men were discovered to have had sexual contact with two female children. John Winthrop's account of the case described the act as 'agitation and effusion of seed.' ... [N]on-penetrative acts which led to ejaculation and the 'spilling of seed' were comparable in infamy to penetrative crimes and should be equally punished. As one minister put it, the spilling of seed 'is equivalent to killing the man who could have been born out of it.'²⁵⁵

Although the actual activity perpetrated by the three Massachusetts Bay Colony men is unclear, we do know that the acts of sodomy were perpetrated upon two *female* children. The issues of whether ejaculation and/or penetration occurred were raised and debated in order to determine whether the men should be sentenced to death.²⁵⁶ This reads like a case of child sexual abuse, involving, perhaps, anal rape or oral/genital contact.

The current edition of *Black's Law Dictionary* broadened these earlier definitions, acknowledging that sodomy, "[w]hile variously defined in state criminal statutes, is generally oral or anal copulation between humans, or between humans and animals."²⁵⁷ That dictionary also cites to an early case, *State v. Young*,²⁵⁸ in which Young appeals

252. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1612 (revised ed. 1951). "Buggery" is defined tautologically as "sodomy." *Id.* at 226. Although this definition was propounded in 1951, misperceptions on the definition of sodomy are the product of a combination of past writings and present definitions.

253. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1274 (3rd college ed. 1988). Even definitions promulgated in the 1980s specify only men as engaging sodomy.

254. See ROBSON, *supra* note 170, at 47-59.

255. Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 533 (1992) (quoting JOHN WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649: VOLUME II 54 - 55 (1853)) (citations omitted).

256. *Id.* (describing how colonists could not agree on what type of acts would be punishable by death. Furthermore, the colonists lacked any statutory definitions for sodomy, so they had to find a definition from the Bible and English common law.).

257. BLACK'S LAW DICTIONARY 1391 (6th ed. 1990).

258. See *State v. Young*, 13 P.2d 604 (Or. 1932).

from a conviction for the "crime of sodomy, or the crime against nature."²⁵⁹ *Young* quotes *Anderson's Dictionary of Law* definition of "sodomy" as:

'carnal copulation,' by human beings with each other against nature, or with a beast. Named from the prevalence of the sin in Sodom. The infamous crime against nature ; ... an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out.²⁶⁰

In this case, Young and Lucile Howard, his female companion, were arrested after police officers came to their hotel room door.²⁶¹ When Young came to the door, an officer shoved his foot in the door and walked in.²⁶² After the officer looked for a woman and found Lucile Howard, he arrested them both for commission of "the unspeakable crime hereinbefore named."²⁶³ Howard pled guilty and testified against Young.²⁶⁴ In her testimony, Howard explained that Young urged her to "go down on him," stating that "he had been frenched so much that he wasn't much good any other way."²⁶⁵ She also testified that she had heard that it "was fashionable" and "everybody does it."²⁶⁶ Although there was considerable evidence to suggest Young was actually executing a plan to take Howard across state lines for purposes of prostitution, no charges were filed against him for prostitution, but Howard was referred to as his "accomplice" in sodomy.²⁶⁷

There are three aspects of this case that are immediately striking. First, Howard pled guilty to the charge of committing the unspeakable act. As a direct result of pleading guilty, the court gave Howard carte blanche before the law to graphically describe the most intimate details of this unspeakable crime.²⁶⁸ In fact, on those occasions while testifying, when Howard demonstrated modesty or reserve, the court encouraged her to provide detailed explicit answers.²⁶⁹ Secondly, as a participant, Howard was the only witness who could de-

259. *Id.*

260. *Id.* at 607.

261. *Id.* at 605. Howard testified that she and Young were sexually involved on more than one occasion. *Id.*

262. *Id.*

263. *See Young*, 13 P.2d at 605 (referring to the act of sodomy between Young and Howard).

264. *Id.*

265. *Id.* at 606.

266. *Id.*

267. *Id.* at 607.

268. *See Young*, 13 P.2d at 605-606.

269. *Id.* at 605.

scribe the actual sodomic acts that she herself performed in violation of the law. But for her guilty plea, she would have been the primary witness against herself.²⁷⁰ In this case the woman who actually performed the unspeakable crime, is referred to diminutively as a weak and sinful girl and regarded as a mere accomplice, while her male partner remained the referent.²⁷¹

Then a lawyer said, But what of our Laws, master? And he answered: You delight in laying down laws, Yet you delight more in breaking them... . But what of those to whom life is a rock, and the law a chisel with which they would carve it in their own likeness? What of the old serpent who cannot shed his skin, and calls all others naked and shameless? And of him who comes early to the wedding-feast, and when over-fed and tired goes his way saying that all feasts are violation and all feasters lawbreakers? What shall I say of these save that they too stand in the sunlight, but with their backs to the sun? They see only only their shadows, and their shadows are their laws.²⁷²

A deconstructive reading of *Young* reveals Young and Howard juxtaposed as text. Derrida has reminded us how to read the text: every text includes unconscious traces of other positions, some exactly opposite to that which it sets out to uphold. Deconstruction is, among other things, "a theory of reading and writing."²⁷³ These "straw binaries" are hierarchical and oppositional:²⁷⁴ bad/good, male/female, heterosexual/homosexual. They re-enforce and enliven each other. An expression of the paradox occurred during a tense moment in the Senate gay-ban hearing when Strom Thurmond shouted, "Heterosexuals don't practice sodomy,"²⁷⁵ as he attempted to control the gay-ban debate with the sheer force of his lawful perspective. "But when the shadow solidifies as law, the over-fed, tired one of old can don it. Only then can the imperial guard proclaim the emperor's new cloak, compelling all to see and believe as though it were so."²⁷⁶

270. In fact, without Howard's testimony, the prosecutor had very little evidence upon which to base the state's case. *Id.*

271. *Id.* at 609.

272. KHALIL GIBRAN, *THE PROPHET* 44-45 (1923).

273. See CROWLEY, *supra* note 155, at xv.

274. See CROWLEY, *supra* note 155, at xv.

275. *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at A9. The audience laughed at this comment. *Id.* Senator Kerry, a war veteran, stated that he felt the ban on gays and lesbians was fundamentally wrong. *Id.* He further noted that there are homosexuals in Congress and they have not been arrested for violating anti-sodomy laws. *Id.* Thurmond's response was that those Congressmembers should be arrested if they committed sodomy. *Id.*

276. Leslye M. Huff, *Just Unlawful Poems*, unpublished law school poem journal, on file with the author.

I am reminded here of Derrida's admonishment and Cornell's warning: first judgment without translation is the obligation of a just judgment and second, it is inherently violent to be "before the law."²⁷⁷ Violence also inheres outside the law, beside the law, as well as behind the law. Once the force of law is engaged, it seems unstoppable despite reasoned criticism, without apparent consequences.²⁷⁸ In *Bowers v. Hardwick*, Justice White's opinion that the state of Georgia had a right to its criminal sodomy law as applied to homosexuals still has the force of law.²⁷⁹

Legal interpretation, whether statutory or constitutional, functions primarily through two myths that purport to legitimize law by finding its source.²⁸⁰ The first is the myth of the intent of the founding fathers - the knowable original foundation.²⁸¹ In *Bowers v. Hardwick*, Justice White thrusts this myth upon the very silence of the framers of the United States Constitution regarding the rights of homosexuals.²⁸² The second myth is the plain meaning of the words or "the myth of full readability."²⁸³ Justice White interpreted the founders' silence to mean that if the matter is not included in the Constitution, the founders did not want it included.²⁸⁴ For every canon of statutory or constitutional interpretation, there is an opposite canon. Justice White chose his interpretation - a violent choice to conserve the legal status quo.²⁸⁵ It was not just. Whether one uses one canon or another is based on one's own evaluation of the matter. Cornell explains that "interpretation is also evaluation."²⁸⁶

That Justice White used the silence of the founders concerning homosexuality to support his opinion in *Bowers v. Hardwick*, flies in the face of the United States Constitution's Ninth Amendment, which states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by

277. See CORNELL, *supra* note 183, at 159.

278. See CORNELL, *supra* note 183, at 159.

279. See CORNELL, *supra* note 183, at 159. See *Bowers*, 478 U.S. at 191 (espousing the majority's view that the Court would not recognize a fundamental right to engage in homosexual sodomy).

280. See CORNELL, *supra* note 183, at 161.

281. See CORNELL, *supra* note 183, at 161.

282. See *Bowers*, 478 U.S. at 191.

283. See CORNELL, *supra* note 183, at 161. Significantly, the Supreme Court can and has changed the law and has given new interpretations to the meaning of the Constitution. The Court could have found a fundamental right to engage in homosexual sexual behavior.

284. See *Bowers*, 478 U.S. at 191 (stating that the right to engage in homosexual acts of sodomy is "not readily identifiable in the Constitution's text").

285. *Id.* at 194.

286. See CORNELL, *supra* note 183, at 161.

*the people.*²⁸⁷ The deconstructibility of law allows for the possibility of deep structural change and allows for the possibility of justice. I assess the Justices' efforts to meet their responsibility to justice by their openness to transformation.²⁸⁸ The Ninth Amendment should be understood as institutional humility before the call to justice.²⁸⁹ Justice White constructed his opinion on a tautological framework instead of on inclusive affirmative conditions that foster justice.²⁹⁰

In a deconstructive sense, Justice White failed in his obligation to justice as *aporia*. First, Justice White failed to make a fresh judgment in the midst of the paradox. He merely described the state of the law as he understood it over the last century, which does not constitute judging anew. Secondly, Justice White failed to traverse the undecidable, where no moment holds a fully just decision and yet, one perseveres for justice sake. Thirdly, Justice White failed to acknowledge the urgent need for justice that inhered in the issues comprising *Bowers v. Hardwick*, which would impel him to take a leap of faith for justice.

Libation

We are the generation
of woman who must use
the lightning that we have
so carefully stored under
our tongues. We must speak
our words of power with a certainty
of our inextricable oneness with the
Powers of Our Mothers; With a certainty
that We can, will, do change things.
It is our task, our duty
to unleash the power of
profound structural change.
cosmetic change
will no longer

287. U.S. CONST. amend. IX (emphasis added). See CORNELL, *supra* note 183, at 164 (emphasizing Cornell's view that "[t]he Ninth Amendment can and ... should be interpreted to attempt fidelity to the deconstructibility of even the 'best' constitution, so as to allow for historical change in the name of Justice").

288. See CORNELL, *supra* note 183, at 165-67.

289. See CORNELL, *supra* note 183, at 166.

290. See CORNELL, *supra* note 183, at 164 (stating that "the tautology upon which Justice White's opinion rests - that the law is and therefore is justified to be, because it is - is exposed as tautology rather than justification").

suffice.

As²⁹¹

I want a deconstructive reading of sodomy that shakes things up and shifts the momentum so that, perhaps somewhere in the future, Justice will appear, because we need it now. That men have consistently been the primary focus of sodomy laws is not likely to be debated. Perhaps a shift toward a more egalitarian focus will assist us along our path. Nan Hunter posits that

the term sodomy is a cultural chameleon, which has shifted in meaning from its original delineations based primarily on non-procreative sex to a contemporary view that reflects social anxiety over sexual orientation... . This phenomenon is now confusing Equal Protection doctrine, and it necessitates a gay-friendly deconstruction of the new sexual orientation categories.²⁹²

The shift in sodomy laws has been multifaceted. In the early 1960s, every jurisdiction in the United States had a sodomy law which criminalized certain sexual behaviors.²⁹³ These sexual behaviors were often vaguely defined, but they concentrated on the act rather than the actor.²⁹⁴ In 1961, Illinois became the first state to repeal its sodomy law, and ten years later, Connecticut followed.²⁹⁵ More than twenty states followed Connecticut.²⁹⁶ The momentum of the repeal effort slowed and culminated in 1983 when Wisconsin became the last repealing state to date. Instead of repealing sodomy statutes, many state legislatures amended them to only prohibit same-sex oral or anal sex.²⁹⁷ Sodomy law specification replaced the tendency to repeal.²⁹⁸

Courts responded and shifted in their application of sodomy laws. For example, an Oklahoma appellate court reversed a conviction for maiming and "crime against nature," based on the appellant's claim that the sodomy statute "as applied to non-violent consensual activity between adults in private, violates his right to privacy under the United States Constitution."²⁹⁹ The trial court acquitted the defen-

291. See HUFF, *Libation*, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 5.

292. See Hunter, *supra* note 255, at 531-32.

293. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 23, at 87, 92 n.1 (reporting that in 1961, Illinois was the first state to repeal its sodomy law).

294. See Hunter, *supra* note 255, at 532.

295. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 23, at 92 nn.1, 2.

296. See LESBIANS, GAY MEN AND THE LAW, *supra* note 23, at 92 n.1.

297. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 23, at 92 nn.1, 2.

298. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 23, at 92 nn.1, 2.

299. *Oklahoma v. Post*, 715 P.2d 1105, 1106-07 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986).

dant of rape, but convicted him of two counts of crime against nature, for anal and oral penetration, and one count of maiming, for severely beating the victim, blinding her, and causing eye loss.³⁰⁰ In 1986, the same year that *Bowers v. Hardwick* came before the Court, the United States Supreme Court refused to grant *certiorari* in this Oklahoma case.³⁰¹ This treatment of Oklahoma's sodomy law and the unwisely decided *Bowers v. Hardwick* opinion taken together send a clear message that the *Bowers* Court intended sodomy laws to be applied almost exclusively to homosexual sexual relationships.³⁰² Given the continued male reference point, lesbian sexual encounters are lost. Are our relationships brought before the law or are we outside of the rule of law?

Lesbians are marginalized in discussions regarding women, men, and sodomy. Yet virtually all the jurisdictions that have maintained sodomy statutes apply them to lesbians.³⁰³ In fact, the language of many of these laws has not improved since *Blackstone's Commentaries*. To more accurately reflect lesbians' relationship to current sodomy statutes, Ruthann Robson takes a lesbian-centered approach.³⁰⁴ Robson refers to the sodomy statutes as "lesbian sex statutes," but warns that "the statutes, individually and collectively, are idiosyncratic in their application to various expressions of lesbian sexuality."³⁰⁵

I am a bleak heroism of words
that refuse
to be buried alive
with the liars.³⁰⁶

To spend the lion's share of the fourteenth anniversary of my Commitment Ceremony³⁰⁷ with my partner completing this writing

300. *Id.* at 1107.

301. See *Oklahoma v. Post*, 479 U.S. 890 (1986) (denying *certiorari*).

302. See generally *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting) (stating that the majority obsessively focused on homosexual sexual activity even though the Georgia statute in question had broad, sweeping language that applied to heterosexuals as well).

303. See ROBSON, *supra* note 170, at 47.

304. See ROBSON, *supra* note 170, at 47.

305. See ROBSON, *supra* note 170, at 47.

306. See LORDE, *supra* note 168, at 53.

307. Reminiscent of the disrespect afforded the relationships between African-originated people during slavery and the outright illegality of bi-racial relationships in the United States as late as the 1960s, committed relationships between two people of the same gender is not legal in any state in the United States. Nonetheless, because of our love for each other, our commitment to a long-term relationship, and our devotion to our children, we designed a ceremony to express the joy of our obligation and commitment to each other. We invited family and friends to join us, not only to witness as we voiced the terms of our bond, but also to add their promise of support to the maintenance of that bond.

project about sodomy is both ironic and taxing. I want to say “fuck sodomy” and get on with the work of living, much the same as I want to say “fuck racism,” or gender oppression, or ageism, but of course, addressing these forms of oppression is the work of living at this time, in this place. Yet, how can something so vaguely defined as sodomy infiltrate our daily living so completely and demand such attention? What right did a sodomy law have to invade Hardwick’s Georgia bedroom? What empowers this broadly written, arguably misapplied, Georgia sodomy statute? What confers on it the authority to crowd into my Ohio home and stand shoulder to shoulder with twenty-two other equally uncouth state statutes?³⁰⁸ The absence of statutes in *twenty-seven states* since 1961,³⁰⁹ seems to have less value for our safety from the onslaught of the force of law.

Regardless of how the law tries to apply these statutes to lesbians and regardless of what Ruthann Robson calls them, my lesbian partner tells me “[w]e lesbians are anatomically unsuited for these laws, so we should not apply them to ourselves. We don’t do sodomy! Do we?” “And besides,” she continued, “they ought to reward us for all of the work we lesbians are doing - exploring and creating healthier relationships - healthier families. These heterosexual families were in pretty bad shape until they started picking up on some of the ideas we’ve been talking, teaching, learning about, and working through for all these years. You know? We’re working hard and helping out.”³¹⁰

According to Robson, the existing criminal sodomy statutes fall into at least one of three categories. First, the oral/anal category criminalizes sexual behavior involving sexual organs (genitals) and these body parts.³¹¹ It is unclear whether behavior involving mouth and mammarys fits under these statutes, because breasts may not be categorized as sexual organs within the meaning of the statutes. Lesbian sexual expression is unwieldy under this category.³¹²

Because the second category relies on presuppositions and assumptions for meaning, Robson designates it “natural.”³¹³ Laws under this category bear descriptors such as “crime against nature,”

308. See *The Regulation of Lesbian and Gay Sexuality*, in LESBIANS, GAY MEN, AND THE LAW, *supra* note 23, at 80 (listing the twenty-three states that still maintain sodomy laws).

309. See *The Regulation of Lesbian and Gay Sexuality*, in LESBIANS, GAY MEN, AND THE LAW, *supra* note 23, at 87.

310. Interview with Amina Mary Ostendorf, in Beachwood, Ohio (Aug. 1, 1996) (following Ostendorf’s reading of an early draft of this paper and during a discussion at our kitchen table).

311. See ROBSON, *supra* note 170, at 48.

312. See ROBSON, *supra* note 170, at 48.

313. See ROBSON, *supra* note 170, at 48.

"abominable and detestable crime against nature," or "the infamous crime against nature."³¹⁴ This category of law is inefficient because the vague descriptors make their elements difficult to prove in a court of law. Although these laws are insufficient and inefficient, many courts, including the United States Supreme Court, have upheld such statutes from constitutional vagueness attacks by reasoning that our common understanding includes knowledge of what such statutes prohibit, or that, even if common knowledge is not so definite, judges interpreting the statute can rely on established legal understandings.³¹⁵

The third category of sex statutes is gender specific.³¹⁶ These statutes may be the most harsh in relation to lesbian sexual expression. These statutes have same-sex prohibitions which may be combined with references to either one or both of the other aforementioned categories. Also, according to Robson, this category of statutes often prohibits sexual contact with animals.³¹⁷

These categories refer to criminal statutes. There are few reported cases involving consenting adults and even fewer cases involving lesbians.³¹⁸

After reviewing the last several paragraphs of my draft, my lesbian friend remarked, "See, one case. Robson cited only one case since 1968"³¹⁹ - I told you these laws aren't made for us. Do you think I could go to jail for sniffing your armpits? I love to sniff your armpits. The joys of lesbian sex. They just don't know what they're are missing."³²⁰ We laugh, hug, and touch no sex organs. "[T]here was a time, not long ago and not yet over, in which we, men meant we adult white male Europeans, carnivorous and capable of sacrifice."³²¹

DAHMERITES

I, I, I, I really love your culture, it's
 it's, it's, it's so rich and, and, and, lush
 and, and, and dark
 I, I, I, I really lovER your culture - it's

314. See ROBSON, *supra* note 170, at 48.

315. See ROBSON, *supra* note 170, at 48.

316. See ROBSON, *supra* note 170, at 48.

317. See ROBSON, *supra* note 170, at 48.

318. See ROBSON, *supra* note 170, at 49.

319. See ROBSON, *supra* note 170, at 49-50 (discussing *People v. Livermore*, 155 N.W.2d 711, 712 (Mich Ct. App. 1968)).

320. See *supra* note 310, and accompanying text.

321. See Derrida, *supra* note 212, at 18.

you know, It's well, at least YOU know your
 roots, your roots, your roots
 If I knew my roots, If I KNEW my roots, If I knew my roots
 knew my rooooots I'd work'em If I knew my roots I'd work'em
 I'd work 'em on You
 If I knew My Roots, I'd work 'em on you on you on you
 generic that's what i am a little of this little of that
 german english french indian in there somewhere in there some-
 where
 I don't know I don't know i don't know
 I'm drawn to - to - to - to - to
 I've always been drawn to, been drawn to been drawn to
 beendrawn - drawn - drawn - too
DRAW ME NEARER NEARER BLESSED LORD
TO THE PLACE WHERE
THOU HAST DIED
 I just want to keep - just want to keep
 I just want to keep you - just want-to
 just want - just you - just us - just us
 justice? just us - us - us - us
 keep you I just want to keep you
 with me always - always
 All ways - All ways
 I didn't MEAN you any harm. not mean - not mean
 no harm no harm
 no?
 harm?
 no! no!No!
 Harm!
 Justice?
 just us
DRAW ME NEARER NEARER BLESSED LORD
TO THE PLACE WHERE
THOU HAST DIED
 If I knew my roots, I'd work 'em on you!
 Jeffrey said he "[J]ust wanted to keep them with [him] always."³²²

322. See Derrida, *supra* note 212, at 18 (quoting a televised interview with Dahmer after his

So, he tried to make zombies. Poor Jeffrey, what's a fellah to do?
 Some friends just don't know how to be there for you -
 how to behave.
 So, Jeffrey Dahmer took the skulls of *HIS* black friends
 with him to work
 and kept them
 in his locker
 at his job
 in the CHOCOLATE FACTORY.
 And I wonder,
 where do you take your colored friends?³²³

In light of Jeffrey Dahmer's actions, privacy alone cannot be the answer, the resolution, the solution to our dilemma.³²⁴ After all, was it not Dahmer's privacy or property rights that urged the police officers to ignore or threaten those Black women who valiantly called upon them to save that Laotian boy's life?³²⁵

Within the interdependence of mutual (nondominant) differences lies that security which enables us to descend into the chaos of knowledge and return with true visions of our future, along with the concomitant power to effect those changes which can bring that future into being. Difference is that raw and powerful connection from which our personal power is forged.³²⁶

Privacy, Prerogative, and Privilege

In order to have a comprehensive deconstruction of sodomy, one must also deconstruct the primary weapon used against sodomy laws - the doctrine of privacy. The term privacy has an amorphic identity that brings as much as, or more, confusion to some as sodomy itself. Nevertheless, the privacy doctrine is invoked with heated reverence by libertarians and constitutional scholars in most discourses on sexual or reproductive autonomy. Like most expressions, privacy brings with it certain presuppositions about the interaction of humans and their sociopolitical environment - presuppositions that are not nec-

conviction). See also Stern, *infra* note 324.

323. See HUFF, *Dahmerites*, in BLACK LESBIANS DO NOT EXIST, *supra* note 1, at 40-41. My mother, Madeline Bowden, coined the term "dahmerites" to signify social/cultural leaches.

324. Jeffrey Dahmer is a convicted serial killer who murdered 17 young males over 13 years. Andrew Stern, *The Blood-Curdling Tale of Dahmer*, ROCKY MTN. NEWS, Dec. 4, 1994, at 12A.

325. Police left a drugged and naked Laotian boy with Dahmer after Dahmer claimed the boy was his lover, was drunk, and had wandered outside. Dahmer later killed the boy. Anthony Shadid, *Cops' Firing Upheld in Dahmer Case*, CHI. SUN-TIMES, Nov. 28, 1992, at 4.

326. AUDRE LORDE, *SISTER OUTSIDER* 111-12 (1984).

essarily true for all groups in the United States, but nevertheless, are accepted as universal truisms. Because the privacy concept is used so often in the debate over sodomy laws and gay rights, it behooves us to examine the merits of privacy as a proper sociopolitical strategy of liberation and legal victory. This section examines all of these factors, while ultimately concluding that better strategies may exist for fighting sodomy laws.³²⁷

A. PRIVACY, PUBLIC HATRED, AND MR. HARDWICK

While *Merriam-Webster* defines privacy with many meanings, including "seclusion," "secrecy," "personal matter," and "a place of seclusion or retreat,"³²⁸ the highest significance is not found on dictionary pages, but in the minds of discourse participants and legal arbiters. Whatever the precise definition is that floats in human minds, most individuals probably think of some sort of arena in which information and/or deeds are closed off from view, secluded, and beyond reproach.

Presuppositions of privacy doctrine include tenets of classical liberalism that are held to be universal truths. Namely, there are arenas such as home, bed, and property, whose sacredness place them above scrutiny. Secondly, arenas designated as private are presumed to be safe space for all participants therein. Thirdly, individuals in such private arenas are presumed to be autonomous and acting of their free will. Finally, there is a philosophical and moral wall between public and private space that prevents either from influencing the other.

As applied to the circumstances of *Bowers v. Hardwick*, nearly all such presumptions are capable of passing analysis. For example, Hardwick and his partner were apparently autonomous individuals who freely chose to engage in a consensual act—and no doubt embraced Hardwick's bedroom as a safe place to perform that act. Yet, the philosophical wall that presupposes the mutual exclusion of Hardwick's bedroom and his public life slowly disintegrates upon close examination of the facts of his case.

The salient facts of *Bowers v. Hardwick* are discussed earlier.³²⁹ However, certain facts bear mentioning when analyzing the alleged public/private schism here. Michael Hardwick's problems with the police officer did not begin in his bedroom; they began in spaces popularly designated as public, that is, the street outside a gay bar

327. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1436 (1992).

328. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804 (1993).

329. See *supra* pages 8-15.

and in the holding cell, where homophobic abuse was perpetrated upon him under color of state authority.³³⁰ It was *public* homophobia and societal oppression that enabled police to legitimize abuse by *private* individuals, as well as by the police themselves. It can be said that, but for the public homophobia enacted upon Hardwick, he would not have found himself being taunted in a holding cell for ostensibly private behavior.

A more unified account of the events that preceded and followed the encounter in Hardwick's bedroom moves toward a broader conception of our analytic object than the privacy principle permits. These events do not simply straddle the boundaries between the public and private - they overrun them altogether.³³¹

That having been said, it is rhetorically incorrect to construct the issues in *Bowers v. Hardwick* as purely privacy interests. One is prompted to question whether privacy doctrine did not adequately confront and/or deconstruct state-endorsed homophobia, or which systems of domination it effectively deconstructed? For whom are the universalized norms of doctrinal privacy actually true? If true for only a few, then how has privacy benefited marginalized groups in United States society?

B. PRIVATE PRIVILEGE; PRIVATE PAIN

To most civil libertarians, the doctrine of privacy has been a boon to fighters of inequality and oppression. Yet, a close examination of legal history yields many instances in which it was the privacy doctrine that enforced public hierarchies and private oppression—and was not the sword of liberation many people now perceive it to be. In many instances, the presumptions of autonomy and private space as safe space pathetically shielded the harsh reality that the person who really had the autonomy in private space was the one with more public power—the one with more money, with masculine sex organs, and with lighter skin.

This dilemma was more than apparent to an African-American man named Irvis, who was refused service at a *private* all-white Moose Lodge.³³² In 1972, when his legal challenge reached the Supreme Court, the great privacy doctrine reared its head to uphold the status quo.³³³ Like his ancestors before him whose autonomy was sacrificed by slaveholders insisting on their right to do as they please with pri-

330. See Irons, *supra* note 32, at 128.

331. See Thomas, *supra* note 327, at 1442.

332. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

333. *Id.* at 179.

vate property, Irvis was faced with a Supreme Court that recognized white privacy as paramount—with the blessing of the Pennsylvania Liquor Board, a decidedly public entity.³³⁴ Recognizing that the majority averted the discourse from racism to private autonomy, in his dissent, Justice Douglas stated that “a black Pennsylvanian suffers cognizable injury, when the State supports and encourages the maintenance of a system of segregated fraternal organizations”³³⁵ Thus, regardless of the de facto support of racism by the State, the injury was swept under the rhetoric of privacy: private clubs and (white) autonomy.

Just as the public/private split has played a large role in racist oppression, many feminist lawyers, including Catharine MacKinnon and RuthAnn Robson, have drawn attention to the experiential difference that doctrinal privacy has for men and women. For women, the presuppositions of privacy doctrine have almost never been true. In *Feminism Unmodified*,³³⁶ MacKinnon states

[b]y staying out of marriage and the family, prominently meaning sexuality - that is to say, heterosexuality ... the law of privacy proposes to guarantee individual bodily integrity, personal intimacy. But if one asks if women's rights to these values have been guaranteed, it appears that the law of privacy works to translate traditional social values into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives ...³³⁷

And sure enough, the privacy doctrine has protected all manner of assaults against women.³³⁸ Additionally, women's bodies are splayed everywhere for public consumption in advertising, the mass media, and pornography, thereby making it less likely for women to find the elusive privacy that white heterosexual men seem to possess.

Advocates of privacy doctrine may quickly point out the gains that privacy doctrine has brought to women via the decision in *Roe v. Wade*,³³⁹ which offered a privacy-engendered guarantee to abortion rights.³⁴⁰ While the Supreme Court decision in *Roe* is beneficial, in that it purports to promote women's reproductive control, the reasoning used to reach the decision is not beneficial. Once reproductive privacy was granted to women by the Court, the presuppositions

334. *Id.* at 177.

335. *Id.* at 183 n.4 (Douglas and Marshall, JJ., dissenting).

336. CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987).

337. *Id.* at 96-97.

338. See Ruthann Robson, *Crimes of Lesbian Sex*, in *LESBIANS, GAY MEN, AND THE LAW*, *supra* note 23, at 82-87.

339. *Roe v. Wade*, 410 U.S. 113 (1973).

340. *Id.* at 153-54.

of privacy doctrine returned in an ominous fashion a mere eight years later in *Harris v. McRae*.³⁴¹ After the 1976 Congress restricted reimbursement to States for abortions for low income women under the Medicaid healthcare program, indigent pregnant women and others brought suit seeking to enjoin the enforcement of the Hyde Amendment,³⁴² so that impecunious women could actually exercise their right to choose as provided by the *Roe* decision.³⁴³ The Court ruled that, even in cases in which a physician deemed it medically necessary to complete an abortion, the Hyde Amendment contravened neither the patient's nor the doctor's constitutional rights; nor does it require that a State supplement funds for the purpose of facilitating abortions since the Hyde Amendment restricts federal funds for that purpose.³⁴⁴ Congress' Hyde Amendment derails indigent women's opportunity to act on choice regarding an unwanted or medically unsound pregnancy.³⁴⁵ The Supreme Court rationalized, justified, and authorized the Amendment through the privacy doctrine.³⁴⁶ The Court told women that in the reproductive sphere, long since designated as private, we women were all "autonomous."³⁴⁷ Reproductive autonomy is a proposition that low-income women may find laughable. The Court voiced the deceptively benevolent desire to stay out of a "private" decision while averting its eyes from the intersectionality of sex and economic oppression that placed the plaintiffs before them.

341. *Harris v. McRae*, 448 U.S. 297 (1980).

342. The Hyde Amendment prohibits "the use of federal funds to reimburse the cost of abortions under the Medicaid program except under certain circumstances." *Id.* at 302.

343. *Id.* at 312.

344. *Id.* at 326.

345. *Id.* at 316.

346. *See McRae*, 448 U.S. at 314-15.

347. *See, e.g., Roe*, 410 U.S. at 153 (recognizing a woman's right to terminate her pregnancy).

C. DOCTRINAL ALTERNATIVES

To such criticism of privacy doctrine, opponents of sodomy laws may be prompted to ask, if not privacy, then what doctrine can be used?

Justice Powell's *Bowers v. Hardwick* concurrence promoted the alternative of using an Eighth Amendment³⁴⁸ challenge premised on the idea that twenty years in prison for one instance of oral or anal sex is "cruel and unusual punishment."³⁴⁹ However, such a challenge fails to confront the illegitimacy of punishing sodomy between consenting adults with *any* prison sentence, whether it is one, five, or twenty years.

A more substantive Eighth Amendment analysis can be used, and has been proposed by Professor Kendall Thomas, who calls it a "corporal integrity approach" to sodomy laws.³⁵⁰ Unlike traditional privacy doctrine, Thomas' approach ensconces protection of bodily integrity and autonomy without presupposing over-extensive truisms about particular arenas. Thomas explains that this approach has more than one use because

The Eighth Amendment prohibitions against cruel and unusual punishments may be construed not only to forbid open and official use of government use of violence to enforce the criminal laws against homosexual sodomy, but also to bar a state from effecting the enforcement of these laws by instigating, encouraging, or permitting private attacks on gay men and lesbians.³⁵¹

When bolstered by a Fourth Amendment³⁵² challenge for invasion of one's person, the corporal integrity approach may adequately confront what privacy doctrine cannot.

D. AN ADMONITION

All of the aforementioned points should serve as a reminder to lesbian and gay communities about the merits of close re-examination of privacy doctrine. This is especially true with the emergence of the North American Man-Boy Love Association (NAMBLA),³⁵³ which in-

348. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

349. See *Bowers*, 478 U.S. at 197-98 (Powell, J., concurring).

350. See Thomas, *supra* note 327, at 1487.

351. See Thomas, *supra* note 327, at 1487.

352. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. CONST. amend. IV (emphasis added).

353. NAMBLA is a "San Francisco-based group that advocates sexual relationships between

vokes privacy and autonomy rhetoric in order to rationalize adult sexual activity with children.³⁵⁴ It is also true when one realizes the degree to which lesbian people of color³⁵⁵ are turned away from the doors of private, elite gay dance clubs, as well as in the situations in which couples desire to use a (usually poor) woman's uterus for surrogate parenting.

Privacy and its illusion of universal autonomy within certain spheres or arenas continues to further hierarchies of power no less within the lesbian community than in heterosexual community. This dilemma renders a critique of privacy, safety, and oppression all the more urgent. Only when this reexamination occurs will lesbian communities be able to decide whether it is wise for lesbians to kneel at the altar of privacy doctrine without inquiring who owns the church.

A DESTRUCTIVE CONCLUSION

we have chosen each other
 and the edge of each other's battles
 the war is the same
 if we lose
 someday women's blood will congeal
 upon a dead planet
 if we win
 there is no telling.³⁵⁶

There is no telling because justice is to be. That is, justice is future-oriented. Justice shines like a light at the end of a tunnel when all concerned parties speaking the same language, having considered our history, the laws, our perspective, come to the point of judgment. At that non-chronological moment when justice requires change, we no longer stand on mere history, but instead we recommit judgment afresh in order to strive toward justice with no guarantee of success. I have said that deconstruction is a strategy for reading and writing text that re-works the margins and the centers, and offers the possibility of justice somewhere.

This paper is a result of my creative efforts,³⁵⁷ offered to the reader

[male] adults and boys." Glen Martin, *S.F. Man Held in Sex Assault on Virginia Boy*, SAN FRANCISCO CHRON., Sept. 5, 1996, A22.

354. *For the Record*, PORTLAND OREGONIAN, Sept. 22, 1992, at C4.

355. I have settled on the use of the term "people of color" - albeit inadequate for its elusiveness, illiveness, and divisiveness - until I find another, more fitting term.

356. See LORDE, *supra* note 168, at 13.

with appropriate humility and audacity, to stir the jurisprudential cauldron. I have added my particular and disparate socio-political, racial, gender-referenced, sexual-oriented, economic, and spiritual ingredients to the pot as I stir it with my varied feminist sensibilities. I have used my newly-found and well-worn talents and resources to call forth sufficient *asé*³⁵⁸ to begin this task. I have conjured up a support system to guide us toward completion of this leg of our journey.³⁵⁹

As the title implies, I invite you all to the process of deconstruction that you have already begun.

Because justice requires it, I persist.

357. I want to thank Dean Steven Smith for encouraging me to continue to speak and act on what I believe. I want to thank Professor Mark E. Wojcik, Conference Chair, for having the courage, commitment, patience, and power to convene such a transformative gathering. I offer special heartfelt appreciation to Professor Beverly Pyle for encouraging me to "go for it!" and for being my friend even when the *Bluebook* was not. I also thank Amina for deconstructing intimacy with me and keeping me company along the path.

358. *Asé* is a Yorùbá devotional word for the life force that is present in everything; everything that is alive with *asé*, which is a functional, focusable power used to make change happen. Yorùbá people are native to Southwestern Nigeria, Togo, and other West African nations, however, *rìsà* worship is worldwide.

359. I called upon EGUN (our ancestors), Audre Lorde, Bill Kuntsler, Mabel Hampton, and Michael Hardwick, and other brave souls for guidance, for justice's sake.