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# REASONING ABOUT SODOMY: ACT AND IDENTITY IN AND AFTER *BOWERS v. HARDWICK*

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*Heterosexuals don't practice sodomy . . . .*

—Senator Strom Thurmond<sup>1</sup>

*THIS IS NOT A CASE ABOUT ONLY HOMOSEXUALS . . . .*  
*ALL SORTS OF PEOPLE DO THIS KIND OF THING.*

—Daniel C. Richman<sup>2</sup>

## INTRODUCTION

THE criminalization of sodomy is crucial to the generation and ordering of sexual-orientation identities. Sodomy statutes generate at least part of the personhood of anyone who wishes to engage in debates about whether such measures should be adopted, modified or repealed. By contributing to the terms on which sexual-orientation identities may be adopted and maintained, sodomy statutes interfere indirectly in the conventions and practices of reasoning about their own propriety. They function to maintain themselves.

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<sup>1</sup> Senators Loudly Debate Gay Ban, N.Y. Times, May 8, 1993, at A9.

<sup>2</sup> Memorandum from Daniel C. Richman to Justice Thurgood Marshall on *Bowers v. Hardwick*, 478 U.S. 186 (1986), quoted in Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. Times, May 25, 1993, at A1, A8 (capitalization in original). Richman wrote this memorandum while serving as Justice Marshall's law clerk. *Id.*

Sodomy statutes place certain people at risk of surveillance, arrest, indictment, conviction and incarceration, while they simultaneously provide for certain other people spaces of relative immunity. What is interesting and complicated about sodomy statutes is that the first group is not exclusively the group of "homosexuals," and the second group is not exclusively the group of "heterosexuals." This is because sodomy, as it has been criminalized in the United States, is not only about identities: it is also about acts. To think of this is to resist the obvious: we all tend to imagine that sodomy is about homosexuals, but if we think for a moment we recall that many resolute homosexuals never do any acts that could be called sodomy, while many resolute heterosexuals are, where sodomy is concerned, avid recidivists. The recollection is a gestalt switch: we have stopped thinking about sodomy as an indicator and regulator of identities, and have recalled its reference to acts.

Sodomy statutes maintain themselves in part by their equivocal reference to identities *and/or* acts. The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity. Designating homosexual identity as the personal manifestation of sodomy confirms its subordination. At the same time, the ways in which homosexual identity is *not* sodomy are subject to an organized forgetting. And heterosexual identity becomes superordinate not because it is absolutely immune, but because it is *intermittently and provisionally* immune from regulation under the sodomy statutes. This instability can be a source of rhetorical and political power. For the designation "heterosexual," the instability of sodomy along the parallel registers of act and identity generates a form of self-interestedness that is also a fragile and fearfully-to-be-maintained identity.

Resisting power in this form provides gay men, lesbians, bisexuals, and their allies with a political opportunity. We can form new alliances along the register of acts. From that vantage point the instability of heterosexual identity can be exploited, and indeed, undermined from within. To be sure, adopting this approach requires that lesbians, gay men, and bisexuals place their identities as such in abeyance at least from time to time. This is dangerous, but it may be the only way that lesbians, gay men, and bisexuals can gain some kind of rhe-

torical leverage in a rhetorical system whose instability normally places us in a double bind.

Before launching on this argument, I offer two methodological points and a roadmap. First, to argue that sodomy prohibitions shape heterosexual and homosexual identities, as I do, is to imply that those identities do not emerge unproblematically from nature or stably describe the persons who bear them. I want to embrace that implication explicitly. In this Article I use the terms "homosexuality" and "homosexual"—and more tendentiously, the terms "heterosexuality" and "heterosexual"—without any implication that they accurately describe any persons living or dead. As I try to use them here, these terms describe rhetorical categories that have real, material importance notwithstanding their failure to provide adequate descriptions of any one of us. Sexual-orientation identities are, then, *facilities* that we use when we attempt to explain ourselves to ourselves, when we seek to situate ourselves in relation to others or others in relation to ourselves, and thus when we seek to gain and wield power, including the power of persuasion.<sup>3</sup>

Second, this Article does not pursue the well-established inquiry into the relationship between gender and sexual orientation, and focuses instead on the dynamics peculiar to sexual-orientation identities. The former line of investigation has produced powerful social and political<sup>4</sup> as well as legal<sup>5</sup> analyses arguing that the social and

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<sup>3</sup> This claim enters the debate described by Daniel R. Ortiz on the side of constructivist accounts of homosexual and heterosexual identity. Daniel R. Ortiz, *Creating Controversy: Essentialism/Constructivism and the Politics of Gay Identity*, 79 Va. L. Rev. 1833 (1993). Of course, if the identities "homosexual" and "heterosexual" are to any important extent socially constructed, the identities "gay," "lesbian," "bisexual," and "queer" are too.

The best sourcebook for the essentialism/constructivism debate is *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Edward Stein ed., 1990).

<sup>4</sup> Perhaps the inaugural essay in this line is Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 Signs 631 (1980). For a thoughtful recent contribution from political theory, see Susan Moller Okin, *Sexual Orientation and the Socio-legal Construction of Gender* (manuscript on file with the Virginia Law Review Association).

<sup>5</sup> See, e.g., Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 187 (arguing that the legal and cultural "disapprobation of homosexual behavior is a reaction to the violation of gender norms, rather than simply scorn for the violation of norms of sexual behavior"). Occasionally, feminist analysis of legal sanctions against homosexuality exhibits a disturbing male-homophobic drift. See, e.g., Sandra J. Grove, *Constitutionality of Minnesota's Sodomy Law*, 2 Law & Inequality J. 521, 530-33 (1984) (drawing on the work of Andrea Dworkin and Catherine MacKinnon to conclude that "[c]onsensual sexual contact between male peers is, in a sense, an expression of the status quo of male power," so that

legal interdiction of homosexuality produces gender hierarchy by enforcing a rigid distinction between the genders, and by requiring women to associate intimately with men and thus to be dependent on them. Kendall Thomas' accompanying commentary pursues a psychohistorical analysis along these lines, concluding that the threat to heterosexuality posed by homosexual sodomy is the threat to masculinity posed by receptive anality (read: the feminine).<sup>6</sup>

I do not disagree with this approach, but I think it is only part of the picture. Heterosexuality exceeds and thus differs from masculinity, just as homosexuality exceeds and differs from the so-called passive role in anal sex. Though they intersect, gender and sexuality exceed and differ from one another. As Andrew Parker notes in a deft summary of the recent articulation of sexuality or queer studies as a body of work distinct from that developed in women's, gender, and feminist studies, "a growing number of critics, 'male' and 'female' alike, no longer find gender *the* inevitable or even appropriate optic through which to explore 'issues of sexuality in general.'"<sup>7</sup> In an inaugurating essay for the study of sexuality, Gayle Rubin invoked Michel Foucault's conception of sexuality as a system of social practices and knowledge "concerned with the sensations of the body, the quality of pleasures, and the nature of impressions,"<sup>8</sup> and argued that

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prosecutorial failure to enforce sodomy statute against consensual sex acts between men is a "legal sanction of male sexual prerogative").

There is no need to indulge in such excesses, however, to find justifications for an argument that sodomy statutes violate the constitutional bar on sex discrimination. The groundbreaking contribution is that of Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L.J. 145 (1988); see also Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 607-50 (1992) (discussing anti-gay bias and sexual orientation discrimination as analogous to gender discrimination); Cass R. Sunstein, *Homosexuality and the Constitution*, in *Laws & Nature: Shaping Sex, Preference and the Family* (David Estlund & Martha Nussbaum eds., forthcoming) (manuscript on file with the Virginia Law Review Association) (arguing that discrimination based on sexual orientation is a species of sex discrimination).

<sup>6</sup> Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 Va. L. Rev. 1805 (1993).

<sup>7</sup> Andrew Parker, *Sensitive New Age Guys*, *Lesbian & Gay Studies Newsletter*, Mar. 1993, at 31, 32 (reviewing *Engendering Men: The Question of Male Feminist Criticism* (Joseph A. Boone & Michael Cadden eds., 1990)).

<sup>8</sup> 1 Michel Foucault, *The History of Sexuality* 106 (Robert Hurley trans., Pantheon Books 1978) (1976).

the study of sexuality so described should not be equated with the study of gender:

I want to challenge the assumption that feminism is or should be the privileged site of a theory of sexuality. Feminism is the theory of gender oppression. To automatically assume that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other. . . .

. . . .

. . . Gender affects the operation of the sexual system, and the sexual system has had gender-specific manifestations. But although sex and gender are related, they are not the same thing, and they form the basis of two distinct arenas of social practice.<sup>9</sup>

Indeed, any assumption that hetero/homosexual dynamics must originate in, or ultimately produce, gender hierarchy or gender identity gives analytic priority to heterosexuality, with its definitional dependence on the concept of male and female, of masculine and feminine, as inatching opposites. Eve Kosofsky Sedgwick speculates that

[i]t may be . . . that a damaging bias toward heterosocial or heterosexual assumptions inheres unavoidably in the very concept of gender. This bias would be built into any gender-based analytic perspective to the extent that gender definition and gender identity are necessarily relational between genders . . . . [T]he ultimate definitional appeal in any gender-based analysis must necessarily be to the diacritical frontier between different genders. This gives heterosocial and heterosexual relations a conceptual privilege of incalculable consequence.<sup>10</sup>

That is to say, heterosexuality may be inscribed as a norm in gender-based approaches.

The sheer plausibility of gender as the source of and explanation for erotic differences makes it especially necessary to look at sexuality independently (though not instead).<sup>11</sup> Sidestepping the pervasive explanatory power of that norm requires an analysis of sexuality that

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<sup>9</sup> Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *Pleasure and Danger: Exploring Female Sexuality* 267, 307-08 (Carole S. Vance ed., photo. reprint 1985) (1984).

<sup>10</sup> Eve K. Sedgwick, *Epistemology of the Closet* 31 (1990).

<sup>11</sup> Valerie Traub, *Desire and the Differences It Makes*, in *The Matter of Difference: Materialist Feminist Criticism of Shakespeare* 81, 84 (Valerie Wayne ed., 1991) (recommending that cultural historians "place sexuality at the centre" of analysis, and "only after that" explore how it intersects with gender, race, ethnicity, and class) (emphasis added); see also Sedgwick, *supra* note 10, at 27-35 (arguing that exploration of the links between

is distinctively queer, in the sense that it seeks to describe the peculiar operations of sexual-orientation taxonomies insofar as they are not articulated through gender. The present Article is such an effort.

Part I of this Article asserts that sodomy statutes have important effects on practices of civic reasoning about sexual orientation and, in particular, on the generation of public personae for people identified as homosexual and for people identified as heterosexual. Part II proceeds to the cultural and legal assignment of meaning to sodomy itself, and seeks to expose the incommensurable articulations of act and identity that are managed by means of sodomy laws.

Once act and identity are articulated as distinct "meanings" of sodomy, Part III analyzes their relationship to each other. I examine *Bowers v. Hardwick*,<sup>12</sup> the Supreme Court decision holding that constitutional privacy and substantive due process rights are not violated when a state criminalizes what the Court was pleased to call "homosexual sodomy."<sup>13</sup> *Hardwick* provides an exemplary basis for reasoning about sodomy because it generates an immobile, fixed, and vulnerable position for the homosexual plaintiff, and a mobile and fluid position in which people identified as heterosexual can seek immunity from the stigma of the sodomy statutes. Because the majority opinion in *Hardwick*, and Chief Justice Warren E. Burger's concurrence, produce these relationships in part through a history of sodomy that represents sodomy as transhistorically stable and identical to homosexual identity, the last Section of this Article becomes a critique not only of the present uses of sodomy, but of sodomy's history. An understanding of sodomy adequate to its current deployments, as exemplified in *Hardwick*, requires an acknowledgement that the historiography of sodomy is permeated by the instability of act and identity.

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gender and sexuality should be deferred in order to permit testing of the hypothesis that they are semi-autonomous).

<sup>12</sup> 478 U.S. 186 (1986).

<sup>13</sup> *Id.* at 190.

## I. REASONS AND REASONERS

*[I]dentity is not the goal but rather the point of departure . . .*

—Teresa de Lauretis<sup>14</sup>

The closet no longer reigns in solitary splendor as *the* metaphor for the political situation of gay men, lesbians, and bisexuals. Its door now opens directly onto the areopagns, the forum, the senate hearing room, the court of law—onto scenes of rational debate, public deliberation, and collective decisionmaking conducted under the aegis of reasonable discourse. The muse of rhetoric, if not her sister logic, presides.

No one following even remotely the fortunes of sexual orientation in contemporary legal culture can have missed the recent proliferation of debates requiring reference to some notion of reasoning. President Bill Clinton's announcement that he would lift the ban on gay men and lesbians in the armed forces has framed the question for vigorous, indeed vertiginous debates within the executive branch, in hearing rooms on Capitol Hill and aboard ship, and on radio talk shows.<sup>15</sup> Debates about the social meaning of sexual orientation pervade state and local politics and private bargaining: one side proposes antidiscrimination statutes and ordinances<sup>16</sup> and seeks employment con-

<sup>14</sup> Teresa de Lauretis, *Feminist Studies/Critical Studies: Issues, Terms, and Contexts*, in *Feminist Studies/Critical Studies* 1, 9 (Teresa de Lauretis ed., 1986).

<sup>15</sup> For reports on the political process leading to the Department of Defense Directive, see Gwen Ifill, *White House Backs 2-Step Plan to End Military's Gay Ban*, N.Y. Times, Jan. 27, 1993, at A1 (reporting President Clinton's suspension of the old military policy requiring investigation and discharge of anyone evincing homosexual desire or acts); Excerpts from the News Conferences by Clinton and Nunn, N.Y. Times, Jan. 30, 1993, at A8 (discussing Clinton's charge to the Secretary of Defense of formulating a new policy acceptable to military leaders); Eric Schmitt, *President's Policy on Gay Troops Is Backed in Vote of Senate Panel*, N.Y. Times, July 24, 1993, at A7 (discussing proposal by Senate Armed Forces Committee to codify stricter versions of new Department of Defense policy). For the actual policy, see Text of Pentagon's New Policy Guidelines on Homosexuals in the Military, N.Y. Times, July 20, 1993, at A16. This is a tale of three branches, not two. See *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993) (enjoining enforcement of old military policy); Complaint for Declaratory Judgment and Permanent Injunction, *Doe v. Aspin*, No. 93-1549 (D.D.C. filed July 27, 1993) (seeking to enjoin enforcement of new military policy).

<sup>16</sup> At least six states and the District of Columbia have instituted statewide statutory prohibitions against discrimination on the basis of sexual orientation in employment, housing, and/or public accommodations. See 1991 Conn. Acts 91-58 (Reg. Sess.) (codified in scattered sections of Conn. Gen. Stat. § 46a); Haw. Rev. Stat. §§ 368-1, 378-1 to -2 (1992); Mass. Gen. Laws Ann. ch. 151B, § 4 (West 1993); 1991 N.J. Laws 519 (codified in scattered sections of N.J. Rev. Stat. §§ 10, 11A); 1992 Vt. Laws 135 (codified in scattered sections of Vt. Stat. Ann. tits. 1, 3, 8, 9, 10, 15, 21); Wis. Stat. Ann. §§ 111.321 - .322 (West 1992); D.C. Code Ann. § 1-



tracts recognizing domestic partners,<sup>17</sup> while the other sets out on a campaign designed to foreclose future public debate, presenting the voters of Riverside, California, of Oregon, of Colorado—and by the time this volume reaches its readers, no doubt, other localities and states as well—with a debate about whether to have a debate.<sup>18</sup> Academics have followed suit. Judge Richard Posner's *Sex and Reason*,<sup>19</sup> for instance, uses the logic of economic utilitarianism to determine just how much discrimination against gay men and lesbians, and just how much state regulation of same-sex conduct, is reasonable. This bold contribution to the new rationality has engendered a cottage industry of academic dispute.<sup>20</sup>

Judicial attention increasingly focuses on reasoning about sexual orientation. In significant equal protection cases challenging discrimi-

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2501 (1992). For a review of the local-ordinance approach, see Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partner Ordinances, 92 Colum. L. Rev. 1164 (1992).

<sup>17</sup> For an unusually thoughtful and thorough study of the policy considerations underlying this program, see Subcommittee on Domestic Partners' Benefits, University Comm. on Faculty & Staff Benefits, Stanford University, Report of the Subcommittee on Domestic Partners' Benefits (June 1992) (on file with the Virginia Law Review Association); Benefits Eligibility Extended to Same-sex Partners, Campus Rep. (Stanford University), Dec. 9, 1992, at 1. A number of corporations have adopted similar programs. HBO Grants Benefits to Staff's Same-Sex Partners, N.Y. Times, July 2, 1993, at D3 (reporting that "a growing number of large public companies . . . offer same-sex domestic-partner benefits").

<sup>18</sup> See *infra* Appendix A: Foreclosure of Pro-Gay Political Activity.

<sup>19</sup> Richard A. Posner, *Sex and Reason* 291-323 (1992).

<sup>20</sup> The following book reviews evaluate Judge Posner's *Sex and Reason*: Robert M. Anderson, EP Seeks EP: A Review of *Sex and Reason* by Richard A. Posner, 31 J. Econ. Literature 191 (1993); Martha Ertman, Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality, 45 Stan. L. Rev. 1485 (1993); William N. Eskridge, Jr., A Social Constructionist Critique of Posner's *Sex and Reason*: Steps Toward a Gaylegal Agenda, 102 Yale L.J. 333 (1992); Elizabeth Fox-Genovese, Beyond Transgression: Toward a Free Market in Morality, 5 Yale J.L. & Human. 243 (1993); Robert P. George, Can Sex Be Reasonable? 93 Colum. L. Rev. 783 (1993); Gillian K. Hadfield, Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man, 106 Harv. L. Rev. 479 (1992); Chris Hutton, *Sex and Reason*: A Review and Application of Judge Posner's Theory, 38 S.D. L. Rev. 1 (1993); Martha Nussbaum, "Only Grey Matter"? Richard Posner's Cost-Benefit Analysis of Sex, 59 U. Chi. L. Rev. 1689 (1992); Carol Sanger, He's Gotta Have It, 66 S. Cal. L. Rev. 1221 (1993); Martha Nussbaum, Venus in Robes, The New Republic, Apr. 20, 1992, at 36.

*Sex and Reason* was also the subject of an exchange in the Connecticut Law Review. See Katharine T. Bartlett, Rumpelstiltskin, 25 Conn. L. Rev. 473 (1993); Martha A. Fineman, The Hermeneutics of Reason: A Commentary on *Sex and Reason*, 25 Conn. L. Rev. 503 (1993); Richard A. Posner, The Radical Feminist Critique of *Sex and Reason*, 25 Conn. L. Rev. 515 (1993); Gillian K. Hadfield, Not the "Radical" Feminist Critique of *Sex and Reason*, 25 Conn. L. Rev. 533 (1993).

nation against gay men and lesbians, courts have begun to apply rational basis review in a way that requires the government to articulate its reasons for anti-gay policies, and that requires judges to decide whether those reasons are reasonable. In Dusty Pruitt's challenge to her discharge from the Army, the Ninth Circuit required the defendant to state nontautological reasons for its anti-gay policies.<sup>21</sup> In Keith Meinhold's suit alleging unconstitutional discrimination by the Navy, the court held that "[t]he Department of Defense's justifications for its policy banning gays and lesbians from military service are based on cultural myths and false stereotypes" and fail rationality review.<sup>22</sup>

More is at stake in these debates than the appropriate policy for government to take on matters of sexual difference. More fundamentally, they involve a struggle to define the discursive processes in which that and other policy choices shall be made, and thus the discursive situations of the debate's participants. These debates about sexual orientation require all the players to participate in the construction of their own sexual-orientation identities, and to make themselves available for interpretation along this register by others. In debating about sexual orientation, we do not just reflect or deliberate upon it and how it shall be used to effect redistribution of social goods: we also constitute it and enroll ourselves in it. This particular effect of public conflict over sexual-orientation issues cannot adequately be described if we assume that the cultural effects of legal practices are "merely" symbolic. The role of the law in constituting persons by providing a forum for their conflicts over *who they shall be understood to be* is deeply material, even though it involves not physical force but the more subtle dynamics of representation.

To take but one example before turning to the role of sodomy laws in this constitutive process, consider the measurable increase in violence against gay men and lesbians that attends these debates.<sup>23</sup> This

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<sup>21</sup> Pruitt v. Cheney, 963 F.2d 1160, 1165-67 (9th Cir.) (reversing dismissal of Pruitt's equal protection claim and remanding it for rational-basis review), cert. denied, 113 S. Ct. 655 (1992).

<sup>22</sup> Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993).

<sup>23</sup> Timothy Egan, Violent Backdrop for Anti-Gay Measure, N.Y. Times, Nov. 1, 1992, at A15 (claiming that violence against supporters of the proposed Oregon amendment rose even as the amendment headed for defeat); Michael Booth & Adriel Bettelheim, Gays See Surge in Violence, Denv. Post, Mar. 12, 1993, at 1B (noting that the campaign for the Colorado amendment fueled violence against homosexuals).

violence registers both material effects and rhetorical ones. Gay men, lesbians, bisexuals, their supporters, and people mistaken for them are killed, beaten up, and burned out.<sup>24</sup> By arguing that the military's ban on openly gay troops was necessary to prevent anti-gay violence, proponents of that ban recently escalated the rhetorical effect of this violence from the implicit to the explicit.<sup>25</sup> At this point, the repertoire of rational debate came to include the theatrics of torture and death, the graphic and imaginative invocation of the corporeal.

This rhetorical deployment of the material has grave effects on *who plays* in the ensuing phases of the debate. These effects are measurable not by empirical means, but by the tools offered by cultural criticism.<sup>26</sup> Louis Althusser's famous description of interpellation captures a first step in the dynamic:

[I]deology 'acts' or 'functions' in such a way that it 'recruits' subjects among the individuals . . . or 'transforms' the individuals into subjects . . . by that very precise operation which I have called *interpellation* or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: 'Hey, you there!'

Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a *subject*. Why? Because he has recognized that the hail was 'really' addressed to him, and that 'it was *really him* who was hailed' (and not someone else).<sup>27</sup>

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<sup>24</sup> Kendall Thomas has described the peculiar intensity of homophobic violence and its "communicative thrust," materially altering the lives of anyone who can imagine becoming its target. Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1461-67 (1992).

<sup>25</sup> Senate Armed Services Committee Hearing on the Ban on Homosexuals in the Military, May 11, 1993 (Reuter Transcript Service) (testimony of Marine Corps Colonel Frederick Peck). Peck noted that "my son Scott is a homosexual, and I don't think there's any place for him in the military. . . . [I]f we went into combat[,] . . . he'd be in grave risk . . . I would be very fearful that his life would be in jeopardy from his own troops." Id.

<sup>26</sup> For a description of the approach offered here, see Guyora Binder & Robert Weisberg, *Literary Criticism of Law*, ch. 5, *Cultural Criticism of Law* (Princeton Univ. Press, forthcoming 1994) (manuscript on file with the Virginia Law Review Association) (arguing that regarding law as a series of "social texts" susceptible to literary criticism may be the most promising means of preparing to critique the "interests" which law not only mediates but also creates).

<sup>27</sup> Louis Althusser, *Ideology and Ideological State Apparatuses* (Notes towards an Investigation), in *Levin and Philosophy and Other Essays* 123, 162-63 (Ben Brewster trans., 1971) (footnote omitted).

The legal interpellation or hailing of subjects engages us in generating not only how we present ourselves to others, but how we imagine ourselves as persons. It is inextricably material *and* symbolic because it materially reconfigures the *polis* by rearranging how people imagine and present themselves in political engagements.

Promoting threats of violence to the status of legitimate policy arguments in the military-ban debates generated at least four subjects in Althusser's sense. First, responding to this call "subjected" those who already identified themselves as gay, lesbian, or bisexual to a political profile defined by the identity under threat. Opposing the ban meant engaging in identity politics, and invoked a series of courageous coming-outs that reconstituted the personhood of those involved. Second, the legitimation of threatened violence encouraged many soldiers who entertain same-sex erotic desire, whether they act on it or not, to identify publicly as heterosexual. Third, it encouraged troops whose erotic energies were cross-sex to identify publicly as heterosexual, as explicitly as their sense of decorum would permit. And fourth, for anyone within reach of the last two effects, the threat of violence legitimated a sense of indignation that became a form of heterosexual self-consciousness: "homosexual panic"<sup>28</sup> became a state of mind one could inhabit all day long. Even when the subject of debate seems to presuppose participants with settled sexual-orientation identities, those identities may be under negotiation. The resulting contests are even more discernable in the law and legal culture of sodomy.

The criminalization of sodomy is crucial to the ordering of sexual-orientation identities, particularly to the subordination of homosexual identity and the superordination of heterosexual identity. Sodomy statutes are materially important for concrete, material reasons: under their authority, people are in jail.<sup>29</sup> They are materially important for symbolic reasons as well. Sodomy statutes acquire symbolic impor-

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<sup>28</sup> For a description of the "homosexual panic" defense, raised by defendants charged with assaulting gay men or lesbians and predicated on a theory that their revulsion at a homosexual overture compelled their actions, see Gary D. Comstock, *Dismantling the Homosexual Panic Defense*, 2 *Law & Sexuality* 37 (1992); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 *Cal. L. Rev.* 133 (1992).

<sup>29</sup> In 1986, 56 people were incarcerated in Virginia on convictions of sodomy obtained without any finding of force or coercion. Letter from Duncan Brogan, Executive Assistant to the Director of Virginia Department of Corrections, to ACLU Attorney Barbara Quackenbos (Aug. 28, 1986) (on file with the Virginia Law Review Association).

tance in part because they are, most often, facially neutral. Twenty-eight states and Washington D.C. have repealed their provisions governing sodomy, either by statute or through adjudication.<sup>30</sup> Of the twenty-three statutes (including the Military Code of Justice) that retain prohibitions on consensual sodomy, only five prohibit same-sex sodomy alone and leave cross-sex sodomy unregulated.<sup>31</sup> Eighteen statutes (including the Military Code of Justice) prohibit sodomy no matter whether it is engaged in by people of the same or of different sexes.<sup>32</sup> It is not clear how many prosecutions for consensual, non-commercial sodomy between adults are threatened or brought every year in the U.S., but it is clear that these statutes are at least sporadically enforced, more often against same-sex conduct, though with surprising frequency against cross-sex conduct as well.

Though discriminatory enforcement of sodomy statutes against parties in same-sex erotic contacts may be difficult to prove,<sup>33</sup> selective prosecution is widely recognized,<sup>34</sup> and has even been held, in the military context, to "bear[ ] a substantial relationship to an important governmental interest."<sup>35</sup> Commentators have argued that an invidious legislative intent to target same-sex conduct often underlies facially neutral statutes, rendering them indistinguishable under the Equal Protection Clause from the very few statutes that target same-sex conduct.<sup>36</sup> I agree that it is most often entirely appropriate to consider the main run of sodomy statutes "homosexual sodomy law."<sup>37</sup> But most sodomy statutes are in fact facially neutral. This

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<sup>30</sup> See *infra* Appendix B: Repeal of Sodomy Statutes in the United States.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See, e.g., *Ray v. State*, 389 S.E.2d 326 (Ga. 1990); *Gordon v. State*, 360 S.E.2d 253 (Ga. 1987) (finding that selective enforcement challenges to Georgia's sodomy statute failed for want of evidence).

<sup>34</sup> See, e.g., *Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1520-21 (1989).

<sup>35</sup> *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1382 (9th Cir. 1980), cert. denied, 454 U.S. 864 (1981).

<sup>36</sup> Koppelman, *supra* note 5, at 152-53; *Developments in the Law*, *supra* note 34, at 1526, 1531-34.

<sup>37</sup> Most analyses of sodomy laws and their effect on sexual-orientation hierarchy focus on enforcement against same-sex contacts. See Thomas, *supra* note 24, at 1469 (analyzing "homosexual sodomy law" as a "political power" that operates in tandem with private violence against gay men, lesbians and bisexuals); Koppelman, *supra* note 5, at 147 ("[T]he sodomy laws . . . function . . . to maintain the polarities of gender on which the subordination of women depends."); Law, *supra* note 5, at 189-91, 196-97 (noting that discriminatory

Article focuses on the cultural dynamics set in motion by the *possibility*—a possibility that is more than merely theoretical<sup>38</sup>—that cross-sex conduct will be prosecuted.

The facially neutral sodomy statutes make complex and unstable reference to erotic acts *and* to the public identities of persons. Conversely, act and identity are incommensurable articulations of sodomy. The next Part argues that prying act and identity apart in this context exposes the political character of that equivocation.

## II. RHETORICS OF ACT AND IDENTITY

*"Homosexuality is not a benign . . . characteristic, such as skin color or whether you're Hispanic or Oriental. . . . It goes to one of the most fundamental aspects of human behavior."*

—General Colin L. Powell<sup>39</sup>

*Capt. Gary:*      *The Uniform Code of Military Justice, okay, which basically says that nobody—and it's not homosexual-specific, it's heterosexual and homosexual—will not engage in any kind of, you know—*

*Koppel:*          *Sodomy.*

*Capt. Gary:*      *—sodomy. Well, we have heterosexual soldiers that do that on a daily basis. We're all men here, and we've all heard soldiers talk.*

*Capt. Rivers:*    *I don't believe that. I don't agree with that. I do not agree—*

*Capt. Gary:*      *Well, it was very openly discussed.*

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enforcement of sodomy law, and its implicit approval by the Supreme Court in *Hardwick*, justifies other forms of discrimination against gay men and lesbians and thus tends to confirm traditional gender roles). A similar focus emerges in an interesting analysis of the enforcement of public indecency statutes. See George W. Smith, Policing the Gay Community: An Inquiry into Textually-mediated Social Relations, 16 Int'l J. Soc. L. 163, 165, 176-80 (1988) (analyzing police surveillance and raid of a gay bath house in Toronto resulting in the arrest of more than 300 men, and concluding that this intervention of state power into gay men's lives was "textually-mediated" by police reports which depended, in turn, on the criminal code provision prohibiting maintenance of a bawdy house, so that "the central mechanism organizing the policing of gays is the Criminal Code"). I do not disagree with this approach: I simply do not think it is exhaustive.

<sup>38</sup> See *infra* Appendix C: Cross-Sex Sodomy.

<sup>39</sup> John Lancaster, Why the Military Supports the Ban on Gays; Arguments Ranging from Privacy to AIDS Offered Against Clinton's Rights Pledge, Wash. Post, Jan. 28, 1993, at A8 (quoting speech by General Powell to the U.S. Naval Academy).

- Koppel:* All right, wait a second. You're telling me that you've never heard a straight male soldier brag about getting oral sex from some prostitute or from a girlfriend or from some woman?
- Capt. Rivers:* Sure, but I do not agree—
- Koppel:* Well, that's sodomy.
- Capt. Rivers:* —it is a daily occurrence and it's rampant in the military, which is the way that—
- Koppel:* Among the—not necessarily rampant, but—
- Cmdr. Carde:* It happens.
- Capt. Rivers:* Sure, it happens.
- Koppel:* It happens all the time.
- Capt. Rivers:* But it's not something that is a normal occurrence in the military.

—Interchange on Ted Koppel's Nightline<sup>40</sup>

*"The way I feel about it [the ban on gays in the military] is, I don't like them, I don't like the way they do things . . . ."*

—Pvt. Keith McLaren<sup>41</sup>

Two apparently disparate trends encourage us to imagine that sodomy and homosexual identity are identical, or that, in the relation of metonymy, sodomy is to homosexual identity as burglary is to burglars. The first of these trends is explicitly unfriendly to gay men, lesbians, bisexuals, and queers; the second has been crucial to the development of anti-homophobic thinking and litigation strategy.

In the post-*Hardwick* environment, what Justice White described as "homosexual sodomy" has become homosexuals *as* sodomy. Several federal courts have held that *Hardwick* forecloses heightened equal protection scrutiny of discrimination disadvantageous to gay men, lesbians, and bisexuals on the ground that sodomy is the "*behavior that defines the class*" of homosexuals.<sup>42</sup> Other courts have

<sup>40</sup> Nightline, Jan. 28, 1993 (ABC television broadcast, available in LEXIS, Nexis library, Script file) (interchange of Michael Gary, Chair of the Service Academy Gay and Lesbian Alumni Association and former Army Captain; Hank Carde, retired Navy Commander; Larry Rivers, Executive Director of Veterans of Foreign Wars and former Marine Captain; and Ted Koppel, program moderator).

<sup>41</sup> Peter Appleboine, Military People Split Over Ban on Homosexuals: Army; Ranks Are Split, As in Society, N.Y. Times, Jan. 28, 1993, at A16 (quoting Private McLaren).

<sup>42</sup> See *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (emphasis added); see also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (holding that homosexuality did not merit strict or heightened scrutiny level review because

refused to acknowledge that a gay public employee who comes out of the closet has engaged in First Amendment protected speech, or indeed any speech at all, on the ground that an acknowledgement of gay identity is an admission of membership in a criminal—or at least criminalizable—class.<sup>43</sup> The Alabama legislature has banned public

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*Hardwick* declared it was not a fundamental right or liberty); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989) (same), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), cert. denied, 494 U.S. 1003 (1990).

Of course, these moves have provoked countermoves. See *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991) (rejecting conclusion that *Hardwick* controls in the equal protection context, in part on ground of a distinction between sexual conduct and sexual orientation), rev'd on other grounds, 976 F.2d 623 (10th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993); *Watkins v. United States Army*, 875 F.2d 699, 716-20 (9th Cir. 1989) (Norris, J., concurring) (same), cert. denied, 498 U.S. 957 (1990); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1371-72 (N.D. Cal. 1987) (same), rev'd, 895 F.2d 563; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 379-80 (9th Cir. 1990) (Canby & Norris, JJ., dissenting from denial of rehearing en banc) (same); see also Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1168 (1988) (attacking application of due process precedent in equal protection cases).

It is not at all clear how the rhetorics of act and of identity will be interrelated in the upcoming struggle under the new policy providing for investigation and discharge of military personnel found to have engaged in "homosexual conduct," but it is pretty clear that they will not involve the complexities of homosexuality *to the exclusion* of the complexities of acts. One commits "homosexual conduct" sufficient to justify discharge under the new policy by a "homosexual act," an act of same-sex marriage, or a speech act of coming out. The policy further specifies that an act of same-sex hand-holding will be sufficient to trigger an investigation into whether the servicemember has engaged in "homosexual conduct." See Text of Pentagon's New Policy Guidelines on Homosexuals in the Military, supra note 15, at A16. "Conduct" has undergone a remarkable, and probably constitutionally unacceptable, expansion here. Cf. Complaint for Declaratory Judgment and Permanent Injunction, *Doe v. Aspin*, No. 93-1549 (D.D.C. filed July 27, 1993) (challenging conduct-based regulation as an infringement of rights to free speech, to petition Congress, and to equal protection of the laws). Hand-holding exemplifies the imbrication of act with identity in the new policy. When done by people of the same sex, hand-holding is at least bivalent, in that it could indicate sexual affection, or a large number of other, not primarily sexual, forms of liking and helping. If it is to be deemed "homosexual conduct," that must be because a homosexual does it. This complex cross-articulation of act and identity will probably characterize the actual invitation to police the other forms of "homosexual conduct" as well and suggests that issues of identity cannot be sealed off from issues of conduct in this area.

<sup>43</sup> Cf. *Ben-Shalom*, 881 F.2d at 458-62 (rejecting plaintiff's First Amendment claim); *Pruitt v. Cheney*, 963 F.2d 989, 1160, 1163-64 (9th Cir. 1991) (same), cert. denied, 113 S. Ct. 655 (1992). Michael J. Bowers, the Attorney General of Georgia and, not coincidentally, the triumphant defendant in *Bowers v. Hardwick*, has based his defense in *Shahar v. Bowers*, No. 1:91-CV-2397 (N.D. Ga. Mar. 9, 1992), on this inference. Bowers fired Robin J. Shahar from her position as staff attorney in his office when she announced that she intended to marry another woman. Court Allows Lesbian Lawyer to Proceed with Suit Over Withdrawal of Job Offer, *Daily Lab. Rep. (BNA)* No. 49, at A-7 (Mar. 12, 1992). In court papers Bowers argued



funding of any student group "that fosters or promotes a lifestyle or actions prohibited by the [state's] sodomy and sexual misconduct laws,"<sup>44</sup> relying on the state Attorney General's opinion that, under *Hardwick*, Alabama's sodomy statute—a prohibition of oral/genital and genital/anal contacts between *any* unmarried persons<sup>45</sup>—constitutionally prohibits "homosexuality."<sup>46</sup> In these applications of *Hardwick*, the case is construed to authorize state decisionmakers to demote gay men, lesbians, and bisexuals socially, and to exclude them from certain public debates, on the grounds that their identity alone gives rise to an irrebuttable presumption that they have committed criminalizable sodomy, and that this inferred conduct is, in turn, the essential defining feature of their identity.

The same thinking that justifies the extension of *Hardwick* in these instances made a remarkable appearance in Senate hearings convened to test public opinion about President Clinton's proposed termination of anti-gay discrimination in the military. Reminded that gay men and lesbians served as congressional aides, Senator Strom Thurmond demanded, "Sodomy is against the law. Why shouldn't they be arrested?"<sup>47</sup> And outside official fora, this equation repeatedly appears in the "special rights" attack on efforts to locate homosexuality and homosexuals in public discourse. The "special right" sought by gay activists, it seems, is sodomy. When former New York City Schools Chancellor Joseph A. Fernandez promulgated a "Children of

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that "the Plaintiff's continued employment following her publicly announced homosexual 'marriage' would have required the Attorney General to recognize, tacitly if not publicly, her flaunting the very law he had recently defended." See Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Complaint and Amended Complaint, Nov. 15, 1991, at 15, *Shahar* (No. 1:91-CV-2397).

Again, these gestures have not gone unopposed. Probably the most explicit recognition of the importance of gay identity to the political process has been provided by courts striking down provisions intended to bar future public consideration of gay-rights initiatives, discussed *infra* Appendix A: Foreclosure of Pro-Gay Political Activity. See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (upholding a preliminary injunction that stayed enforcement of Colorado's Amendment 2); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991) (upholding city council's refusal to place an antihomosexual initiative on ballot). For a discussion of the political character of sexual orientation identity, see Nan D. Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531 (1992).

<sup>44</sup> Ala. Code § 16-1-28 (Supp. 1992).

<sup>45</sup> Ala. Code §§ 13A-6-65(a)(3), 13A-6-60(2) (1982 & Supp. 1992).

<sup>46</sup> Alabama Attorney General Opinion "Colleges and Universities—State Funds—Sexual Misconduct" (Mar. 19, 1992) (on file with the Virginia Law Review Association).

<sup>47</sup> Senators Loudly Debate Gay Ban, *supra* note 1, at A9.

the Rainbow" curriculum that would have required elementary school teachers to alert their students to the existence of same-sex parents, the Queens Borough school board refused to comply and stated as a reason for its refusal that the proposed "material aimed at promoting acceptance of sodomy."<sup>48</sup> The special rights rhetoric that has buoyed proposed constitutional amendments, defeated in Oregon but adopted in Colorado, actually requiring state discrimination against gay men, lesbians, and bisexuals repeatedly discerns the unregulated practice of sodomy to be the "special right" sought by the gay-rights movement.<sup>49</sup> Buttons distributed by proponents of Oregon Measure 9 announced, "Sodomy Is Not A Special Right."<sup>50</sup>

Sodomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym. In the contexts identified so far this equation seems so unfriendly that it is hard to recognize that pro-gay advocates frequently make a formally identical argument. A familiar example is the practice of outing, when justified on the grounds that the true sexual-orientation identity of a person living as straight is conclusively demonstrated by his or her same-sex erotic contacts.<sup>51</sup>

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<sup>48</sup> Joseph Berger, *Teaching about Gay Life is Pressed by Chancellor*, N.Y. Times, Nov. 17, 1992, at B12 (quoting letter of Mary A. Cummins, President of the Queens School Board, to Fernandez).

<sup>49</sup> Colorado's Anti-Gay Measure Set Back, N.Y. Times, July 20, 1993, at A8 (quoting Will Perkins, a leading proponent of Colorado's Amendment 2 to state, "How someone has sex is not an appropriate criterion for protected class status"); Don Baker, *A Matter of Sin and Acceptance*, L.A. Times, Oct. 15, 1992, at B7 (making a "love the sinner but hate the sin" argument in favor of the Oregon proposal in part by stating: "The gay community wants my stamp of approval on their behavior. . . . I cannot give that . . . approval."). For descriptions of these initiatives, see Appendix A: Foreclosure of Pro-Gay Political Activity.

<sup>50</sup> Marc Cooper, *Queer Baiting in the Culture War: Win or Lose, Oregon's Measure 9 May Define Populism in the '90s*, Village Voice, Oct. 13, 1992, at 29. For an early law review article stating this logic, see Roger J. Magnuson, *Civil Rights and Sexual Deviance: The Public Policy Implications of the Gay Rights Movement*, 9 Hamline J. Pub. L. & Pol'y 217, 235 (1989) ("Gay rights rely on . . . an analogy of behavior based [on] status to true status. That analogy equates a deviant sexual act with color, place of birth, or sex; it cannot bear serious analysis.").

<sup>51</sup> Most arguments providing an ethical justification for outing limit themselves to the propriety of exposing, or of refusing to be complicitous in, the hypocrisy of public figures who (1) are gay or lesbian; and (2) either (a) actively cooperate to defeat pro-gay initiatives, or (b) tacitly perpetuate the false impression that heterosexuality is a human norm by passing as straight. See Richard D. Mohr, *Gay Ideas: Outing and Other Controversies* 11-48 (1992) (ch. 1, *The Outing Controversy*); Michelangelo Signorile, *Queer in America: Sex, the Media, and the Closets of Power* (1993). Proponents of outing tend to treat the first criterion—gay or lesbian identity—as nonproblematic. Signorile, for instance, designates it as a "fact that

Such outings characterize the heterosexuality of people who engage in same-sex contacts as a hypocritical veneer; underlying that veneer is the outed person's "true" homosexuality. This practice reinforces the homo/hetero dichotomy by insisting that the objects of outing, once evicted from the class of heterosexuals, are necessarily and unproblematically homosexuals. It thus denies any value to bisexuality as a social position or project. In addition, it seriously depletes the remarkable range of meanings layered under the identity "heterosexual."<sup>52</sup> These are serious political mistakes because they deny the

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*everyone in Hollywood knows who's queer and who's not.*" Signorile, *supra*, at 263 (emphasis added). Mohr engages more carefully in the problem of sexual-orientation designation, but insists that a single act of same-sex sodomy unequivocally indicates that a man is gay ("I might also know that a male is gay because, say, he has wolfed down my cock with gusto"), Mohr, *supra*, at 16, while a man's having two children by vaginal intercourse in marriage is an uncertain indicator of heterosexual identity. *Id.* at 17 ("His sex acts may have been possible only because he was fantasizing about having sex with a gny—although too, of course, he may never actually have done that."). According to this formulation, same-sex sodomy is univocal in a way that cross-sex vaginal intercourse is not. This inference involves a number of categorical errors: the assumption that all persons are *either* gay *or* straight; the inference from acts of same-sex sodomy to rigid identity as gay; and the default assumption that "real" heterosexuals *do not* engage in sodomy or have any interesting wrinkles in the dynamics of their sexual identities.

Compare the careful maintenance of sailors' heterosexuality strived for in an early, and otherwise progressive, article describing the enforcement of criminal sanctions against homosexuals in Los Angeles County in the early 1960s. Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. Rev. 643 (1966). The study's authors concluded that sailors from Long Beach found themselves arrested for homosexual offenses not as real homosexuals, but as "'situational' violators who succumb[ed] to advances made by 'cruising' homosexuals." *Id.* at 690 & n.29. Nothing in the study supports the notion that the sailors should be construed as the hapless (truly heterosexual) victims of homosexual seduction—a logical deficit that proponents of outing would be quick to note. But neither is there any reason to conclude, as Mohr's logic would lead one to do, that the sailors were unequivocally homosexual. The same three categorical errors detectable in Mohr's analysis reappear in the Los Angeles study, although the second one is inverted: whereas Mohr infers rigid identity as gay from same-sex sodomy, the Project authors inferred rigid identity as heterosexual from a background history of heterosexual activity (cunningly deduced from enlistment in the U.S. Navy).

Acts do not translate, one-for-one, into identities. Once that equation is gone, it becomes difficult to maintain the corollary assumptions that the world properly provides two and only two sexual-orientation identities, and that heterosexuality is pure of sodomitic practice and homoerotic impulse. A practice of outing that avoids these categorical errors might be possible, ethically justifiable, and/or politically useful, but it would not look much like the practice of outing as we know it.

<sup>52</sup> On the possibility that self-ascription of heterosexual identity may be nonhypocritically maintained even by men who routinely engage in same-sex erotic contacts, see, e.g., Tomás Almaguer, *Chicano Men: A Cartography of Homosexual Identity and Behavior*, 3 *differences*

political possibility of alliances along a register of acts. And they rest on a categorical error: outing of this type merges acts discourse into identities discourse, and makes invisible the relative autonomy of each. It oversimplifies the meanings of sodomy.

Michel Foucault's famous periodization of sodomitical acts and homosexual persons has been widely misconstrued to confirm this powerful equation, but, read carefully, it provides a useful means of decoupling it. In the first volume of his *History of Sexuality*, Foucault claimed that the late nineteenth century saw "a new specification of individuals":

As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him . . . . It was consubstantial with him, less as a habitual sin than as a singular nature[,] . . . [and was] constituted . . . less by a type of sexual relations than by a certain quality of sexual sensibility . . . . The sodomite had been a temporary aberration; the homosexual was now a species.<sup>53</sup>

These celebrated lines do not explain what Foucault thought happened to sodomy after the great nineteenth-century shift from acts to sexualities. One reading, depending on the equation of sodomy with homosexual identity, assumes that sodomy (a regime of acts) was *transformed into* homosexuality (a regime of identities). Wherever this assumption operates, sodomy-the-act is thought to have been subsumed into homosexuality-the-identity; if sodomy nevertheless stubbornly reasserts its importance as a category of acts, the move is to save appearances by absorbing it into the newly invented personage of the homosexual.

An alternative reading of Foucault's paragraph assumes less, and leaves in place a more complex and more adequate set of analytic

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75 (1991); Ana Maria Alonso & Maria Theresa Koreck, Silences: "Hispanics," AIDS and Sexual Practices, 1 differences 101, 106-15 (1989); Albert J. Reiss, Jr., The Social Integration of Queers and Peers, in *The Other Side: Perspectives on Deviance* 181 (Howard S. Becker ed., 1964).

<sup>53</sup> Foucault, *supra* note 8, at 43.

categories for understanding the reasoning of sodomy. On this reading, the rhetoric of acts has not been evaporated or transformed; it has merely been displaced, set to one side and made slightly more difficult to discern by the rhetoric of identity.<sup>54</sup> Thus sodomy—even sodomy between two people of the same sex or gender—is not necessarily the equivalent of acts or of identities; it is now unstably available for characterization as a species of act *and/or* as an indicator of sexual-orientation personality. As Sedgwick has argued, the application of gender-neutral sodomy statutes in a culture that simultaneously punishes disfavored identities creates a “threat of . . . juxtaposition [that] . . . can only be exacerbated by the insistence of gay theory that the discourse of acts can represent nothing but an anachronistic vestige.”<sup>55</sup> And as Jonathan Goldberg argues, this “juxtaposition” is threatening because

sodomy, “that utterly confused category,” as Foucault memorably put it, identifies neither persons nor acts with any coherence or specificity. This is one reason why the term can be mobilized—precisely because it is incapable of exact definition; but this is also how the bankruptcy of the term, and what has been done in its name, can be uncovered.<sup>56</sup>

The volatility of sodomy appears when legislatures, courts, prosecutors, juries, voters, and public opinion attempt to determine which bodily acts come within its scope; and again when these players attempt to determine which sexual-orientation identities it governs. But a more complex range of flexibility is offered by the possibility that volatility of the first type is interlinked with volatility of the second. The Supreme Court’s decision in the *Hardwick* case itself provides a laboratory for exploring these complex links.

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<sup>54</sup> Foucault’s pronouncement does, however, insist that homosexual difference *did not exist* before the end of the nineteenth century. I am not at all sure that this claim has been shown. See Janet E. Halley, *Bowers v. Hardwick* in the Renaissance, in *Queering the Renaissance*, (Jonathan Goldberg ed., forthcoming 1993) (recommending “a certain skepticism [in] any project of reading the history of sodomy to decide when and where a homosexual, gay, lesbian, or queer subjectivity came into existence”).

<sup>55</sup> Sedgwick, *supra* note 10, at 47.

<sup>56</sup> Jonathan Goldberg, *Sodomy in the New World: Anthropologies Old and New*, 29 *Social Text* 46, 46 (1991) (quoting Foucault, *supra* note 8, at 101).

III. "HOMOSEXUAL CONDUCT" IN *BOWERS V. HARDWICK*

*Like gender, sexuality is political.*

—Gayle Rubin<sup>57</sup>

Justice White's majority opinion in *Hardwick* and the concurring opinion filed by Chief Justice Burger purport to be transparent frames through which we may behold not the Justices' contributions to the rhetoric of sexual acts and orientations, but those prepared beforehand by the people of Georgia and by Western civilization itself. Such transparency is a rhetorical posture; to resist it, to understand it *as* rhetorical, one must see the text of *Hardwick* as opaque. In this Part, I read *Hardwick* as a cultural gesture, a "social text," of a particularly authoritative kind. Rather than attribute to the majority Justices an analysis better than the one they have produced, this Part will examine *what they have in fact done* with the complex of act and identity described above—even at the cost of describing their work product as systematically incoherent. The fact that similar incoherencies have emerged elsewhere, before or since, does not relieve the severity and the cultural salience of an assertion from the apex of the federal judiciary.

The *Hardwick* decision set the stage for its peculiar contribution to act/identity incoherence, and for the posture the Justices would assume in the end, when it framed the question it would answer.<sup>58</sup> As all the dissenters and virtually every academic commentator on the case have noted, Michael Hardwick challenged a gender neutral sodomy statute on its face.<sup>59</sup> Georgia defined sodomy to be "*any sexual act* involving the sex organs of one person and the mouth or anus of another,"<sup>60</sup> thus imposing a facially neutral prohibition of the specified bodily contacts notwithstanding the gender of the actors. Not

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<sup>57</sup> Rubin, *supra* note 9, at 309.

<sup>58</sup> See Robert A. Ferguson, The Judicial Opinion as Literary Genre, 2 Yale J.L. & Hum. 201, 206-08 (1990) (arguing that "[t]he real creativity in a judicial decision lies in the question that judges decide to accept as the basis of their deliberations" and that this activity is a crucial mechanism of "[j]udicial self-fashioning").

<sup>59</sup> Critical examination of Justice White's refusal to consider the facial challenge raised by *Hardwick* and his focus on "homosexual sodomy" instead, began with Justice John Paul Stevens' dissenting opinion. *Hardwick*, 478 U.S. at 214 (Stevens, J., dissenting). For a sustained consideration of the implications of this point for litigation strategy, see Hunter, *supra* note 43.

<sup>60</sup> Ga. Code Ann. § 16-6-2 (Michie 1984) (emphasis added).

only is it not limited to "homosexuals," it does not even mention them. And yet the Court limited its review to the question

whether the Federal Constitution confers a fundamental right *upon homosexuals* to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.<sup>61</sup>

The by-now classic response to this move is to exclaim at the transparent fictionality of the Court's determination that the case involved homosexual sodomy. I have done this a number of times myself.<sup>62</sup> But to stop there is to oversimplify what is going on in the case. The majority Justices' deft manipulation of act and identity responded to Hardwick's own efforts to manage these elements by trapping Hardwick under the rubric "homosexual sodomy" and permitting heterosexual sodomy—and identity—to escape from view.

#### A. Plaintiff's Case

*Only politics could save you now.*

—William E. Connolly<sup>63</sup>

Justice White's designation of Hardwick's case as a claim for a right to engage in "homosexual sodomy" captures a tension that permeated Hardwick's litigation papers, which sought throughout to present a facial challenge to a facially neutral statute, and to acknowledge that Hardwick, as a homosexual, claimed protection due to all persons. The discourse of identities thus permeated Hardwick's own

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<sup>61</sup> *Hardwick*, 478 U.S. at 190 (emphasis added). In vigorous dissent, Justice Harry A. Blackmun denied that the majority had accurately described the right at stake: Hardwick's challenge, Justice Blackmun would have ruled, called for adjudication of the scope of "the right to be let alone," *id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); the right to "control[ ] the nature of [one's] intimate associations with others," *id.* at 206 (Blackmun, J., dissenting); and "the right . . . to conduct intimate relationships in the intimacy of [one's] own home . . ." *Id.* at 208 (Blackmun, J., dissenting).

<sup>62</sup> Halley, *supra* note 54; Janet E. Halley, *Misreading Sodomy: A Critique of the Classification of "Homosexuals" in Federal Equal Protection Law*, in *Bodyguards: The Cultural Politics of Gender Ambiguity* 351, 355 (Julia Epstein & Kristina Straub eds., 1991).

<sup>63</sup> *Identity/Difference: Democratic Negotiations of Political Paradox* 174 (1991). Describing the situation of a woman for whom female identity is "a relatively unimportant cultural artifact" and who attempts to escape its identification, Connolly observed that such attempts may "only succeed in getting you recognized as a deviant member of the category you resist, and this definition eventually enters somehow or other into what you actually become. Only politics could save you now." *Id.*

litigation of his claim; Justice White was not the first person to put it there. Instead, plaintiff's case was structured by a tension between the rhetoric of acts and the rhetoric of identity as they sought to capture the meaning of sodomy.

Hardwick was charged with sodomy after a Georgia police officer entered his bedroom and observed him engaged in mutual fellatio with another man.<sup>64</sup> This act of male-male sodomy was the only one in the record after the district court dismissed for lack of standing a married couple, John and Mary Doe, who alleged that they wished to engage in sodomy in the privacy of their home but were deterred from doing so by fear of prosecution.<sup>65</sup> When the Does appealed their dismissal, the Eleventh Circuit affirmed it.<sup>66</sup> The Does' claim to standing relied on an unsupported assertion that they were faced with a credible threat of prosecution, and in any event, their presence was not a prerequisite to Hardwick's facial challenge to the sodomy statute. In light of these circumstances, and unaware of the surprising rearrangement of act and identity that would be made by the majority Justices, the Does did not further challenge their dismissal when Georgia took Hardwick's claim to the Supreme Court on certiorari. Like any other person, Hardwick was entitled to challenge the statute facially, and to insist on adjudication directed to criminalization of certain bodily acts.

Framing that facial challenge in light of the act/identity dynamic produced two noticeably different strategies. A team of lawyers with the ACLU of Georgia, headed by Kathleen L. Wilde, litigated Hardwick's case before the district court and the Eleventh Circuit and filed the plaintiff's briefs before the Supreme Court arguing that Georgia's petition for certiorari should be denied.<sup>67</sup> After the Supreme Court

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<sup>64</sup> For details of the circumstances leading to Hardwick's arrest, see Peter Irons, *The Courage of their Convictions* 392-403 (1988); Thomas, *supra* note 24, at 1436-43; Rahel E. Kent, Case Comment, *Constitutional Law—An Imposition of the Justices' Own Moral Choices: Bowers v. Hardwick*, 478 U.S. 186 (1986), 9 Whittier L. Rev. 115, 130-32 n.101 (1987); Art Harris, *The Unintended Battle of Michael Hardwick*, Wash. Post, Aug. 21, 1986, at C1.

<sup>65</sup> *Hardwick*, 478 U.S. at 188 n.2.

<sup>66</sup> *Hardwick v. Bowers*, 760 F.2d 1202, 1206-07 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

<sup>67</sup> Brief of Respondents in Opposition to Petition for Writ of Certiorari, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140). For a discussion of the litigation history of *Hardwick*, see Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1612-17 (1993).



granted certiorari, Laurence Tribe and Kathleen Sullivan convened a new group of attorneys to handle the case.<sup>68</sup> Though both teams insisted on Hardwick's facial challenge, their approaches diverged.

Up to and including the briefs on the petition for certiorari, Hardwick's attorneys consistently framed his case as raising a question of homosexual rights, emphasizing his sexual-orientation identity and deemphasizing the acts for which he was arrested. In his complaint, Hardwick characterized himself as a "practicing homosexual,"<sup>69</sup> and his brief opposing Georgia's petition for a writ of certiorari stated that "as Hardwick regularly engages in private homosexual acts, and will do so in the future, he, like all other homosexuals in Georgia, is in imminent danger of arrest, prosecution, and potential imprisonment."<sup>70</sup> This formulation implicitly equates all "homosexual acts" with sodomy and subsumes them both under the rubric of homosexual identity. It subtly distinguishes sodomitical conduct from homosexual personhood and presents the latter to the court as its real concern. Hardwick's first strategy was therefore to call on the court to protect a group of persons from intimate invasion by making their acts a merely adventitious (in Aristotelian terms, an accidental) characteristic that renders them vulnerable to arrest. Though the early briefs emphasized Hardwick's continuing commitment to "homosexual acts," they were written to *hold at bay* the conclusion that a "practicing homosexual" is a sodomite.

Hardwick's second team of attorneys, pursuing a different strategy, worked to *exclude* that conclusion altogether. After certiorari was granted, Hardwick's attorneys consistently emphasized that his challenge was a facial one. Accordingly they recast Hardwick's claim with painstaking care as a bid for protection along the register not of identities but of acts—"the associational intimacies of private life in the sanctuary of the home."<sup>71</sup> Hardwick's Supreme Court brief acknowledged "homosexual sodomy" only once, and then it argued that Georgia's decision to prosecute selectively, targeting only homosexual sodomy, required "particularized explanation" above and

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<sup>68</sup> Brief for Respondent, *Hardwick* (No. 85-140).

<sup>69</sup> Complaint ¶ 4, Joint Appendix at 3, *Hardwick* (No. 85-140).

<sup>70</sup> Brief of Respondents in Opposition to Petition for a Writ of Certiorari at 1, *Hardwick* (No. 85-140).

<sup>71</sup> Brief for Respondent at 7, *Hardwick* (No. 85-140); see also *id.* at 2 n.2 (insisting that the sodomy statute is not limited to homosexual sodomy).

beyond the mere recitation of moral condemnation of homosexuality.<sup>72</sup> The brief attempted to distance the plaintiff from his identity as "homosexual" by designating it as part of the *state's* analysis rather than plaintiff's. Identity appears here in the defensive posture of a justification for discriminatory enforcement of a facially neutral statute challenged on its face.

The decision to alienate identity in this way reflects anxiety—amply justified in retrospect—about the relationship between Hardwick's entry into reasoning *as a homosexual* and his act of sodomy. Hardwick's Supreme Court briefs were drafted in the shadow of the possibility that sodomy can remain a "category of forbidden acts" and can form the object of a facial attack only if all mention of gay identity is excluded. If that possibility were to materialize, the briefs seem to suggest, Hardwick would emerge as "a homosexual" and simultaneously would claim sodomy as the peculiar province of "a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology . . . ."<sup>73</sup> And as Justice White's decision was soon to reveal, when identity captures Michael Hardwick's act of sodomy, it captures him too.

The almost Sisyphean struggles reflected in these briefs indicate a particular form of vulnerability borne by the "reasoning homosexual." Anyone occupying this position risks becoming the human sign that acts rhetoric and identities rhetoric are one and the same. Keeping these rhetorics apart may be the only way to resist the peculiar form that power takes when it appears, as it did in Justice White's majority opinion, as heterosexual reasoning.

### B. *The Majority and Concurring Opinions*

*I holde a mouses herte nat worth a leek  
That hath but oon hole for to sterte to.*

—The Wife of Bath<sup>74</sup>

While Michael Hardwick was subject to a terrible fixity at the crux of the act/identity intersection, Justice White and Chief Justice Bur-

<sup>72</sup> See Brief for Respondent at 13, 25-29, *Hardwick* (No. 85-140).

<sup>73</sup> Foucault, *supra* note 8, at 43; see *supra* note 53 and accompanying text.

<sup>74</sup> Geoffrey Chaucer, *The Wife of Bath's Prologue and Tale*, in *The Works of Geoffrey Chaucer* 81 (F.N. Robinson ed., 2d ed. 1957).

ger disaggregated these discourses.<sup>75</sup> By this means the majority Justices framed an unstable relationship between the rhetoric of acts, the rhetoric of identity, and Michael Hardwick's act of sodomy. Re-pointing the passage in which the Court presented its question indicates how the volatility of act and identity operate in this context. As Justice White informed us,

The issue presented is whether the Federal Constitution confers a fundamental right *upon homosexuals* to engage in *sodomy* and hence invalidates the laws of the many States that still make *such conduct* illegal and have done so for a very long time.<sup>76</sup>

What does the "such" of "such conduct" refer to? To sodomy generally? Or does it refer to sodomy as inflected by the homosexuals who do it?<sup>77</sup> When Justice White invoked a historical argument to justify rejecting the fundamental rights claim framed in this way, he found that "[p]roscriptions against *that conduct* have ancient roots"<sup>78</sup>—a conclusion that maintains a binocular vision of its object, hanging in delicate equipoise between act and identity.

Are "homosexuals" definitive of "such conduct" or not? These formulations (and others appearing throughout Justice White's opinion for the majority and Chief Justice Burger's concurring opinion) keep

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<sup>75</sup> It might be claimed that *Hardwick* does not support the close, rhetorical reading given it in this Part because the majority Justices considered the Georgia statute "as applied" to Hardwick's act of sodomy, which was concededly "homosexual." This approach to Justice White's and Chief Justice Burger's opinions is simpler than mine, to be sure, but it cannot account for two important features of their opinions. First, it cannot explain the Court's complete failure to note that the actual conduct to which the statute had been applied—male/male fellatio—was not transhistorically "sodomy," and instead provides an excellent starting point for deconstruction of the Court's historical claims. Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 Yale L.J. 1073 (1988); see *infra* text accompanying notes 116-42. Second, it cannot explain the Justices' interest in homosexuality—an interest which becomes so exuberant that they read Georgia's facially neutral statute to express a popular moral condemnation of "homosexuality." *Hardwick*, 478 U.S. at 196; see *infra* text accompanying notes 147-50. If the "as applied" theory cannot explain the Justices' treatment of acts or identities, it seems appropriate to seek a less parsimonious explanation.

<sup>76</sup> *Hardwick*, 478 U.S. at 190 (emphasis added).

<sup>77</sup> A similar split reference problem appears at the beginning of the Court's fundamental rights analysis, where Justice White proposed to test for "a fundamental right [of] *homosexuals* to engage in *acts of consensual sodomy*." *Hardwick*, 478 U.S. at 192 (emphasis added). When he then inquired into whether the Constitution created a fundamental right to engage in "*that conduct*," *id.* at 192 (emphasis added), he brought judicial attention to bear on an unsettled agglomeration of identity and conduct. See *id.* at 192-96.

<sup>78</sup> *Hardwick*, 478 U.S. at 192 (emphasis added).

the Court in suspense: it remains ready to answer yes *or* no. Sodomy can receive its definitive characteristic from the "homosexuals" who do it, or can stand free of persons and be merely a "bad act." The majority Justices have enabled themselves to treat sodomy as a metonym for homosexual personhood—or not, as they wish. The question Justice White sets out to answer is thus apparently single but actually multiple: "such conduct" represents not a purely act-based categorical system but an unstable hybrid one, in which identity and conduct simultaneously diverge and implicate one another.

A classic deconstructive claim at this point is to say that detecting the instability of the decision's figural structure undermines it and threatens to dissolve its claims to authority. Such a claim is implicit in the virtually ubiquitous conclusion that the *Hardwick* majority vitiated its credibility when it framed the question of the case. But such instability is not per se a source of weakness; in the majority and concurring opinions it can be seen instead as positively constituting the peculiar powers and securities belonging to the style of reasoning adopted by the majority Justices. That reasoning style produces not only certain ideas about sodomy, but also, through them, certain positions from which to reason about it, and especially a *heterosexual* position from which to reason about it. We can say the Justices occupied this heterosexual posture even though we know nothing about their personal erotic preferences. It is a public posture, a public identity, and a point of vantage in public discourse. Unlike *Hardwick's* position—fixed, exposed, visible in the klieg lights trained on the homosexual sodomite—the Justices' heterosexual position is fluid, hidden, ever retaining a rhetorical place to hide.

A comparison of the Court's fundamental rights holding with its application of rational basis review reveals the advantages of the majority Justices' labile strategy by exposing the systematic ways in which acts and identities generate incoherence and instability. In his fundamental rights analysis, Justice White (cheered on by Chief Justice Burger) exploited the rhetoric of acts to make plausible his claim that sodomy has been, transhistorically and without surcease, the object of intense social disapprobation. In the rational basis holding, on the other hand, Justice White moved into a rhetoric of identities, holding that Georgia's sodomy statute rationally implements popular condemnation of *homosexuality*. Even within these distinct and opposed arguments, however, the two rhetorics are interlocked: that

of acts implies and depends upon, even as it excludes, that of identities—and vice versa. The fundamental rights holding cannot actually constitute a coherent history of sodomy based on acts alone, for the acts that constitute sodomy are too various: Justice White achieves the appearance of coherence here only through persistent, implicit invocations of homosexual identity as the unifying theme of sodomy's prohibition. Conversely, his rational basis claim—that a facially neutral sodomy statute is reasonable because it makes a legitimate popular statement condemning homosexuality—is frontally incoherent. If the rational basis holding and its invocation of identity make sense at all, it is because they confer invisibility and immunity on a certain type of act. Indeed, heterosexual acts of sodomy are so thoroughly detached from the rhetoric of identity that those who do them are not even acknowledged as a class of persons.

The result of these arrangements is a chiasmic relationship shaped like this:

	Primary Rhetoric	Secondary Rhetoric
Fundamental Rights Holding	Acts	Identities
Rational Basis Holding	Identities	Acts

This diagram schematizes a double bind. In everyday language, you are in a double bind when you cannot win because your victorious opponent is willing to be a hypocrite and to “damn you if you do and damn you if you don’t.” More strictly examined, a double bind involves a systematic arrangement of symbolic systems with at least three characteristics. First, two conceptual systems (or “discourses”) are matched in their opposition to one another; one is consistently understood to be not only different from but the logical alternative of the other. Second, the preferred discourse actually requires the submerged one to make it work. It is at this point that a naive deconstructive claim is often made, that the secret inclusion of the nonpreferred discourse as a prerequisite for the smooth operation of the express one reveals the whole system to be fatally unstable. But third, that very instability can be the source of suppleness and resilience, because the two stacked discourses can be flipped: the one that was submerged and denied can become express, and it in turn can be

covertly supported by the one that was preferred. The master of a double bind always has somewhere to go.

But who is to be the master? As Sedgwick concludes in her examination of a much wider range of paired opposites, or "binarisms," than I am studying here,

rather than embrace an idealist faith in the necessarily, immanently self-corrosive efficacy of the contradictions inherent to these definitional binarisms, I will suggest instead that contests for discursive power can be specified as competitions for the material or rhetorical leverage required to set the terms of, and to profit in some way from, the operations of such an incoherence of definition.<sup>79</sup>

The majority Justices in *Hardwick*, having at their disposal quite a bit of "material [and] rhetorical leverage,"<sup>80</sup> were able to exploit the systematic instability of the act/identity system by treating it as a double bind. *Hardwick*, although his attorneys strove with steady insight to tame the act/identity problem, was cinched by the double bind in the end.

It does not always have to be that way. The denied and submerged element in a double bind provides a point for resistance. Several authors in this volume recommend that pro-gay analysis directly address the problem of acts—a focus that suggests a sense that acts must be evaluated as a potential place from which to articulate the claims of gay men, lesbians, and bisexuals as oppositional.<sup>81</sup> To be sure, the dominant group can at any moment make such resistance futile by flipping the system. And where the dominant group is willing, as were the majority Justices in *Hardwick*, to keep the paired dynamics of the double bind in action simultaneously, the danger of such destabilization is perpetually present, and imposes on the less powerful player a range of strategic options in which fluidity will always be at least potentially valuable.

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<sup>79</sup> Sedgwick, *supra* note 10, at 11.

<sup>80</sup> *Id.*

<sup>81</sup> Cain, *supra* note 67, at 1640-41; Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on The Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643 (1993); Nan D. Hunter, *Speech, Identity, and Equality*, 79 Va. L. Rev. 1695 (1993).

# 1. Fundamental Rights

*"When I started this, I didn't even know there was a sodomy law!"*  
—Michael Hardwick<sup>82</sup>

*"I had no idea that I was incriminating myself."*  
—James Moseley<sup>83</sup>

The linchpin of the Supreme Court's fundamental rights holding in *Hardwick* is a history of anti-sodomy regulation that, both Justice White and Chief Justice Burger claim, is univocal and continuous over time. Justice White wrote for the Court that Hardwick could assert no "fundamental right to engage in homosexual sodomy" unless he could show that the liberty he aspired to is "'deeply rooted in this Nation's history and tradition.'" <sup>84</sup>

Though the Court could have held for the state of Georgia on a finding that Hardwick had failed to make a positive showing that the liberty he claimed was so "deeply rooted," Justice White's decision set out to prove more: that the liberty Hardwick claimed has been transhistorically rejected. It represents "such conduct" as a stable, univocal signifier for act(s) that have a monolithic history: the states "still make such conduct illegal and have done so for a very long time."<sup>85</sup> And he went on to hold:

It is obvious to us that [the requirement that fundamental rights be "deeply rooted in this Nation's history and tradition"] would [not] extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all

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<sup>82</sup> Irons, *supra* note 64, at 402 (quoting Hardwick).

<sup>83</sup> Joyce Murdoch, *Laws Against Sodomy Survive in 24 States*, Wash. Post, Apr. 11, 1993, at A20. For a discussion of Moseley's conviction of consensual sodomy with his wife, see *infra* Appendix C: Cross-Sex Sodomy.

<sup>84</sup> *Hardwick*, 478 U.S. at 191, 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)) (emphasis added). Formally, White also asked whether the liberties asserted were "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." *Hardwick*, 478 U.S. at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)) (alteration in original). But Justice White devoted no separate analysis to this test and relied for his conclusion as to Hardwick's entire fundamental-rights claim only on the history of sodomy analyzed below. I join him in ignoring the standard stated in *Palko*.

<sup>85</sup> *Hardwick*, 478 U.S. at 190.

but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' . . . is, at best, facetious.<sup>86</sup>

Chief Justice Burger reached a similar conclusion: "there is no such thing as a fundamental right to commit homosexual sodomy" because to recognize such a right "would be to cast aside millennia of moral teaching."<sup>87</sup>

It is now commonplace to disparage the *Hardwick* Justices' performance as historians, though it is less common to specify what was wrong with it.<sup>88</sup> At first blush the problem with the Court's sweeping claim about the Georgia sodomy statute's "ancient roots" is simply that it rests on a single, unexamined secondary source, the University of Miami Survey.<sup>89</sup> Justice White's clerk gave only the lightest copy-editing to the Survey's conclusion that "[c]urrent state laws prohibiting homosexual intercourse are ancient in origin,"<sup>90</sup> and the Court adopts this posture of slavish dependency unwisely, as even a passing acquaintance with the relevant literature indicates.<sup>91</sup>

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<sup>86</sup> Id. at 192-94 (citations & footnotes omitted). I have deleted footnotes in which the Court painfully lists every state sodomy statute in effect in 1791 (when the Bill of Rights was ratified) and in 1868 (when the Fourteenth Amendment was ratified). I also delete a misleading footnote on the modern repeal of sodomy statutes: though 26 states had repealed their sodomy states by 1986, the Court cites only one. For a more accurate account of repeals, see *infra* Appendix B: Repeal of Sodomy Statutes in the United States.

<sup>87</sup> *Hardwick*, 478 U.S. at 196-97 (Burger, C.J., concurring).

<sup>88</sup> As Judge Posner correctly notes, the avalanche of law review commentary on *Hardwick* provides vastly more doctrinal than historical analysis. Posner, *supra* note 19, at 347. Anne B. Goldstein's article, with which I differ at some points in this Article, is a remarkable, pathbreaking exception—as Judge Posner has noted. See Goldstein, *supra* note 75; Posner, *supra* note 19, at 343 & n.49.

<sup>89</sup> Yao Apasu-Gbotsu, Robert J. Arnold, Paul DiBella, Kevin Dorsey, Elisa L. Fuller, Steven H. Naturman, Dung Hong Pham & James B. Putney, Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521 (1986) [hereinafter Survey].

<sup>90</sup> Id. at 525.

<sup>91</sup> The Survey authors included in their unbroken history of sodomy at least two periods in Western history in which same-sex conduct often classified as sodomitical was not merely tolerated but, in certain settings, socially approved: the ancient and the early medieval periods. Id. at 525. Thus the Survey purports to find what Plato "believed" about "homosexuality" in his *Laws*, id.; see Plato, *The Laws of Plato*, Book VII 835d-842a (Thomas L. Pangle trans.,



What gives structure to the Court's historiographical embarrassment is not the sheer bad scholarship represented by its uncritical

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1980)—and failed to mention his *Symposium*. See Plato, *On Homosexuality: Lysis, Phaedrus, and Symposium* (Benjamin Jowett trans., 1991). For considerations of the importance of the *Symposium* in the history of erotic relations between men, see K.J. Dover, *Greek Homosexuality* 11-13, 162-70 (1978); David M. Halperin, *Why is Diotima a Woman?*, in *One Hundred Years of Homosexuality and Other Essays on Greek Love* 113 (1990); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419, 1441 (1993); Morris B. Kaplan, *Constructing Lesbian and Gay Rights and Liberation*, 79 Va. L. Rev. 1877, 1885 (1993). Though the latter three studies were published after 1986, the first was readily available to the Survey authors and to the Court. Of course, they could have read the *Symposium* anytime.

The Survey authors asserted that "[t]hroughout the Middle Ages" sodomy was a capital crime equivalent to heresy, Survey, *supra* note 89, at 525—even though John Boswell's *Christianity, Social Tolerance, and Homosexuality*, published six years earlier, had made a strong argument that capital punishment of sodomy and its assimilation to heresy were legal innovations of the twelfth and thirteenth centuries, and that before that time same-sex unions were at least tolerated if not actively approved. John Boswell, *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* 296-302 (1980) [hereinafter Boswell, *Christianity*]. Boswell's book was widely reviewed, even in the popular press. See Jean Strouse, *Homosexuality Since Rome*, *Newsweek*, Sept. 29, 1980, at 79. Boswell's book received a well-publicized American Book Award from the Association of American Publishers, and was named a "best book" of 1980 by the *New York Times* Book Review. Paperbacks: *New and Noteworthy*, *N.Y. Times*, July 19, 1981, § 7, at 23; *Editors' Choice* 1980, *N.Y. Times*, Nov. 30, 1980, § 7, at 3. To be sure, Boswell's title and nomenclature aroused a great deal of controversy as to whether same-sex relations in pre-modern history can be described as "gay." For Boswell's position, see Boswell, *Christianity*, *supra*, at 44 (claiming that "gay people," defined as those who entertained a conscious erotic inclination to persons of their own gender, existed in the middle ages); John Boswell, *Revolutions, Universals, and Social Categories*, in *Hidden from History: Reclaiming the Gay and Lesbian Past* 17, 35 (Martin Duberman, Martha Vicinus & George Chauncey, Jr., eds., 1989) [hereinafter Boswell, *Revolutions*] (modifying the definition of "gay persons" to include those whose same-sex inclinations are not conscious). For an opposing view, see generally David M. Halperin, *One Hundred Years of Homosexuality*, in *One Hundred Years of Homosexuality*, *supra*, at 15. Much less substantial critical efforts were mounted to dislodge Boswell's more central claim, that same-sex relationships enjoyed wide latitude and even approval throughout Europe in the early middle ages. For one such critique, see J. Robert Wright, *Boswell on Homosexuality: A Case Undemonstrated*, 66 *Anglican Theological Rev.* 79 (1984). Even if the Survey authors or the Justices agreed with the reviewers of Boswell's study who rejected the claim that the early medieval period was a period of widespread tolerance of homosexuality, they should have understood themselves to be under some duty of scholarly care requiring an explanation of why they took a contested position. For a discussion on Boswell's later research on same-sex eroticism in the early middle ages in Europe, see Eskridge, *supra*, at 1451-53.

Other inaccuracies raise doubts about the Survey as an historical source. The problem of equating all same-sex conduct throughout history with gay identity is addressed at length in this Part; for an argument that slippages of act and identity should be understood to pervade the historical record, see Halley, *supra* note 54. Here I will detail only some inaccuracies affecting the Survey's representation of the actual punishments levied for sodomy in the

reliance on the Survey, however, but its handling of the act/identity problem in history. To claim that present sodomy statutes prohibit the same thing as ancient sodomy prohibitions and as the colonial proscriptions which Justice White so lovingly cited, is to promote formal sameness over radical historical discontinuity.<sup>92</sup> As the following

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Middle Ages. The Survey reported that "homosexuals" were burned at the stake by medieval ecclesiastical courts, Survey, *supra* note 89, at 525, ignoring the well documented institutional relationships of church and state, in which ecclesiastical officials, having convicted, handed the guilty party over to secular officials to be punished. Pollock and Maitland derive this tradition from the First Lateran Councils of 1179 and 1215, which concluded that "[t]he impenitent heretic when convicted by the ecclesiastical court is to be handed over to the lay power for due punishment." 2 Sir Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* 545 (2d ed. 1898). The punishment of sodomy, understood as a species of heresy, "was a subject for ecclesiastical cognizance, and apparently there was a prevailing opinion that, if the church relinquished the offenders to the secular arm, they ought to be burnt." *Id.* at 556. Whether in fact such a punishment was assigned, as Pollock and Maitland note, is another question: "As a matter of fact we do not believe that in England they were thus relinquished." *Id.*

Finally, though the Survey stated that capital punishment at the stake was consistently applied, it was not; less severe sanctions were more common. Pollock & Maitland, *supra*, at 556. The Survey depends for this point on Derrick Sherwin Bailey, *Homosexuality and the Western Christian Tradition* 146-47 (1955). See Survey, *supra* note 89, at 525 n.17. But on this very point Bailey asserts precisely the opposite: relying on the passage from Pollock and Maitland quoted above, Bailey concludes that "as a matter of fact persons in England who were guilty of homosexual acts were not . . . relinquished" by the Church to secular officials for capital punishment by burning. *Id.* at 147 (citing Pollock & Maitland, *supra*, at 556-57). More recently, James A. Brundage has concluded that the severity of punishment increased during the thirteenth century, but that even then the sanctions varied widely. James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 472-73 (1987). Ecclesiastical sanctions included fasting and other ascetic disciplines, expulsion from religious orders, and the requirement that penance be made not before an ordinary confessor but before a bishop. *Id.* To be sure, the municipalities provided for other corporal punishments, escalating in severity as the middle ages progressed: some alternatives were castration and hanging or hanging by "the virile members." *Id.* (citation omitted). But Brundage concludes that, during the late medieval period when these severe sanctions became available, they were rarely invoked: young offenders had to pay fines, and "[c]ase records show that the most horrendous statutory punishments were reserved for particularly vicious cases, such as homosexual rape[,] and that ordinary offenders were more likely to be whipped, fined and exiled." *Id.* at 534-35. For all the severity of the available sanctions, the actual social practices of punishing sodomy were various.

In sum, the Survey did no one a service by seeking to cram the entire history of sodomy into a single mold.

<sup>92</sup> The process was described by Oliver Wendell Holmes, Jr. as a "very common phenomenon":

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of the centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought

discussion of sodomy's various definitions in Georgia will indicate, the history of sodomy shows a startling variation in the kinds of physical acts deemed to be sodomitical. Moreover, even when the condemned act and the degree of condemnation are the same in two instances, the *identities* which the act is supposed to demonstrate, and which bring the act under disapprobation, have differed sharply: sodomy has been objected to not because of the sexual but the *political* personality of its supposed performers;<sup>93</sup> not for the erotic but the *religious* identity of those said to have done it.<sup>94</sup> And sodomy may not be inflected by

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of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

Oliver W. Holmes, Jr., *The Common Law* 5 (photo. reprint, Dover Publications, Inc., 1991) (1881).

<sup>93</sup> James A. Brundage, *The Politics of Sodomy: Rex v. Pons Hugh de Ampurias* (1311), in *Sex in the Middle Ages* 239, 243 (Joyce E. Salisbury ed., 1991) (concluding that the prosecution of Count Pons Hugh by James II of Aragon offers "another episode . . . in the political use of sodomy as an instrument of royal as well as ecclesiastical power"); Brundage, *supra* note 91, at 473 (finding that, in thirteenth- and fourteenth-century Europe, the "charge of sodomy became a more or less routine ingredient of political and social invective just when secular penalties for homosexual practices were becoming markedly more savage. . . . [I]f these charges also had some foundation in fact, that was a convenient coincidence"); Alan Bray, *Homosexuality in Renaissance England* 37 (2d ed. 1988) (arguing that early Stuart accusations of homosexual conduct actually targeted "the Court—the extravagant, overblown, parasitic Renaissance Court"); B.R. Burg, *Ho Hum, Another Work of the Devil: Buggery and Sodomy in Early Stuart England*, 6 *J. Homosexuality* 69, 77 (1980/81) (special edition of *Journal* entitled *Historical Perspectives on Homosexuality*, Salvatore J. Licata & Robert P. Petersen eds.) (concluding from a survey of seventeenth-century sodomy prosecutions in England that the decisions to prosecute same-sex conduct and to impose severe penalties for it were usually taken only "when public figures were involved and political motives were present").

<sup>94</sup> Consider an argument to the Lords assembled in London in 1631 to try Mervyn Touchet, Earl of Castlehaven, for sodomy and other offenses. Anticipating Castlehaven's defense to the sodomy charge that the essential element of penetration was unproven against him, the Lord Steward asserted that:

As to [the charge of sodomy] there is no other Question, but whether it be *Crimen Sodomiticum penetratione*, whether he penetrated the Body, or not; to which I answer, the Fifth of *Elizabeth*, sets it down in general Terms, and *ubi Lex non distinguit, ibi non distinguendum* [where the law does not distinguish, let there be no distinction made]; and I know you will be cautious how you give the least Mitigation to such abominable Sins; for when once a Man indulges his Lust, and Prevaricates with his Religion, as my Lord *Audley* has done, by being a Protestant in the Morning, and a Papist in the Afternoon, no wonder if he commits the most abominable Impieties; for when Men forsake their God, 'tis no wonder he leaves them to themselves.

The Tryal and Condemnation of Mervin, Lord Audley Earl of Castle-Haven., At Westminster, April the 5th 1631., For Abetting a Rape upon his Countess, Committing Sodomy with his Servants, and Connianding and Countenancing the Debauching of his Daughter (1699),

identities at all: it may be a species of bad act *simpliciter*, or be deemed bad because of other contextual factors that do not involve the articulation of contested identities.<sup>95</sup> The Court submerges all

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reprinted in *Sodomy Trials* 12 (Randolph Trumbach ed., 1986). Sir Edward Coke, in a roughly contemporaneous synthesis of British law, stated that penetration (but not necessarily emission) was then an essential element of felony sodomy. Edward Coke, *The Third Part of the Institutes of the Laws of England* 59 (London, E & R. Brooke, Bell-Yard 1797) (stating that "there must be *penetratio* that is, *res in re*"). Personhood thus functioned to redefine sodomy in Castlehaven's case, but it was religious, not sexual, personhood that was decisive.

<sup>95</sup> A substantial proportion of the historians of sexuality hold, with Foucault, that sodomy could not be about sexual personality before the late nineteenth century because sexual personalities did not exist before then. See, e.g., Halperin, *supra* note 91, at 15; Goldstein, *supra* note 75, at 1086-89. Even without the Foucauldian claim, however, substantial passages of sodomy's history exhibit more concern for acts than identities. James Brundage, who agrees with Boswell, see *supra* note 91, that homosexual persons were imaginable to medieval minds, nevertheless concludes that most doctrinal worries about sodomy focused not on the obligation to procreate but on the "unnatural" use of sex organs. Brundage, *supra* note 91, at 212-13, 241, 286-87. This act-based conception allowed "sodomy" to include heterosexual or homosexual anal intercourse, fellatio, or cunnilingus; intercrural sex; sexual contacts with animals; and even masturbation and the use of mechanical instruments for sexual pleasure. *Id.* Indeed, regulation of sodomy imagined as the misuse of the body thus occasionally included regulation of heterosexual, vaginal intercourse performed *a tergo*, with the man behind the woman. *Id.* at 161, 367, 473. If the prohibition of heterosexual, vaginal intercourse "more canino" is about identity at all, *id.* at 286, it is about generating a distinction between human and animal identity. See Peter Brown, *The Body and Society: Men, Women and Sexual Renunciation in Early Christianity* 432 (1988).

The treatment of potentially procreative intercourse as the equivalent of sodomy rears in Massachusetts' colonial records. Robert F. Oaks has gathered materials on a revealing sodomy case, tried in Massachusetts in 1641. Robert F. Oaks, *Defining Sodomy in Seventeenth-Century Massachusetts*, 6 *J. Homosexuality* 79 (1980/81) (special edition of *Journal* entitled *Historical Perspectives on Homosexuality*, Salvatore J. Licata & Robert P. Petersen eds.). The defendants were adult men, charged with repeatedly engaging in vaginal intercourse with two young sisters, one of them only seven years old. *Id.* Because the defendants refused to admit penetration, however, they could be tried only on an accusation of having engaged in masturbatory contacts with the girls ("*contactus et fricatio usque ad seminis effusione sine penetratione corporis*") or "contact and friction producing the emission of semen without penetration of the body"). *Id.* at 80. Massachusetts then had a capital prohibition of sodomy that tracked, word for word, the definition given in Leviticus: "If a man lyeth with mankind, as he lyeth with a woman, both of them have committed abomination[.]" See *id.* at 79 (quoting Leviticus 20:13). The legal question was whether the defendants could be capitally punished under this provision.

The defendants were severely punished but not put to death, as they would have been if the judges had been confident that the sodomy ban applied. Oaks, *supra*, at 81; 2 *Records of the Governor and Company of the Massachusetts Bay in New England* 12-13 (Nathaniel B. Shurtleff ed., Boston, William White 1853). The problem that vexed the judges, and the ministers from other states whom they consulted, seems to have been the lack of penetration. Sec 2 John Winthrop, *The History of New England from 1630 to 1649*, at 55-58 (James Savage ed., Boston, Little, Brown & Co. 1853) (reporting that most of the ministers consulted advised

these discontinuities, proposing, as the basis for its fundamental rights holding, a uniform history of sodomy throughout Western history.

That history, by default, is necessarily a history of sodomy not as various acts, but as *an act*. But because of the way Justice White framed the question before him, identities are always implicitly available as a rhetorical resource: "such conduct" can always escape its provisional meaning as a set of physical acts and recapture its reference to the "homosexuals" who are said to be its characteristic performers.<sup>96</sup> Indeed, if it does not—if sodomy remains an act attributable to any and all persons—the Court's reliance on a discourse of acts endorses the condemnation of the very heterosexual conduct which the Justices worked so hard to exclude from the question on review.

In a pioneering article on *Hardwick*, Anne B. Goldstein exposed the way in which the majority Justices thus trapped themselves in their own logic.<sup>97</sup> My reading of *Hardwick* depends pervasively on Goldstein's, but diverges from it by critiquing not only the content, but the method of the Court's history. Though Goldstein very deftly catches the Justices in their own double bind by forcing recognition that the Court's rationale cannot differentiate heterosexual sodomy, she does so by invoking a positivistic, objectively ascertained history of sodomy.<sup>98</sup> To insist on such an account of sodomy's history

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that the sodomy ban did not apply, apparently because "*there must be such an act as must make the parties one flesh*") (emphasis added); William Bradford, *Of Plymouth Plantation 1620-1647*, Appendix X (Samuel E. Morison ed., 1967) (printing letters from three ministers concluding that the sodomy statute did apply because penetration was not crucial). Oaks somehow concludes from these records that "many of the responding ministers clearly and understandably equated 'sodomy' with male-male sexual activity and found it difficult to apply the term to [this] case" because it involved heterosexual contacts. Oaks, *supra*, at 80-81; see also Jonathan Goldberg, *Sodomities* 240-41 (1992) (concluding that the rape of the girls was not sodomy because it was not found to be between male and male or male and animal). As Nan Hunter concludes after her own review of this case, Oaks and Goldberg seem to be mistaken. See Hunter, *supra* note 43, at 533-34. The more probable inference from the records, and the one drawn by Hunter, is that sodomy would have been interpreted to include what we would now call heterosexual child molestation and/or statutory rape if legally sufficient proof of vaginal penetration had been available.

<sup>96</sup> Compare Justice White's cagey declaration that "Proscriptions against that conduct have ancient roots," *Hardwick*, 478 U.S. at 192, with Chief Justice Burger's more blunt statement that "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization." *Id.* at 196 (Burger, C.J., concurring).

<sup>97</sup> Goldstein, *supra* note 75, at 1102-03.

<sup>98</sup> *Id.* at 1081-89.

excludes from consideration the crime's most salient characteristics: its mutability, its shiftingness, its plasticity, its volatility. A meta-historical approach to sodomy better reveals the ways in which its past is always a reflection of, and a rhetorical resource for, its present, and the ways in which precisely that rhetorical mirroring can expose the hidden artificer located in, and protecting, heterosexual identity. Concealment of heterosexual identity, even more than exposure of homosexual identity, is the product of *Hardwick's* historiography: only by examining the judicial historian's method can we detect the flickering relationship between sodomy and heterosexual identity.<sup>99</sup>

As Chief Justice Burger reminds us in celebratory cadences, sodomy is "a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'" <sup>100</sup> And as Samuel Pepys, a busy-bodied know-it-all ensconced in the governing elite of seventeenth-century London, wrote to his diary, "blessed be God, I do not to this day know what is the meaning of this sin, nor which is the agent nor which the patient."<sup>101</sup> *Not knowing* what sodomy is, *not naming* it at all, *not describing* it accurately, *not acknowledging* its presence, are all important parts of its historical profile. Obscurity is part of what sodomy is, a means by which it attains its social effects.

Pepys' is not a quaint and outdated posture. After *Hardwick* more acutely than before, ignorance of one's own vulnerability to a sodomy prosecution is a social privilege, a "privilege of unknowing."<sup>102</sup> *Hardwick* renders inhabitants of homosexual identity markedly less capa-

<sup>99</sup> I borrow the term "flickering" from Denise Riley's relentlessly subtle discussion of the instabilities that affect the identity "woman." Denise Riley, "Am I That Name?" *Feminism and the Category of "Women"* in *History* 96 (1988).

<sup>100</sup> *Hardwick*, 478 U.S. at 197 (Burger, J., concurring) (quoting 4 William Blackstone, *Commentaries* \*215).

<sup>101</sup> Randolph Trumbach, *The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern Culture, 1660-1750*, in *Hidden from History*, supra note 91, at 129, 131 (quoting 4 Samuel Pepys, *The Diary of Samuel Pepys* 209-10 (Robert Latham & William Matthews eds., 1971) (1663)). Brundage reports on twelfth-century penitential manuals which advise confessors "to be exceptionally careful in questioning penitents about these matters. Robert of Flamborough noted that his own practice in confession was to allude to unnatural sex only in the most vague and general terms, in order to avoid giving penitents ideas that had not already occurred to them." Brundage, supra note 91, at 399 (footnote omitted).

<sup>102</sup> See Sedgwick, supra note 10, at 4-5. Another example is *Stewart v. United States*, 364 A.2d 1205 (D.C. 1976), in which the defendant sought to make a discriminatory enforcement claim by adducing evidence that Washington D.C.'s facially neutral sodomy statute resulted in a higher incidence of arrests of homosexuals than heterosexuals. *Id.* at 1207. The claim nevertheless failed because the court found enforcement disparities to result from "the lack of

ble of retaining this privilege, and confers it more peculiarly on inhabitants of heterosexual identity. But as long as acts discourse has legitimacy, and sodomy between persons of the different sexes *is* sodomy, inhabitants of heterosexual identity can find their blithe immunity stripped away. The instability of act and identity that the majority Justices deployed in *Hardwick* thus both protects and exposes heterosexual identity. Heterosexual reasoning about sodomy is, ultimately, about managing that instability.

The Supreme Court's decision to base its fundamental rights holding in *Hardwick* on a history of sodomy made sodomy's historiography a crucial means of instability management, a point that is exemplified by the Court's misrepresentation of the history of sodomy in Georgia itself. Justice White's and Chief Justice Burger's opinions concluded with composure that sodomy was a crime at common law when, in 1784, Georgia adopted the common law of England.<sup>103</sup> Yet Georgian sodomy persistently resists arguments seeking to fix exactly what it was, and when.

Even the original moment of Georgia's prohibition is uncertain. As Goldstein points out, Georgia did not adopt an explicit statutory ban on sodomy until 1816 or 1817;<sup>104</sup> all Georgia did in 1784 was to adopt "the common laws of England, and of such of the statute laws as were usually in force."<sup>105</sup> Severe difficulties would have confronted the Justices had they made any effort to substantiate their claim that this provision encoded a law against sodomy. First, it cannot be conclusively shown that sodomy was a common law crime in England:

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knowledge by the police concerning heterosexual sodomitic acts." *Id.* at 1208 (emphasis added).

<sup>103</sup> *Hardwick*, 478 U.S. at 192 n.5; *id.* at 197 (Burger, C.J., concurring).

<sup>104</sup> Georgia's first statutory prohibition of sodomy appears to have been enacted in 1817. Act of Dec. 20, 1817, 3 Ga. Sess. Laws 61 § 35, 62 § 36, reprinted in Oliver H. Prince, A Digest of the Laws of the State of Georgia 350 (Milledgeville, Grantland & Orme 1822). It prohibited "sodomy and bestiality" without defining them. *Id.* An almost identical statute apparently was adopted in 1816, but according to the Georgia Court of Appeals in a 1949 decision, that statute never went into effect. See *Barton v. State*, 53 S.E.2d 707, 709 (Ga. Ct. App. 1949); Oliver H. Prince, A Digest of the Laws of the State of Georgia 619 n.\* (Athens, 1837). Justice White and Chief Justice Burger missed this nuance, *Hardwick*, 478 U.S. at 192 n.5 (White, J.); *id.* at 197 (Burger, C.J., concurring); Goldstein did not. Goldstein, *supra* note 75, at 1084 n.65.

<sup>105</sup> Goldstein, *supra* note 75, at 1084 n.65 (quoting An Act for Reviving and Enforcing Certain Laws Therein Mentioned, 1784, reprinted in R. Watkins, Digest of the Laws of Georgia 289 (Philadelphia, 1800)).

the sources in favor of this position are almost exclusively hornbooks summarizing English common law,<sup>106</sup> and decisions of state courts referring to the "common law crime" of sodomy or buggery as a source of authority for determining the scope of a state sodomy *statute* under challenge.<sup>107</sup> Moreover, the presence of a sodomy *statute* from the time of Henry VIII<sup>108</sup>—originating nonecclesiastical, civil jurisdiction over sexual offenses—would seem to argue that the crime was entirely statutory in nature, and that the "common law" of sodomy refers not to a separate source of authority but a tradition of statutory interpretation.

Assuming a common law crime of sodomy existed, it cannot be imagined as a brooding omnipresence in the sky: it necessarily underwent transformations in the colonies, which generally preferred to proceed by statute.<sup>109</sup> Any autonomous, nonstatutory common law tradition of sodomy's prohibition need not have survived the process. The conclusion so confidently offered by Justice White and Chief Justice Burger lacks the support of any evidence cited by the Court or its commentators to show that a common law prohibition of sodomy (assuming it existed) survived this transformation. Nor does it seem possible to claim with confidence that the English sodomy statute was "usually in force" in Georgia in 1784.<sup>110</sup> Evidence that proponents of the claim might offer in support is not decisive: Jonathan Ned Katz does report a sodomy conviction in Georgia in 1734,<sup>111</sup> but it is not clear how that bears on whether a sodomy proscription was "usually in force" in 1784, fifty years later.

Goldstein describes this record as "unclear" and tentatively concludes that "it appears that no proscription against buggery was 'in

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<sup>106</sup> Goldstein provides a list of seventeenth- and eighteenth-century treatises on the common law referring to sodomy as a common law crime. Goldstein, *supra* note 75, at 1082-83 n.62.

<sup>107</sup> See, e.g., *State v. Morrison*, 96 A.2d 723, 724-25 (N.J. Super. Ct. Law Div. 1953) (refusing to give the state sodomy statute a broader interpretation than that given to it "at common law"); *Herring v. State*, 46 S.E. 876, 881 (Ga. 1904) (rejecting limits placed on sodomy by "common law writers"). But see, e.g., *R. v. Wiseman*, 91 Fortes 91, 92 Eng. Rep. 774 (1716), which explicitly denies that "buggery" as prohibited by statute was a common law crime: "The word buggery made use of [in the statute], is not a term of art appropriated to the common law." 91 Fortes at 93, 92 Eng. Rep. at 775.

<sup>108</sup> 25 Hen. 8, ch. 6 (1533) (Eng.), reinstated by 5 Eliz., ch. 17 (1562) (Eng.).

<sup>109</sup> See Lawrence M. Friedman, *A History of American Law* 34-36, 90-93 (2d ed. 1985).

<sup>110</sup> See Goldstein, *supra* note 75, at 1084 n.65 (challenging Justice White's assertion to that effect).

<sup>111</sup> Jonathan N. Katz, *Gay/Lesbian Almanac: A New Documentary* 133, 680 n.67 (1983).



force' [in Georgia] at the time the Bill of Rights was adopted."<sup>112</sup> Even such a provisional conclusion should probably await further investigation, however. Deciding whether the 1784 statute incorporated a ban on sodomy through its adoption of English common law requires some definition of English common law. Lawrence Friedman argues that colonial common law, where it existed, emerged in inchoate ways from "remembered folk-law" and "norms and practices that the colonists adopted because of who they were—the ideological element."<sup>113</sup> Such sources could well have introduced incipient legal norms about sexual conduct that came to be understood and applied as common law. And what are the standards for determining that a statute is "usually in force?" Must there be prosecutions? Must there even be violations? To be sure, when in 1826 William Schley compiled the English statutes then in force in Georgia pursuant to the 1784 Act, he made no mention of sodomy.<sup>114</sup> Goldstein cites Schley's compilation as evidence suggesting that sodomy was not implicitly included in the 1784 Act,<sup>115</sup> but it is conceivable that Schley omitted sodomy because he thought the positive legislation promulgated in the years 1816 to 1817 was sufficient to displace any adoption of the English sodomy statute by the 1784 Act.

When an act is not fit to be named among Christians, a court seeking to find its first prohibition might be expected to have difficulty. But the real heavy lifting in the Supreme Court's management of sodomy's instability involves the scope of sodomy's prohibition. In *Hardwick*, the Court refused to specify what it steadfastly termed "sodomy." Although it set out to determine whether a right to commit sodomy was denied at constitutionally significant moments in the past, it failed to ask itself what an act of sodomy *is*. Throughout Justice White's footnote history of sodomy, and even more sweepingly in Chief Justice Burger's concurring opinion, sodomy is always and only "sodomy"; "homosexual sodomy" is treated as its equivalent, and no specification of bodily contacts is offered.

By this means the Court can hide—but just barely!—the problem exposed with great care by Goldstein: that *fellatio*, the act for which

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<sup>112</sup> Goldstein, *supra* note 75, at 1084 & n.65.

<sup>113</sup> Friedman, *supra* note 109, at 35.

<sup>114</sup> William Schley, *A Digest of the English Statutes in Force in the State of Georgia*, at vii (Philadelphia, J. Maxwell 1826).

<sup>115</sup> Goldstein, *supra* note 75, at 1084 n.65.

Hardwick was in fact arrested,<sup>116</sup> cannot be shown to have been sodomy in 1791 or 1868.<sup>117</sup> Instead the Court informs us that "Hardwick . . . was charged with violating the Georgia statute criminalizing sodomy by committing *that act* with another adult male . . . ."<sup>118</sup> As the Court proposes to use it, the term "sodomy" is not a general analytic category that includes more specific bodily acts; it is not a legal fiction devised to describe a set of physical practices; rather, it *is* the act: "sodomy" is what Michael Hardwick *did*. But Goldstein argues that, in many of the states Justice White cited for his claim of historical continuity, fellatio was not sodomy at the time the Bill of Rights and the Fourteenth Amendment were adopted.<sup>119</sup> Considering a series of cases, the earliest dated 1897, holding that oral-genital contact was not sodomy *then*, Goldstein infers that fellatio had not been sodomy *before* the cases were decided either.<sup>120</sup> The force of her argument is to break the continuity of sodomy upon which the Supreme Court's reasoning depends for its constitutional justification of the Georgia statute "as applied" to Hardwick's act of fellatio.

I think the legal historical record is too equivocal to support Goldstein's claim at full strength, as a positive statement of what happened. It is not just that I hesitate to conclude from cases decided after a certain date that the meaning they attribute to a statute constitutes a retroactive construction of its meaning before that date. More to the point, it appears that the volatility of sodomy wheels with particular rapidity around the question whether sodomy includes oral sex. Once confronted with the question in the late nineteenth and

<sup>116</sup> Irons, *supra* note 64, at 395.

<sup>117</sup> Goldstein was not able to find a single oral sex case decided before 1897 and my own research confirms that this may be the *terminus a quo*. See Goldstein, *supra* note 75, at 1085 n.71, 1086 n.74.

<sup>118</sup> *Hardwick*, 478 U.S. at 187-88 (emphasis added) (footnote omitted).

<sup>119</sup> Goldstein, *supra* note 75, at 1084-85 ("Courts in at least seven of the thirty-two states Justice White found to have 'criminal sodomy statutes in effect in 1868,' explicitly held that these statutes did not apply to oral-genital contact.") (footnote omitted) (quoting *Hardwick*, 478 U.S. at 193 n.6).

<sup>120</sup> *Id.* at 1085 n.71, 1086 n.74. Goldstein also argues that most state court decisions that *did* recognize oral sex to be sodomy, did so only after acknowledging that they could not do so without rejecting the "common law meaning of sodomy." *Id.* at 1086 n.74. Given the uncertainties affecting the status of common law sodomy, see *supra* text accompanying notes 106-11, it may be that these acknowledgements limit the retroactive inferences to be drawn from the cases in which they appear. One such case, Georgia's *Herring v. State*, 46 S.E. 876 (Ga. 1904), is strikingly equivocal on this point, as I attempt to demonstrate below. See *infra* notes 128-30 and accompanying text.

early twentieth centuries, state courts diverged sharply, though without generating any striking patterns, in their willingness to define fellatio as sodomy.<sup>121</sup> In some states, courts refused to interpret sodomy statutes to include cunnilingus or fellatio.<sup>122</sup> In many other states, courts were willing to take this step—even though their statutes were not discernably different in scope.<sup>123</sup> Georgia courts, with admirable inconsistency, did both.

Uncertainty pervaded Georgian sodomy even when the legislature did define it, in 1833, as “the carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman.”<sup>124</sup> It is only in the modern era that states have decided to put relentlessly asserted, but most often futile, void-for-vagueness challenges to sodomy statutes<sup>125</sup> to rest by adopting, as Georgia did in 1968, statutory language specifying the exact body parts that must not touch one another.<sup>126</sup> Where such amendments have not been adopted, obscure and highly general language describing sodomy keeps the tradition of sodomy’s unnameability alive. The gradient between the general language of a definition, and the specific referential acts deemed to fall within it, establishes a semantic of *multivocality*: like a roadsign that spins on its post, the general term has a

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<sup>121</sup> For two not entirely satisfactory efforts to taxonomize these developments, see Robert J. Evans, Note, *The Crimes against Nature*, 16 J. Pub. L. 159, 162-71 (1967); James R. Spence, *The Law of Crime Against Nature*, 32 N.C. L. Rev. 312 (1954) (reviewing the history of the North Carolina statute). One court sought but failed to find correlations between states’ willingness to include oral sex within the scope of their sodomy laws and their different forms of statutory language. *State v. Morrison*, 96 A.2d 723 (N.J. Super. Ct. Law Div. 1953). (The court in *Morrison* construed the criminal statute narrowly to limit the proscription against “crimes against nature” and “sodomy” to anal penetration in light of the principle of strict construction of criminal statutes. *Id.* at 727-28.)

<sup>122</sup> See *Morrison*, 96 A.2d at 725-26 (reviewing the practices in various states).

<sup>123</sup> See *id.* at 726-27.

<sup>124</sup> Penal Code, 4th Div., 1833 Ga. Laws. 83 § 36, reprinted in Oliver H. Prince, *A Digest of the Laws of the State of Georgia* 619 (Athens, 1837).

<sup>125</sup> Some courts have held “crime against nature” statutes void for vagueness. See, e.g., *Franklin v. State*, 257 So.2d 21 (Fla. 1971); *Harris v. State*, 457 P.2d 638 (Alaska 1969) (upholding sodomy conviction but not conviction for “crime against nature”). The Supreme Court has held, however, that such statutes are not void for vagueness. See *Rose v. Locke*, 423 U.S. 48 (1975); *Wainright v. Stone*, 414 U.S. 21 (1973).

<sup>126</sup> See, e.g., Georgia’s 1968 amendment: “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.” 1968 Ga. Laws § 26-2002 (codified at Ga. Code Ann. § 16-6-2(a) (Michie 1992)).

range of possible meanings, leaving open the possibility of nonce selections among them.

Georgian sodomy, both as state courts developed it in cases arising under the 1833 statute and as the Supreme Court represented it in its review of Georgia's more recently amended "body parts" statute,<sup>127</sup> exhibits the instability of this multivocal structure most clearly in the relation between sodomy and oral sex, particularly fellatio—precisely the act at issue in *Hardwick*. In its 1904 case *Herring v. State*,<sup>128</sup> the Georgia Supreme Court had to decide whether the state's 1833 Act included fellatio.<sup>129</sup> The court, coyly describing the conduct involved as an "infamous act . . . committed . . . not per anum, but in even a more disgusting way,"<sup>130</sup> held that it was criminal sodomy. This appears to be the first such holding in Georgia, and the court was clearly concerned (as the *Hardwick* Court would be eighty-two years later) to avoid the appearance of improvisation. It worried that various authorities on the English common law excluded fellatio from the definition of sodomy, but proceeded to hold that the lack of a positive historical basis for its holding was of no importance because present views could be imputed to past courts:

After much reflection, we are satisfied that, if the baser form of the abominable and disgusting crime against nature—i.e., by the mouth—had prevailed in the days of the early common law, the courts of England *could well have held* that form of the offense *was* included in the *current definition* of the crime of sodomy. . . . We therefore think that it made no difference in this case whether Herring . . . had in mind the one or the other form of the crime [when he made the false accusation of sodomy upon which his perjury conviction was based].<sup>131</sup>

Reading "through" this passage, and ignoring the specific language in which it is couched, would permit one to construe it as a commonplace application of a general "principle" of sodomy to the specific facts presented by a novel case involving fellatio. But that would be to ignore the droll, and suggestive, disruption of chronological sequence in the highlighted passages. The court presents us with

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<sup>127</sup> Id.

<sup>128</sup> 46 S.E. 876 (Ga. 1904).

<sup>129</sup> Penal Code § 36.

<sup>130</sup> *Herring*, 46 S.E. at 881.

<sup>131</sup> Id. at 881-82 (emphasis added).

what amounts to a prediction of the past on the basis of the present: it determines that putative English common law courts convened centuries before *could have held* that oral sex *was then* included in Georgia's 1833 statute!<sup>132</sup>

Where a present construction of a figure of the past is treated *as* the past, a traditionalist court can innovate without angst. It is but a step from *Herring* to *Hardwick*, where Justice White refuses to invalidate "the laws of the many States that *still* make such conduct illegal and [then? therefore?] *have done so for a very long time*."<sup>133</sup> The open texture created by sodomy's multivocality allows this investment of the present into the past to proceed unimpeded by firm definitional limits, and thus offers a means not only of maintaining, but also of hiding, its volatility.

A close look at the subsequent history of Georgian sodomy provides further instances in which the revolving door between present and past spins on its axis. After *Herring*, the Georgia Court of Appeals held in *Comer v. State*<sup>134</sup> that the 1833 sodomy statute's specific terms—"carnal knowledge and connection . . . by man . . . in the same unnatural inamier with woman"—also prohibited cunnilingus performed by a man on a woman.<sup>135</sup> And yet, in *Thompson v. Aldredge*,<sup>136</sup> the Georgia Supreme Court held that the same statute did not encompass cunnilingus committed by two women.<sup>137</sup> This created the intolerable anomaly that a man and a woman were subject to life imprisonment for doing together an act two women could indulge in with impunity. Decades later this anomaly was removed, when the state supreme court in *Riley v. Garrett*<sup>138</sup> reversed *Comer* and held that heterosexual cunnilingus was not sodomy in Georgia.<sup>139</sup>

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<sup>132</sup> I am reminded of my dissertation advisor's anxiety that one of his students would set out to write about Wordsworth's influence on Milton. Wordsworth's epic *The Prelude* was published posthumously in 1850, within months of his death. English Romantic Writers 169, 212 (David Perkins ed., 1967). Milton published his first epic, *Paradise Lost*, in 1674. John Milton, *Paradise Lost: A Norton Critical Edition* (Scott Ellege ed., 2d ed. 1993). Once one has read them both, it is hard to prevent Wordsworth's nineteenth-century poem from acting as an influence on Milton's seventeenth-century one.

<sup>133</sup> *Hardwick*, 478 U.S. at 190 (emphasis added).

<sup>134</sup> 94 S.E. 314 (Ga. Ct. App. 1917).

<sup>135</sup> *Id.* (quoting the 1833 statute).

<sup>136</sup> 200 S.E. 799 (Ga. 1939).

<sup>137</sup> *Id.* at 800.

<sup>138</sup> 133 S.E.2d 367 (Ga. 1963).

<sup>139</sup> *Id.* at 370.

None of these decisions resolves the problem of whether Georgian sodomy included oral-genital contacts in 1868, when the Fourteenth Amendment was adopted.

What happened next points more directly to the inextricable involvement of the present in sodomy's past. Within five years after *Riley* the Georgia legislature amended the 1833 statute, issuing the present prohibition on all oral-genital and genital-anal contacts notwithstanding the gender of the participants.<sup>140</sup> This statute clearly has the effect of reversing *Riley* and *Aldredge*. But what does this change tell us about the meaning of the 1833 Act? Does it tend to prove that fellatio and cunnilingus were always already sodomy in Georgia, or that the legislature has just now added them to the roster of sodomitical acts? The legislative history not only fails to answer these questions but also reproduces the *Herring* court's equivocal relations between present and past.

The legislature's stated rationale for the 1968 amendment squints, looking to both continuity and innovation for justification:

Although appearing widely dissimilar to present Georgia provisions, the proposal on sodomy *substantially restates, in modern language, the prevailing law* with respect to sodomy.

*Added* to the coverage of the proposal are Lesbian acts of sexual gratification. *The omission of these situations* has been commented on adversely by past judicial decisions where the court has felt itself obligated to follow the reading of [the 1833 statute].<sup>141</sup>

Does the new statute substantially restate the old one, or add new actions to its coverage; and if the latter, were those acts omitted from the old statute because of its narrow scope or because of narrow readings conferred on it by grudging courts? The legislative history answers none of the really interesting questions about the 1968 Act, and thus none of the crucial ones about the 1833 Act.<sup>142</sup>

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<sup>140</sup> 1968 Ga. Laws § 26-2002 (codified at Ga. Code Ann. § 16-6-2(a) (Michie 1992) ("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.")).

<sup>141</sup> Ga. Code Ann. Ch. 26-20 (1968) (Committee Notes).

<sup>142</sup> The most relevant canons of statutory interpretation cut both ways as well. First, the canonists tell us, "any material change in the language of the original act is presumed to indicate a change in legal rights," so that "it is presumed that the provisions added by the amendment were not included in the original act." 1A Norman J. Singer, *Sutherland Statutory Construction* § 22.30 (4th ed. 1985) [hereinafter *Sutherland*]. They also tell us, however, that no purpose to change the law "is indicated by the mere fact of an amendment of

The *Herring* decision, the subsequent shifting judicial interpretations of the 1833 statute, and the contradictory inferences created by the 1968 amendment all undermine any assumption that the 1833 statute had a single determinate meaning when it was adopted, at any one time thereafter, or over the entire fool's progress of its (non)reformulation. That is, these moments in the history of sodomy in Georgia threaten the idea that sodomy has a history.

The volatility of sodomy is a problem. Goldstein tames it by giving sodomy a clearer historical transformation than the record will support. The Supreme Court goes to the other extreme. It exploits sodomy's volatility by eliding the acts into which sodomy dis- and re-aggregates. The centrifugal forces of sodomy's internal differences are there within the field of the Court's decision, even though the Court does not explicitly mention them. Ultimately, the only coherence the Court can offer depends not on its express acts discourse, but on intermittent, and often only implicit, invocation of persons as bearers of sexual identity.

What gives definitional coherence to the *Hardwick* Court's sodomy, and makes possible its legally crucial equation of past with present prohibitions, is not conduct (for the classes of conduct defined as sodomy are mutable) but the *person of the homosexual*. The Court's apparent focus on acts, that is, depends on a less obvious focus on persons. Its strict act-based traditionalism covertly supplies a transhistorical homosexual person who has always (Justice White implies) been the real target of legal condemnation and who alone can

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an ambiguous provision," *id.*, a principle of interpretation that might apply if the explicit naming of body parts is seen as an effort to make less ambiguous the 1833 terms "carnal knowledge and connection against the order of nature." Penal Code § 36; see *supra* note 124. Moreover, the canons of statutory interpretation continue, "the time and circumstances surrounding the enactment of the amendment may indicate that the change wrought by the amendment was formal only—that the legislature intended merely to interpret the original act." *Sutherland*, *supra*, § 22.30. Such "time and circumstances" may be supplied by the Georgia legislature's relatively swift action after the *Riley* decision came down: "If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change." *Id.* § 22.31.

Of course, reciprocal cancellation is a feature of statutory interpretation under the recognized interpretive canons. See Karl Llewellyn's celebrated send-up of the canons: Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 *Vand. L. Rev.* 395, 401-06 (1950). My argument here concerns the particular effect of this indeterminacy in the context of sodomy statutes and their historiography.

unite within the tentative grasp of logical coherence the vast array of different sodomy statutes and of different sorts of conduct which the Court treats as the same.

The fundamental-rights holding's express discourse of acts displays *heterosexual* identity in equally crucial but diametrically opposed ways. First, and most noticeably, the Justices only fleetingly acknowledge heterosexual identity. But second, heterosexual identity is the location from which the Justices decide the case without appearing to. The very dynamic that Goldstein criticizes as a failure of logical consistency that traps the Justices in their own positivist history can also be described as a peculiarly resilient and supple form of rhetorical activity, in which heterosexual identity makes possible the Justices' self-fashioning as the exemplars of judicial restraint. By insisting that sodomy is nothing but a species of act and that as such it is identical to itself over time, Justice White pretends that his decision plays no intervening role in the history of sodomy, that he merely defers to past decisions about it. Framed as a case about mere bodily acts and not messy, contested, relentlessly political identities, *Hardwick* purports to take the Justices out of politics. Inasmuch as it is about acts and not identities, their ruling is a gesture of deference to majority sentiment. They carry their posture of neutrality so far that they even claim to refrain from deciding whether criminal prohibitions of "sodomy . . . between homosexuals in particular, are wise or desirable."<sup>143</sup> Far from acting on anti-gay animus, they are, they say, evenhandedly indifferent to *all* sexual-orientation identities; they claim to be equally without a view "on whether laws against sodomy between consenting adults in general . . . are wise or desirable."<sup>144</sup> While the fundamental rights holding, with its express reliance on a discourse of acts, ultimately confers on homosexuals and homosexuality glaring and definitive identities, heterosexuals and heterosexuality disappear from view, and take the Justices with them.

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<sup>143</sup> *Hardwick*, 478 U.S. at 190.

<sup>144</sup> *Id.*



## 2. Rational Basis Review

*"From up until the time I was in the eighth or ninth grade, I didn't really like girls, wasn't interested in them. . . . If I had [had] a counselor who was predisposed in that way, he could have easily convinced me: 'You're one of us. We like guys.'"*

—Will Perkins<sup>145</sup>

**"QUALIFIED, COMMITTED, AND . . . MORE LIKE YOU!"**

—Advertisement for Wayne Jacobs, candidate for  
Maine House of Representatives, Fall, 1990.<sup>146</sup>

In its fundamental rights holding, the *Hardwick* Court pursues an act-based approach that both distinguishes itself from and depends upon an identity-based approach. The identity that does the work is that of the homosexual, definitionally limited to the sodomy he or she does. In the *Hardwick* decision's rational basis holding, a symmetrical but opposite pattern appears: here, the explicit justification for refusing Michael Hardwick's claim is the rhetoric of identity; a rhetoric of acts actually underlies that logic; and the implied actor is the *heterosexual sodomite* whose invisibility is the linchpin of the whole argumentative structure.

The rational basis holding in *Hardwick* is nothing less than astonishing:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be

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<sup>145</sup> Dirk Johnson, "I Don't Hate Homosexuals," N.Y. Times, Feb. 14, 1993, at A10 (quoting Will Perkins, head of Colorado for Family Values and leading proponent of Colorado's Amendment 2).

<sup>146</sup> Campaign Literature (on file with the Virginia Law Review Association). Jacobs' opponent in Maine's District 91, Representative Susan Farnsworth, was publicly known to be a lesbian and was a leading proponent of a bill seeking to include sexual orientation as a prohibited ground of discrimination in Maine's Human Rights Act. Telephone Interview with Maine Representative Susan Farnsworth (Sept. 13, 1993). Jacobs urgently denied that the bumper sticker referred to Farnsworth's sexual orientation, but, according to Farnsworth's staff members, that is not how many voters construed it. *Id.* Farnsworth went on to win the contested seat with 60% of the vote and is now in her third term in the Maine House of Representatives. *Id.*

invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.<sup>147</sup>

This is the core of the decision's representation of reasoning about sodomy, as it probes for the popular purpose—the public choice—that the sodomy statute reflects. That public choice is a moral one: the “moral choice[ ]” to regard “homosexual sodomy [as] immoral and unacceptable.”<sup>148</sup> Indeed, this moral decision runs beyond the discourse of acts right into the heart of identity: Georgia's sodomy statute is said to arise from and be rationally justified by “majority sentiments about the morality of *homosexuality* . . . .”<sup>149</sup> An attempt to justify a facially neutral sodomy statute by invoking the immorality of *homosexuality* might be said to lack the minimum indicia of reasoning. Tracing the interlocked meanings of this construction of acts for homosexual and heterosexual identity, however, can make this passage make sense of a grim kind.

Justice White crafted the rational basis holding in part as an act of ventriloquism, in which Hardwick (designated “respondent”) is given the lines of the Attorney General of Georgia. It was Michael Bowers, not Michael Hardwick, who claimed that Georgia's facially neutral sodomy statute reflected a rational public disapprobation of homosexuality.<sup>150</sup> Voicing this argument through Michael Hardwick allows the Court to temper its attribution of truth-value to the claim: it is merely a “presumed belief.” The voice of official heterosexuality is protected in this way not only from being exposed as the proponent of a risible claim, but also from being represented as believing it.

This protection of heterosexual identity allows the Court's rational basis analysis to make sense. The view that sodomy is a category of acts undifferentiated by identity, when viewed in light of Georgia's statute criminalizing all such acts, creates unacceptable consequences for inhabitants of heterosexual identity as the Court constructs them. *Heterosexual* acts are prohibited by the Georgia sodomy statute and, notably, by virtually identical statutes in force when the Justices ren-

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<sup>147</sup> *Hardwick*, 478 U.S. at 196.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (emphasis added).

<sup>150</sup> Brief of Petitioner at 34-35, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

dered their decision not only in Washington D.C., but also in Virginia and in Maryland, where presumably several of the majority Justices spent their most intimate hours.<sup>151</sup> By reasoning that the Georgia statute plausibly supports an anti-homosexual morality, the Justices engage in masking their own status as potential sodomites *even if* they never stray from the class of heterosexuals. Invisibility here is immunity; and an important part of the rationality of sodomy is to interpellate a reasoning heterosexual who responds to this call—this “Hey, you there!”—designating him or her as having a legitimate, state-sanctioned interest in seeking and maintaining immunity of this kind.

#### IV. CONCLUSION

As a conceptual matter, criticism of *Hardwick* isolates itself by posing the questions whether the Court’s analysis is more fundamentally act-based or identity-based, and whether it can be better refuted from an act- or identity-based position. It is the unstable relationship between act and identity—not the preference of one to the other—that allows the Justices to exploit confusion about what sodomy is in ways that create opportunities for the exercise of homophobic power, and that create in particular the heterosexual subject position from which the opinion’s reasoning issues.

Heterosexual identity as it is implied by the *Hardwick* Court’s rational basis holding is (1) immune from the stigma and vulnerability of sodomy understood as a species of identities regulation; and (2) subject to the stigma and vulnerability of sodomy understood as a species of acts regulation. It is therefore (3) unstable, provisional, internally volatile—both sodomitical and not-sodomitical; and (4) able to maintain its appearance of coherence and its status of immunity by remaining *invisible*. The conceptual complexity of heterosexual superordination thus produced should be reflected in pro-gay strategic analysis.

Any attempt to exploit the rhetorical possibilities created as *Hardwick* becomes part of our legal and extra-legal culture and should embrace the multiplicity of strategies adopted by the Court. Anti-homophobic strategy should look *both* to identities *and* to acts as con-

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<sup>151</sup> D.C. Code Ann. § 22-3502 (1981) (repealed by D.C. Act 10-23 (D.C. Code Supp. 1994)) (copy of Enrolled Original on file with the Virginia Law Review Association); Md. Ann. Code art. 27, §§ 553-54 (1982); Va. Code Ann. § 18.2-361 (Michie 1982).

ceptual locations for opposition. More specifically, it is time to recognize that further destabilizing the identity "heterosexual" is an important goal that can be partly accomplished by an emphasis on acts. The subordinating dynamics that generate social privilege for its members will require that we deal directly with acts rhetoric.

To do so, however, those of us who inhabit gay and lesbian identity must loosen our grip on these identities, and admit into the field of our self-identification a cross-cutting set of identities founded on acts. This is a grave and dangerous move for a hated minority rhetorically involved in a double bind. Gay men, lesbians, and bisexuals must organize insistently around their stigmatized identities in order to remain players in the social process of giving those identities meaning, and in order to consolidate a recognizably "minority" movement in pluralistic politics. Moreover, as Anne B. Goldstein and Mary Ann Case quite correctly point out in commentaries in this volume, if gay men, lesbians, and bisexuals develop political and legal strategies emphasizing acts, they open themselves to attacks insisting on identities with renewed vigor: an antisodomy campaign that depended on an alliance of sodomites, both heterosexual and homosexual, might well merely set the stage for an anti-gay strategy purchasing the quiescence of heterosexuals by isolating homosexual sodomy for distinctively unfavorable treatment.<sup>152</sup>

This is simply to say that no double bind can ever be safe for the player with less power. It is not at all clear as a theoretical matter whether, in a particular situation, the subordinated party to a double bind should contest the superordinated party's preferred discourse (here, of acts or of identities) by attempting to capture it or by repairing to the opposed discourse. But these provisos do not justify staying rigid when your opponent is fluid, or ignoring the ways in which acts, like identities, can be described and deployed in ways that undermine (even as they undergird) homophobic rhetoric. In this connection it is important to recall that the last two sodomy statutes invalidated by

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<sup>152</sup> See Anne B. Goldstein, Reasoning About Homosexuality: A Commentary on Janet Halley's "Reasoning About Sodomy: Act and Identity In and After *Bowers v. Hardwick*," 79 Va. L. Rev. 1781, 1804 (1993); Case, *supra* note 81, at 1689-93.

legislative repeal were, at the time they were rejected, facially neutral.<sup>153</sup>

Two benefits emerge from an emphasis on acts, one material and one symbolic. First, it can engage anti-homophobic heterosexuals, providing a place for them in gay, lesbian, bisexual, and queer movements and making possible a range of alliances capable of diversifying *heterosexual* identity by displaying its multiple relationships to sodomy—both cross-sex and same-sex. Second, it forces heterosexual identity to share some of the glaring light that shines, thanks to *Hardwick*'s privacy holding, on the profane homosexual bed, and exposing the immunity which invisibly gives heterosexuality its rationale. These goals are important enough that pro-gay advocates should pursue them even at the expense of a rigid—and, as it happens, also unsafe—loyalty to identities.

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<sup>153</sup> The Washington, D.C. statute repealed this year was facially neutral, see *infra* note 164 and accompanying text; the Nevada statute had been amended to be facially neutral by the same legislature that then repealed it. See *infra* notes 165-66 and accompanying text.

## APPENDIX A

*Foreclosure of Pro-Gay Political Activity*

Anti-gay conservatives have advanced a number of proposals ranging from bans on state or local antidiscrimination for gay men, lesbians, and bisexuals to positive requirements of state or municipal discrimination against them.

Colorado's Amendment 2, now encoded as part of Colorado's Bill of Rights, provides that the state shall not acknowledge "homosexual, lesbian or bisexual orientation, conduct, practices or relationships . . . [as] the basis of . . . any minority status, quota preferences, protected status or claim of discrimination."<sup>154</sup> This provision would invalidate a number of existing local ordinances banning discrimination on the basis of sexual orientation, and would render extinct meaningful public debate, at the municipal or the state level, about the propriety of similar laws. Section 30b is currently subject to a preliminary injunction.<sup>155</sup>

An even more drastic initiative, Oregon's 1992 Ballot Measure 9, would have required positive state discrimination against gay men, lesbians, and bisexuals. The initiative proposed to amend the state constitution to prohibit state recognition of "sexual orientation" in any antidiscrimination program, to prohibit the use of state facilities to "promote, encourage, or facilitate homosexuality," and to require all state agencies and departments to demonstrate to young people that homosexuality is "abnormal, wrong, unnatural, and perverse."<sup>156</sup> Although Measure 9 was defeated at the polls, similar ordinances more recently have passed in several Oregon counties and towns.<sup>157</sup> Initiatives similar to Amendment 2 and Measure 9 are a growth industry in anti-gay politics, and emphasize the importance of a self-consciously *political* pro-gay movement.

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<sup>154</sup> Colo. Const. art. 2, § 30b (1993).

<sup>155</sup> *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

<sup>156</sup> Timothy Egan, *Oregon Measure Asks State To Repress Homosexuality*, N.Y. Times, Aug. 16, 1992, at A1, A34 (reprinting text of proposed amendment).

<sup>157</sup> Timothy Egan, *Voters in Oregon Back Local Anti-Gay Rules*, N.Y. Times, July 1, 1993, at A10; see also *Concord's Anti-Gay Measure Voided*, S.F. Daily J., Nov. 17, 1992, at 2 (reporting that the court in *Bay Area Network of Gay and Lesbian Educators v. City of Concord* (No. C9105455) invalidated a Concord, California, ordinance prohibiting local antidiscrimination legislation); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 650-51, 661 (Cal. Ct. App. 1991) (upholding the decision of the City Council of Riverside, California, that a ballot initiative similar to Oregon's Measure 9 proposed an invalid exercise of municipal power, and could not be placed on the local ballot).

## APPENDIX B

*Repeal of Sodomy Statutes in the United States*

After a long period when judicial repeal by state courts seemed unachievable, litigators and courts are making headway again. Judicial repeals achieved in New York and Pennsylvania in 1980 have been followed in the 1990s by similar holdings in Kentucky, Texas, and Michigan.<sup>158</sup> It would be easy to overstate the reach of judicial repeal in Massachusetts. Massachusetts has two relevant statutes, section 34 of title 272, prohibiting "crime against nature,"<sup>159</sup> and section 35, prohibiting "unnatural and lascivious act[s]."<sup>160</sup> Constitutional litigation has generated what might be called a judicial repeal only of the latter.<sup>161</sup>

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<sup>158</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487, 488, 491-92 (Ky. 1992) (holding that Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1990), a homosexual sodomy prohibition, is invalid under state constitutional law); *State v. Morales*, 826 S.W.2d 201, 202, 204-05 (Tex. Ct. App. 1992) (invalidating Tex. Penal Code Ann. § 21.06 (West 1989), a homosexual sodomy prohibition, under the state constitutional guarantee of privacy); *Michigan Organization for Human Rights v. Kelley*, No. 88-815820 CZ, slip op. at 12 (Mich. Cir. Ct. July 9, 1990) (invalidating Mich. Comp. Laws Ann. §§ 750.158, 750.338, 750.338a, and 750.338b (West 1991) as an infringement of privacy rights guaranteed by the state constitution when applied to consensual activity in the home); *People v. Onofre*, 415 N.E.2d 936, 938-39 (N.Y. 1980) (invalidating N.Y. Penal Law §§ 130.00(2) and 130.38 (McKinney 1987), proscribing "consensual sodomy" defined to include all penis-anus and oral-genital contacts, as an infringement of federal constitutional rights to privacy and equal protection; and vacating convictions for same-sex and cross-sex sodomy), cert. denied, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 415 A.2d 47, 48-50 (Pa. 1980) (invalidating 18 Pa. Cons. Stat. Ann. §§ 3101, 3124 (1973), prohibiting "deviate sexual intercourse" defined to include nonmarital sexual intercourse "per os or per anus," as beyond the scope of the police power and an infringement of state and federal equal protection guarantees).

<sup>159</sup> Mass. Gen. Laws Ann. ch. 272, § 34 (West 1990).

<sup>160</sup> *Id.* § 35.

<sup>161</sup> In *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974), and related cases, Massachusetts courts assumed that § 34 and § 35 are mutually exclusive. In *Balthazar*, the Massachusetts Supreme Judicial Court faced two questions of first impression under § 35: whether or not the statute applied to consensual acts, and whether or not it applied to fellatio and anilingus. See *id.* at 479. Finding the statute vague, the court held it to be inapplicable to any private, consensual, noncommercial adult activity. *Id.* at 481. The court invited the legislature to enact a more specific statute governing private conduct (an invitation which has not been taken up), *id.* at 480 n.1, 481, but it nevertheless affirmed defendant's conviction because he had failed to raise the issue of consent. *Id.* at 481. The *Balthazar* holding apparently does not apply to § 34, prohibiting the "crime against nature." See *Balthazar v. Superior Court*, 573 F.2d 698, 700-01 (1st Cir. 1978) (distinguishing the two statutes), *aff'g* 428 F. Supp. 425 (D. Mass. 1977) (granting writ of habeas corpus to defendant in *Commonwealth v. Balthazar*, on the ground that before that decision was rendered, § 35 was unconstitutionally vague as applied to Balthazar's oral-genital and oral-anal contacts). The *Balthazar* decisions all extend the reach of judicial repeal only to statutory language as yet unlimited by judicial decision. 573 F.2d at 702; 428 F. Supp. at 433; 318 N.E.2d at 480.

Legislative repeal proceeded at a healthy pace in the 1970s, under the influence of the Model Penal Code.<sup>162</sup> I am unaware of any successful repeal effort during the 1980s, when legislatures were busy adopting statutes criminalizing the transmission of HIV instead. As many commentators have concluded, some aspects of the HIV/AIDS crisis made it difficult to repeal sodomy statutes.<sup>163</sup>

Two recent successes suggest, however, that legislative repeal may once again be politically possible. Washington D.C.'s facially neutral statute has been repealed by the District's Council.<sup>164</sup> And Nevada's same-sex sodomy statute<sup>165</sup> was recently repealed—though not until it had been amended to include public heterosexual fellatio and cunnilingus.<sup>166</sup> Note that both repeals involved a statute that, at the time the repeal vote was taken, prohibited cross-sex as well as same-sex conduct.

This repeal history has left in place only five statutes targetting same-sex sodomy *and not* cross-sex sodomy,<sup>167</sup> but eighteen facially neutral stat-

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Subsequent decisions have implied that oral sex is an "unnatural act" within the scope of § 35. *Commonwealth v. LaBella*, 306 N.E.2d 813, 815-16 (Mass. 1974) (refusing to examine jury charge that characterized cunnilingus as an unnatural act); *Commonwealth v. Deschamps*, 294 N.E.2d 426, 428 (Mass. App. Ct. 1972) (refusing to challenge classification of fellatio as an unnatural act). Thus these cases have no effect on the scope and enforceability of the commonwealth's bar on any "crime against nature," other than to offer support for the negative inference that the crime does not include the "unnatural" acts of fellatio and anilingus.

<sup>162</sup> Model Penal Code § 213.2 & commentary at 364, 366-67 (Official Draft & Revised Comments 1980).

<sup>163</sup> See, e.g., *Developments in the Law*, supra note 34, at 1536-37. For a close examination of transcripts recording debates in an unsuccessful legislative repeal effort undertaken before HIV became part of the rhetoric of sodomy, see Randy Von Beitel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 Hum. Rts. 23 (1977).

<sup>164</sup> D.C. Act 10-23 (D.C. Code Supp. 1994) (copy of Enrolled Original on file with the Virginia Law Review Association).

<sup>165</sup> Nev. Rev. Stat. Ann. § 201.190 (Michie 1992).

<sup>166</sup> See Nevada Repeals Sodomy Law, *Wash. Times*, June 16, 1993, at B5 (reporting that the Nevada Assembly had voted to repeal Nevada's sodomy statute, a same-sex statute which the state senate had amended earlier in the legislative session to include public cross-sex oral sex); Addenda, *Wash. Post*, June 18, 1993, at A2 (reporting that Nevada Governor Robert J. Miller had signed the repeal into law).

<sup>167</sup> Ark. Code Ann. § 5-14-122 (Michie 1987); Kan. Stat. Ann. §§ 21-3501, 3505 (1988); Mo. Ann. Stat. §§ 566.010, 090 (Vernon 1979 & Supp. 1993); Mont. Code Ann. §§ 45-2-101(20), 45-5-505 (1990); Tenn. Code Ann. § 39-13-510 (1991).



utes.<sup>168</sup> Michigan maintains not only a facially neutral sodomy statute,<sup>169</sup> but also three statutes distinguishing between gay male, lesbian, and heterosexual encounters. The statutes prohibit "gross indecency," a term that may include fellatio, and apply to acts between men,<sup>170</sup> to acts between women,<sup>171</sup> and to acts between a man and a woman.<sup>172</sup> By their terms these statutes apply to private as well as public conduct. Application of these statutes to consensual activity in the home has been declared a violation of state privacy guarantees in an unpublished lower-court decision.<sup>173</sup>

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<sup>168</sup> Ala. Code §§ 13A-6-65(a)(3), 13A-6-60 (1982 & Supp. 1993); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1989); Fla. Stat. Ann. ch. 800.02 (Harrison 1991); Ga. Code Ann. § 16-6-2 (Michie 1992); Idaho Code § 18-6605 (1987); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Ann. Code art. 27, §§ 553-54 (1992); Mass. Gen. Laws Ann. ch. 272, § 34 (West 1990); Mich. Comp. Laws Ann. §§ 750.158 (West 1991); Minn. Stat. Ann. § 609.293 (West 1987); Miss. Code Ann. § 97-29-59 (1972); N.C. Gen. Stat. § 14-177 (1992); Okla. Stat. Ann. tit. 21, § 886 (West Supp. 1993); R.I. Gen. Laws § 11-10-1 (1981); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Utah Code Ann. § 76-5-403 (1990); Va. Code Ann. § 18.2-361 (Michie Supp. 1993); Uniform Code of Military Justice, 10 U.S.C. § 925, art. 125 (1988).

<sup>169</sup> Mich. Comp. Laws Ann. § 750.158 (West 1991).

<sup>170</sup> Id. § 750.338.

<sup>171</sup> Id. § 750.338a.

<sup>172</sup> Id. § 750.338b.

<sup>173</sup> Michigan Organization for Human Rights v. Kelley, No. 88-815820 CZ, slip op. at 12 (Mich. Cir. Ct. July 9, 1990) (invalidating Mich. Comp. Laws Ann. §§ 750.158, 750.338, 750.338a, and 750.338b).

## APPENDIX C

*Cross-Sex Sodomy*

Heterosexuals *are* prosecuted for sodomy. Only military courts have been willing to state frankly that sodomy statutes apply to consensual heterosexual conduct.<sup>174</sup> But prosecutions of heterosexual sodomy occur with some frequency, and tend to take one of two forms: those in which consensual sodomy is charged as a lesser included offense in a case involving allegations of forced sexual contact; and those in which consensual sodomy is prosecuted alone.

Frequently charges of consensual sodomy are made as lesser-included offenses in cases alleging sexual assaults; and frequently, defendants are convicted *only* on the consensual offense. For example, in *Schochet v. State*,<sup>175</sup> the defendant was charged with a variety of sexual assaults but was ultimately convicted only on a charge of consensual fellatio with the complaining witness.<sup>176</sup>

Of course, it is impossible to pierce the opacity of court records and judicial opinions to determine whether these cases actually involved fully voluntary conduct. Given the skepticism that women encounter when complaining of sexual assault, some counter-skepticism is appropriate. But it should be a matter of deep concern to feminists dealing with that problem, that *consensual* sodomy charges and convictions become its solution. And there is reason to think that juries may convict defendants on charges of consensual sodomy after concluding that allegations of the coercion are not

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<sup>174</sup> *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992); *United States v. Fagg*, 34 M.J. 179 (C.M.A.), cert. denied, 113 S. Ct. 92 (1992).

<sup>175</sup> 580 A.2d 176 (Md. 1990).

<sup>176</sup> *Id.* at 177-78. The state supreme court held that the statute prohibiting "unnatural or perverted sexual practices," Md. Ann. Code art. 27, § 554 (1982 & Supp. 1992), did not include consensual, private, noncommercial heterosexual fellatio. *Schochet*, 580 A.2d at 184; see also *State v. Santos*, 413 A.2d 58 (R.I. 1980) (affirming jury acquittal of defendant for rape and kidnapping charges but also affirming conviction on charges of transporting for immoral purposes and sodomy); *Dixon v. State*, 268 N.E.2d 84 (Ind. 1971) (affirming defendant's acquittal of charges of rape and aggravated assault but also affirming conviction of sodomy charge); *State v. Poe*, 252 S.E.2d 843 (N.C. 1979) (affirming dismissal of rape charge at close of government's case but also upholding jury conviction of defendant for sodomy, the sole remaining charge), appeal dismissed, 259 S.E.2d 304 (N.C. 1979), appeal dismissed, 445 U.S. 947 (1980); *State v. Elliott*, 539 P.2d 207 (N.M. App. Ct. 1975) (invalidating conviction of male defendant on charges of burglary and sodomy; the single judge wishing to hold the statute unconstitutional under the federal Equal Protection Clause inferred from the jury's failure to convict on a rape charge "that the jurors believed the acts did take place, but . . . with the consent of the prosecutrix"), rev'd, 551 P.2d 1352 (N.M. 1976) (holding that application of the sodomy statute to consensual, heterosexual, unmarried conduct does not violate the Equal Protection Clause).

only "not proven" but are fabricated. In a recent Georgia case, *Moseley v. Esposito*,<sup>177</sup> the jury may have done just that.

In 1988, Georgia prosecuted James Moseley on his estranged wife's charge of rape and forcible sodomy; no consensual sodomy charges were filed.<sup>178</sup> On his attorney's advice Moseley denied any element of coercion, and testified that he had participated in oral sex with his wife at her request.<sup>179</sup> The trial judge, acting sua sponte and without notice to the parties, gave the jury an instruction on consensual sodomy.<sup>180</sup> Explaining his decision to make the sodomy charge notwithstanding the fact that, in oral argument before the Supreme Court in *Hardwick*, Georgia's Attorney General had explicitly stated that a prosecution for marital sodomy would be barred by federal constitutional privacy guarantees,<sup>181</sup> the trial judge explained, "It's a criminal offense. I'm sworn to uphold the laws of the state of Georgia."<sup>182</sup> One juror later stated, in an affidavit filed in support of Moseley's habeas petition, that he "was the victim in a divorce situation."<sup>183</sup> Another juror stated that "there was no physical evidence at all that there was any force used by Mr. Moseley on his wife. I thought his wife set him up."<sup>184</sup> These jurors explained that they had voted for conviction because they felt obliged to enforce the law as it was read to them.<sup>185</sup> Moseley was sentenced to five years, but later obtained habeas relief in state proceedings.<sup>186</sup>

Where consensual sodomy charges stand alone, the application of sodomy laws raises concerns that facially neutral statutes may offer partners in disintegrating heterosexual relationships an unsavory means of garnering bar-

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<sup>177</sup> No. 89-6897-1 (Ga. Sup. Ct. Sept. 6, 1989).

<sup>178</sup> Slip op. at 2.

<sup>179</sup> Id. at 1-2.

<sup>180</sup> Id. at 2; see Murdoch, *supra* note 83, at A20; Alma E. Hill, *ACLU Eyes Test Case of Man Convicted of Sodomy With Wife*, Atlanta Const., July 25, 1989, at A1 [hereinafter Hill, *ACLU Eyes Test Case*]; Alma E. Hill, *Sodomy Defense Team Warns Against Hypocrisy*, Atlanta Const., Aug. 25, 1989, at A1.

<sup>181</sup> Oral Argument in *Bowers v. Hardwick*, in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law: 1985 Term Supplement 636* (Philip B. Kurland & Gerhard Casper eds., 1987).

<sup>182</sup> Hill, *ACLU Eyes Test Case*, *supra* note 180, at A1 (quoting Superior Court Judge William H. Ison).

<sup>183</sup> Affidavit of Karen Haymie, Pre-Trial Motion and Notice of Intent to Rely on Specified Affidavits, *Moseley v. Esposito*, No. 89-6897-1 (Ga. Sup. Ct. Sept. 6, 1989).

<sup>184</sup> Affidavit of Margaret Ann Myers, Pre-Trial Motion and Notice of Intent to Rely on Specified Affidavits, *Moseley v. Esposito*, No. 89-6897-1 (Ga. Sup. Ct. Sept. 6, 1989).

<sup>185</sup> Affidavit of Karen Haymie, *supra* note 183; Affidavit of Margaret Ann Myers, *supra* note 184.

<sup>186</sup> *Moseley*, slip op. at 4-5; see Linda P. Campbell, *Georgia Judge Rules Spousal Sodomy Legal*, Wash. Times, Sept. 7, 1989, at A6. This decision has not been officially reported.

gaining power. One reported element of Moseley's case was his wife's fear that, if he filed for divorce alleging her adultery, she would be unable to obtain child custody.<sup>187</sup> In one military case, the defendant was convicted of consensual heterosexual sodomy after being accused (according to one judge) by a "jilted" former "partner in sodomy."<sup>188</sup> It is not difficult to find cases in which male defendants are convicted *only* of consensual sodomy committed during an intimate heterosexual relationship. In one such case, *State v. Bateman*,<sup>189</sup> the Arizona Supreme Court entertained consolidated appeals, one from a conviction of sodomy within marriage and the other from a conviction of sodomy between an unmarried heterosexual couple, and held that sodomy charges could be established in both cases notwithstanding complaining witness' consent.<sup>190</sup> In *Cotner v. Henry*,<sup>191</sup> a wife charged her husband with sodomy, apparently making no allegation of her lack of consent. The husband plead guilty and was sentenced to two to fourteen years but later obtained habeas relief from federal circuit court.<sup>192</sup> These cases should be disturbing, if not to feminist then at least to anti-homophobic analysis.

Of course, cross-sex sodomy has better legal protection than its same-sex counterpart. Facially neutral statutes are far less likely to be enforced against cross-sex than same-sex activity. Constitutional privacy law is friendlier too. Sodomy performed in the "sacred precincts of marital bedrooms"<sup>193</sup> is most often deemed to be protected from prosecution, though nonprosecution of this sort of sodomy, joined with increasingly grudging standing rules, makes judicial enunciation of this widely accepted conclusion a rarity.<sup>194</sup> Arguments invoking *Eisentadt v. Baird*<sup>195</sup> to protect unmarried consensual sodomy have met with some success.<sup>196</sup> But several courts have

<sup>187</sup> Hill, *ACLU Eyes Test Case*, supra note 180, at A1.

<sup>188</sup> United States v. Fagg, 34 M.J. 179, 180 (C.M.A.), cert. denied, 113 S. Ct. 92 (1992).

<sup>189</sup> 547 P.2d 6 (Ariz. 1976).

<sup>190</sup> Id.

<sup>191</sup> 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968).

<sup>192</sup> Id. at 874-76.

<sup>193</sup> Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

<sup>194</sup> For cases that have reached this question and explicitly recognized a special status for marital sodomy, see, e.g., *Moseley*, slip op. at 4-5 (recognizing a right to "marital and domestic privacy"); *Buchanan v. Bachelor*, 308 F. Supp. 729 (N.D. Tex. 1970) (finding a Texas statute overbroad because it applied to married couples), vacated sub nom. *Wade v. Buchanan*, 401 U.S. 989 (1971); see also Utah Code Ann. § 76-5-407 (1990) (exempting married couples from a facially neutral sodomy law).

<sup>195</sup> 405 U.S. 438 (1972).

<sup>196</sup> See, e.g., *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976) (assuming that constitutional right to privacy protects marital fellatio), cert. denied, 429 U.S. 977 (1976); *Post v. State*, 715 P.2d 1105, 1109 (Ok. Crim. App.) (holding Oklahoma's facially neutral statute unconstitutional as applied to heterosexual conduct), cert. denied, 479 U.S. 890 (1986); *State v.*

refused to hold that unmarried cross-sex sodomy is protected,<sup>197</sup> and at least one court has held that sexual "misconduct" is subject to regulation notwithstanding the marital status of the participants.<sup>198</sup>

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Pilcher, 242 N.W.2d 348 (Iowa 1976) (holding that federally guaranteed fundamental rights, including privacy rights, bar prosecution of private, consensual, cross-sex conduct of unmarried adults under Iowa's facially neutral sodomy statute); see also *Schochet*, 580 A.2d at 184 (construing Maryland's facially neutral sodomy statute prohibiting "unnatural and perverted practice[s]" to exclude consensual, private, noncommercial heterosexual fellatio in order to avoid question whether federal rights were infringed).

<sup>197</sup> See, e.g., *Fry v. Patseavouras*, No. 91-7240, 1991 WL 212246 (4th Cir. Mar. 6, 1992) (denying habeas relief to defendant convicted of consensual heterosexual sodomy under North Carolina's facially neutral statute); *State v. Santos*, 413 A.2d 58, 66-69 (R.I. 1980); *State v. Poe*, 252 S.E.2d 843, 845 (N.C. 1979); *State v. Elliott*, 551 P.2d 1352, 1353 (N.M. 1976).

<sup>198</sup> *Bateman*, 547 P.2d at 9-10.