10-1998

Coming Out: Decision-Making in State and Federal Sodomy Cases

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ARTICLES

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The law is meant to be a way in which people can live together in spite of their differences.

—James Boyd White[1]

[J]ustice is the relation to the other.

—Jacques Derrida[2]

INTRODUCTION

In 1791, American states were enacting laws against sodomy at the same time they ratified the Bill of Rights, the first ten constitutional amendments meant to safeguard fundamental rights of individuals in a free society.[3] In a March 1789 letter to James Madison, Thomas Jefferson asserted that a bill of rights was necessary to

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[1] JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 47 (1985).

[2] DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA 17 (John D. Caputo ed., 1997). In quoting the definition of justice given by Emmanuel Levinas, Derrida characterizes the definition as "very minimal but which I love, which I think is really rigorous." *Id.*

[3] *See* Bowers v. Hardwick, 478 U.S. 186, 192-93 n.5 (1986) (noting that sodomy was a common law crime and that the original 13 states had anti-sodomy laws); *see also* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, 220 (A Classics ed., Northeastern Univ. Press 1983) (1955).

give the judiciary the power to protect such individual rights.[4] Ironically, that which the judiciary gives, it may also take away, since "[t]he legislator is a writer. And the judge a reader."[5]

This Article deconstructs recent sodomy cases in order to challenge judicial adoption or reinscription of "the straight mind," the social construct grounded in and perpetuating the heterosexual paradigm.[6] Although deconstruction informs the argument, the Wallace Stevens poem *A High-Toned Old Christian Woman*[7] is used as an extended metaphor for the analysis of judicial reasoning in selected state and federal sodomy cases. The first half of the poem reads:

> Poetry is the supreme fiction, madame.
> Take the moral law and make a nave of it
> And from the nave build haunted heaven. Thus,
> The conscience is converted into palms,
> Like windy citherns hankering for hymns.
> We agree in principle. That's clear. But take
> The opposing law and make a peristyle,
> And from the peristyle project a masque
> Beyond the planets. Thus, our bawdiness,
> Unpurged by epitaph, indulged at last,
> Is equally converted into palms,
> Squiggling like saxophones. And palm for palm,

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[4] *See* RUTLAND, *supra* note 3, at 196 (noting that "the potentialities of the high court as a protector of a citizen's rights had not escaped Jefferson").

[5] JACQUES DERRIDA, DISSEMINATION 113 (Barbara Johnson, trans., Univ. of Chi. Press 1981) (1972). Legislators write statutes which judges then interpret. This quote comes from Derrida's essay, *Plato's Pharmacy,* a deconstructive reading of Plato's dialogue *Phaedrus. See id.* at 65. Although Plato values, or privileges, speech over writing in *Phaedrus,* Derrida shows how elsewhere Plato privileges writing over speech. *See id.* at 113. For example, the *Republic* privileges writing in the following statement: "because legal prescriptions . . . once put into writing . . . remain always on record," and can thus be studied: "'There is, in truth, no study whatsoever so potent as this of law.'" *Id.* Although judges are readers, their readings rewrite the law. So, even the reader/writer binary is a false one. As is discussed in Part II, Derrida's essay is an example of a deconstructive reading. *See infra* notes 57-102 and accompanying text. Part of his project in *Plato's Pharmacy* is to deconstruct the father/son binary, in which the father, as origin of *logos*, reigns over the son. *See id.* at 75-78, 85. Similarly, this Article attempts to demonstrate ways in which the federal father is usurped by the state son. *See infra* Part IV (discussing state court rejections of *Bowers*).

[6] *See* MONIQUE WITTIG, THE STRAIGHT MIND AND OTHER ESSAYS 27-28 (1992) (discussing "the oppressive character that the straight mind is clothed in").

[7] WALLACE STEVENS, *A High-Toned Old Christian Woman, in* THE PALM AT THE END OF THE MIND 77 (Holly Stevens ed., Archon Books 1984) (1971).

Madame, we are where we began.[8]

In this poem, addressed to "A High-Toned Old Christian Woman," Stevens describes two possible worlds: a "nave" (i.e., the central part of a cathedral) derived from "the moral law," and a "peristyle" (i.e., columns surrounding a temple or court) derived from "the opposing law." Although the moral law satisfies the "conscience," the opposing law "indulge[s]" it. So, although "we agree in principle" with the consequences of the moral law, Stevens preferred the "bawdiness" of the opposing law and "imagined a world where sexuality was to be indulged and displayed like the sounds of the words themselves."[9]

A High-Toned Old Christian Woman serves as a metaphor for judicial reasoning in sodomy cases. As argued in this Article, *Bowers v. Hardwick*[10] represents the "haunted heaven" built from the "moral law" concerning homosexuality and sodomy. In this frequently-cited decision,[11] the Supreme Court upheld Georgia's sodomy law. *Bowers* contrasts with state decisions that have stricken sodomy laws, such as *Commonwealth v. Wasson*,[12] *State v. Morales*,[13] *Campbell v. Sundquist*,[14] and *Gryczan v. State*.[15] These cases "take . . . [t]he opposing law and make a peristyle" rejecting *Bowers v. Hardwick*.

Wallace Stevens, who was a lawyer in addition to being a poet, was undoubtedly well-acquainted with the phenomenon of legal reasoning in which the analysis of a specific set of facts could result in widely disparate conclusions.[16] Just as Stevens attempted to

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[8] *Id.* The second half of this poem is reproduced in Part IV of this Article.

[9] JOAN RICHARDSON, WALLACE STEVENS: THE EARLY YEARS, 1879-1923, at 301-02 (1986).

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

[11] *See, e.g.*, Andrew M. Jacobs, Romer *Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 917 (noting the state court cases that rejected *Bowers*). As of October 1998, there were over 2000 law review and journal articles that cited *Bowers*. Search of WESTLAW, Law Reviews and Journals Combined Library (Oct. 14, 1998).

[12] *See* 842 S.W.2d 487, 502 (Ky. 1993) (affirming the circuit court's decision that the criminal statute prohibiting consensual homosexual sodomy violated privacy rights guaranteed by the Kentucky Constitution).

[13] *See* 869 S.W.2d 941, 949 (Tex. 1994). The Texas Supreme Court reversed the judgment of the court of appeals and remanded the case to the district court to dismiss for want of jurisdiction based on a finding that the parties did not have standing. *See id.* at 949.

[14] *See* 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996) (holding that Tennessee's Homosexual Practices Act was unconstitutional, and that petitioners had standing despite the fact that none of them had been prosecuted under the Act).

[15] *See* 942 P.2d 112, 126 (Mont. 1997) (concluding that Montana's deviate-sexual-conduct statute is unconstitutional).

[16] *See* Daniel J. Kornstein, *The Double Life of Wallace Stevens: Is Law Ever the 'Necessary Angel' of Creative Art?*, 41 N.Y.L. SCH. L. REV. 1187, 1208, 1220 (1997) (arguing

rout out "the flaccid underside of any dogmatic position,"[17] this Article joins numerous others which criticize *Bowers'* flaccid foundation.[18] Specifically, it illustrates how *Bowers* produces the straight mind and examines whether other cases successfully subvert that production. Also asked is what happens when we consider the ethical implications of these sodomy decisions. Can the law incorporate an ethics of care for the other, or must it continue to oppress the other?

To lay the foundation for answering these questions, Part I defines the straight mind and traces its historical development relying primarily on the work of Michel Foucault.[19] Part II briefly defines deconstruction and considers features of a deconstructive reading.[20] This deconstructive approach provides a practical and pragmatic technique to interrogate judicial reasoning and to change injustice. Part III critiques *Bowers* by showing how the decision incorporates or reinscribes the straight mind.[21] Part IV presents several state decisions that rejected *Bowers'* reasoning and argues that even though these state decisions reject *Bowers* and come to an opposite conclusion, they are not always completely successful in rejecting the straight mind.[22] Although examining how the law produces the straight mind constitutes an ethical endeavor, Part V focuses on three problems that more obviously concern ethical issues: (i) the failure to acknowledge violence encouraged by the straight mind; (ii) the failure to enforce sodomy statutes; and (iii) the failure to inculcate an ethics of inclusion or care for the other.[23]

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that Stevens' poetry was influenced by legal thinking, including the notion "that poetry depended on the same type of reasoning as law"); *see also* THOMAS C. GREY, THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY 35-51 (1991) (discussing connections between Stevens' legal practice and poetry).

17 RICHARDSON, *supra* note 9, at 438.

18 *See, e.g.*, Thomas C. Grey, Bowers v. Hardwick *Diminished*, 68 U. COLO. L. REV. 373 (1997) (analyzing the role of *Bowers* after the *Romer* decision); Janet E. Halley, Romer v. Hardwick, 68 U. COLO. L. REV. 429 (1997) (examining sex and hate in *Bowers*); Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick, 32 HARV. C.R.-C.L. L. REV. 225 (1997) (noting the narrow holding in *Bowers* that "there is no fundamental right to homosexual sodomy under the Due Process Clause"); Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988) (discussing how the court reached its decision in *Bowers*); Tracey Rich, Note, *Sexual Orientation Discrimination in the Wake of* Bowers v. Hardwick, 22 GA. L. REV. 773 (1988) (theorizing that *Bowers* has been used as a justification for discrimination against homosexuals).

19 *See infra* notes 26-56 and accompanying text.

20 *See infra* notes 57-102 and accompanying text.

21 *See infra* notes 103-56 and accompanying text.

22 *See infra* notes 157-249 and accompanying text.

23 *See infra* notes 250-301 and accompanying text.

Sodomy cases apply universal laws, i.e., civil liberties that try to protect individual rights in a pluralistic society. In applying these universal laws, however, the cases fail to reconciliate self and other, and thus illustrate a cardinal binary interrogated by deconstruction: the subject/object or subject/other.[24] As will be argued below, the appearance of reconciliation usually indicates that the writing is a "product of ideological distortion, suppression of difference or subordination of the other."[25]

I. THE STRAIGHT MIND

The straight mind is the social construct or law that regulates sexuality.[26] According to Monique Wittig, who coined the term, the rhetoric or discourses of the straight mind "are those which take for granted that what founds society, any society, is heterosexuality."[27] She points out that, at the beginning of the twentieth century, the term "heterosexuality" was coined as the opposite of "homosexuality."[28] The evolution of the straight mind cannot be traced because "[i]t has sneaked into dialectical thought . . . as its main category."[29] Wittig castigates "the oppressive character that the straight mind is clothed in . . . to immediately universalize its production of concepts into general laws which claim to hold true for all societies, all epochs, all individuals."[30]

In addition to universalizing general laws, the straight mind also wields power over those it oppresses.[31] A necessary consequence of the straight mind is the oppression of the "different/other"—of the other sex, other race.[32] The straight mind cannot function "economically, symbolically, linguistically, or politically" without domination over the other.[33] Thus, although the straight mind may

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[24] *See* Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism, in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 152, 153, 168 (Drucilla Cornell et al. eds., 1992) (discussing the "crisis" in legal interpretation).

[25] *Id.* at 153.

[26] *See* WITTIG, *supra* note 6, at 27 (discussing the "primitive concepts" that reinforce "the straight mind").

[27] *Id.* at 24.

[28] *See id.* at 41 (explaining the origin of the term homosexuality).

[29] *Id.* at 43. An example is the implicit requirement from Aristotle's *The Politics* that male and female "'*must* be united in a pair.'" *Id.* at 42.

[30] *Id.* at 27.

[31] *See id.* at 25-26 (using pornography as an illustative example).

[32] *Id.* at 28.

[33] *Id.* at 28-29.

unite male and female as a pair, it oppresses female as the other, just as it oppresses the homosexual or gay as other.[34]

The French philosopher Michel Foucault has traced the historical development of the heterosexual imperative in his three-volume work, *The History of Sexuality*.[35] Foucault analyzes sex as power relations, rather than as the result of "repression or law."[36] He argues that sexuality is not a "natural given," but:

> [i]t is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in accordance with a few major strategies of knowledge and power.[37]

Defining "power" as the "multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization,"[38] Foucault theorizes that in the eighteenth century, four measures formed specific mechanisms of power and knowledge regarding sex: (i) analyzing female bodies as sexual and hysterical; (ii) protecting and preventing children's sexual potential; (iii) conducting social and economic studies of procreative behavior; and (iv) clinically analyzing perverse pleasure.[39] Although all four are significant to his history of sexuality, the fourth is of special importance to an examination of sodomy decisions. The standard for determining perverse pleasures was the heterosexual institution.[40] In analyzing Foucault's thesis, Judith Butler explains that in the historical construction of sex, heterosexual desire not only established

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[34] *See* Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 235-37 (1996) (describing "deep-seated societal views toward women and sexuality generally").

[35] *See* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., Vintage Books ed. 1990) (1976) [hereinafter 1 FOUCAULT] (discussing the history of sexuality in the West); 2 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: THE USE OF PLEASURE (Robert Hurley trans., Vintage Books ed. 1990) (1984) [hereinafter 2 FOUCAULT] (exploring how sexuality in the West became a moral issue); 3 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: THE CARE OF THE SELF (Robert Hurley trans., Random House 1986) (1984) [hereinafter 3 FOUCAULT] (describing issues that relate to our sexual mores).

[36] 1 FOUCAULT, *supra* note 35, at 92.

[37] *Id.* at 105-06.

[38] *Id.* at 92.

[39] *See id.* at 103-05 (noting that such measures emerged as "mechanisms of knowledge and power centering on sex" in the eighteenth-century).

[40] *See id.* at 105.

the male/female gender binary, but also regulated sexual practices.[41]

As a historical matter, Foucault reports that up to the end of the eighteenth century, sex was regulated based on the marriage relationship by canonical law, the Christian pastoral, and civil law.[42] During this period, these three codes emphasized the unlawful conduct that broke marriage vows or sought strange pleasures.[43] As Foucault indicates, "[p]rohibitions bearing on sex were essentially of a juridical nature."[44] This emphasis changed in the eighteenth and nineteenth centuries when codes and institutions were less concerned with the sexuality of the legitimate couple than with the sexuality of others.[45] Based on his historical survey, Foucault argues that the type of power that the nineteenth century wielded over sexuality was not law or taboo, not "an age of increased sexual repression," but an age that extended various forms of sexuality.[46] What was scrutinized during this period was the sexuality of children, the insane, and the homosexual.[47] Thus, in the nineteenth century there were fewer legal codes relating to sexual offenses, but, in scrutinizing the sexuality of the unnatural, medicine and other institutions exercised greater power to define and manage sexual practices,[48] especially "peripheral sexualities."[49] For instance, medicine transformed the sodomite from "a temporary aberration" to a defined psychiatric "species."[50]

In looking at how power constructs sexuality, which is not a "natural given," Foucault imagines "a multiplicity of discursive elements" that exist in different contexts and that are not necessarily consistent:

> discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance

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41 *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 22-23 (1990) ("The institution of a compulsory and naturalized heterosexuality requires and regulates gender as a binary relation in which the masculine term is differentiated from a feminine term, and this differentiation is accomplished through the practices of heterosexual desire.").

42 *See* 1 FOUCAULT, *supra* note 35, at 37 (describing these regulations as "explicit codes").

43 *See id.*

44 *Id.* at 38.

45 *See id.* at 38-39 ("The legitimate couple, with its regular sexuality, had a right to more discretion.").

46 *Id.* at 49.

47 *See id.* at 39.

48 *See id.* at 40-41 (noting that "law itself often deferred to medicine").

49 *Id.* at 40.

50 *Id.* at 43.

> and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.[51]

In other words, "law might be understood to produce or generate the desire it is said to repress."[52] The law, including decisions such as *Bowers,* participates in Foucault's description of the construction of sexuality grounded in heterosexual repression.[53]

Using the history of sodomy, Foucault demonstrates this two-fold operation of discourse as both creating and undermining power.[54] In the eighteenth century, there was both "extreme severity (punishment by fire)" and widespread tolerance for sodomy "which one can deduce indirectly from the infrequency of judicial sentences, and which one glimpses more directly through certain statements concerning societies of men that were thought to exist in the army or in the courts."[55] Thus, not only were strict prohibitions against sodomy unenforced, but sodomy was socially accepted. A similar pattern arose in the nineteenth century in which "psychiatry, jurisprudence, and literature of a whole series of discourses on the species and subspecies of homosexuality, inversion, pederasty, and 'psychic hermaphrodism'" made social controls possible, but which also gave rise to a "'reverse' discourse" in which "homosexuality began to speak in its own behalf, to demand that its legitimacy or 'naturality' be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified."[56]

Deconstructive techniques, informed by Foucault's theory that sex is an effect or a historical construct of power relations, are applied in Parts III and IV to read sodomy decisions. Do these decisions construct the straight mind? Do they adopt or re-inscribe the straight mind? Do they subvert it? Do they both produce and repress homosexual desire? Before considering these judicial opinions concerning sodomy, Part II shows how these features of deconstruc-

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[51] *Id.* at 101.

[52] BUTLER, *supra* note 41, at 75.

[53] According to Butler, "the law produces the conceit of the repressed desire in order to rationalize its own self-amplifying strategies." *Id.* at 65. Rather than repressing desire, law is "a discursive practice which is productive or generative—discursive in that it produces the linguistic fiction of repressed desire in order to maintain its own position as a teleological instrument." *Id.*

[54] *See* 1 FOUCAULT, *supra* note 35, at 101.

[55] *Id.*

[56] *Id.*

tion—the focus on binary oppositions and ambiguities in meaning, intertextuality, deferred meaning, and undecidability—provide a practical way to read sodomy decisions.

II. DECONSTRUCTING SODOMY DECISIONS

Deconstruction has been defined as "a theory of reading which aims to undermine the logic of opposition within [texts]."[57] A deconstructive approach seeks to reveal and interrogate hierarchical binary systems. It also shows the "disparities between what the author of a text *'means to say'* and what the text is 'nonetheless *constrained to mean*.'"[58] These discontinuities–gaps in meaning, or blind spots–occur when a text self-contradicts and "involuntarily betrays the tension between rhetoric and logic."[59] Jacques Derrida, the French philosopher considered to have founded deconstruction, specifically warns that "[d]econstruction is not a method or some tool that you apply to something from the outside . . . [d]econstruction is something . . . which happens inside."[60] His reading typically isolates binary oppositions, and he attempts to show "that what has been presented as a dichotomy in Western thought, such as man/woman, is in fact merely a difference which has [become] a hierarchy."[61] Deconstruction does not try to synthesize meaning into a coherent whole, but "search[es] for . . . systematic contradictions and uncontrollable ambiguities in meaning."[62]

In addition to focusing on contradictions and ambiguities, deconstructive readings are intertextual because texts are not seen as self-contained, but as a mesh of other texts. Thus, Derrida's shorthand phrase that "there is no 'outside-the-text'" captures this

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[57] A DICTIONARY OF CULTURAL AND CRITICAL THEORY 136 (Michael Payne et al. eds., 1996). Many theorists stress the dangers of defining deconstruction. *See, e.g.*, Rosenfeld, *supra* note 24, at 152 ("Any attempt at defining deconstruction is hazardous at best as there is disagreement over whether deconstruction is a method . . . based on a particular ontological and ethical vision."); *see also* Ronald K.L. Collins, *Outlaw Jurisprudence?*, 76 TEX. L. REV. 215, 225, 237, 244 (1997) (reviewing DECONSTRUCTION IN A NUTSHELL, *supra* note 2, and evaluating Derrida's warning against nutshelling deconstruction).

[58] Rosenfeld, *supra* note 24, at 153.

[59] CHRISTOPHER NORRIS, DERRIDA 19 (1987).

[60] DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 9.

[61] A DICTIONARY OF CULTURE AND CRITICAL THEORY, *supra* note 57, at 136.

[62] *Id.* A recent example of a deconstructive reading of several judicial decisions involving contract law and statutory interpretation can be found in Madeleine Plasencia, *Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE U. L. REV. 215 (1997); *see also* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

premise of the intertextuality of all texts.[63] And, as Jonathan Culler points out, intertextuality in law is "abundantly evident" since "any case is part of an endless text: it[ ] has potential points of contact with a vast array of other cases and other data."[64] This intertextuality is illustrated in the Kentucky sodomy case of *Wasson* by defendant's evidence presented by a cultural anthropologist, Presbyterian minister, social historian, sociologist/sex researcher, psychologist, therapist, and medical professor, as well as the court's reliance on the philosophy of John Stuart Mill and on scientific data concerning sexual preferences and AIDS.[65] Another example, discussed below, is *Bowers'* reliance on historical surveys of sodomy laws—from the time of Ancient Rome to the present.[66] Finally, this Article illustrates intertextuality by reading *A High-Toned Old Christian Woman* against sodomy decisions.

Derrida explores the relation between law and deconstruction in an essay entitled *Force of Law: The 'Mystical Foundation of Authority.'*[67] He begins by discussing the "force of law," the violence of law's enforceability:

> [t]here are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.[68]

The question is how to distinguish between "force that can be just, or in any case deemed legitimate" and violent force that is not legitimate.[69] Derrida seeks to deconstruct, "by destabilizing or com-

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[63] JONATHAN CULLER, FRAMING THE SIGN: CRITICISM AND ITS INSTITUTIONS 148 (1988). This intertextuality is not unlicensed free-play, but disciplined reading of "words 'actually present' in a discourse with all the other words in the lexical system." DERRIDA, *supra* note 5, at 129-30; *see id.* at 334-35 (discussing the "intertext").

[64] CULLER, *supra* note 63, at 148.

[65] *See* Commonwealth v. Wasson, 842 S.W.2d 487, 496-97, 500, 501 (Ky. 1993).

[66] *See* Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986) ("Proscriptions against that conduct [consensual homosexual sodomy] have ancient roots.").

[67] *See* Jacques Derrida, *Force of Law: The 'Mystical Foundation of Authority,' in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE, *supra* note 24, at 15. The essay was distributed at a colloquium in 1989 at Cardozo Law School where Derrida presented the opening session. *See id.* at 3.

[68] *Id.* at 6.

[69] *Id.*

plicating the opposition" between law and justice, among other oppositions.[70]

The tension between force and law reminds us that "if justice is not necessarily law . . . it cannot become justice legitimately or *de jure* except by withholding force or rather by appealing to force from its first moment."[71] Reinterpreting Montaigne's idea that "laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority,"[72] Derrida follows a line of argument that begins with Plato and continues through Hume, Kant, and Wittgenstein, by distinguishing laws and justice: "[l]aws are not just *as* laws. One obeys them not because they are just but because they have authority."[73] Again quoting Montaigne's statement that "even our law, it is said, has legitimate fictions on which it founds the truth of its justice,"[74] Derrida raises the question, "[w]hat does it mean to establish the truth of justice?"[75] Law, he argues, has no transcendental ground or foundation, thus it can be deconstructed; justice, however, is not deconstructible.[76] This paradox makes deconstruction possible. "There is a necessary, structural gap or distance between the law and justice, and deconstruction situates itself there, in that space or interval, in that abyss."[77] Wittig's straight mind illustrates this "legitimate fiction" that acts as foundation for sodomy decisions. But is the straight mind a "legitimate fiction?" How can it be deconstructed?

Derrida gives three "aporias,"[78] of the justice/law distinction. The first aporia is the "épokhè [suspension] of the rule," or the "'fresh judgment'" made every time the law is applied.[79] In other words, for a decision to be just, a judge does not merely follow a rule of law, "but must also assume it, approve it, confirm its value, by a reinstituting act of interpretation, as if ultimately nothing previously ex-

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[70] *Id.* at 8. Some of the other oppositions he mentions are positive law and natural law, the subject of law and the subject of morality. *See id.*

[71] *Id.* at 10.

[72] *Id.* at 12.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See id.* at 14-15 (discussing the structure of the law).

[77] DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 131-32. This paradox leads Derrida to conclude that "Deconstruction is justice." Derrida, *supra* note 67, at 15.

[78] For Derrida, an aporia is a "moment where oppositions are held in mutual suspension, neither term of which can be granted structuring primacy or qualitative superiority." A DICTIONARY OF CULTURE AND CRITICAL THEORY, *supra* note 57, at 142.

[79] Derrida, *supra* note 67, at 23.

isted of the law, as if the judge himself invented the law in every case."[80] The "suspension of the rule" implies that the judge does not simply apply the law as "a calculating machine"; rather, the judge "reinvent[s] it in each case."[81] Thus, in sodomy cases, the court reinvents the law and reinscribes the straight mind by an act of writing. This is a two-fold action: first, the re-invention or reinterpretation of past cases; and second, the re-inscription of the law through writing. Paradoxically, "there is never a moment that we can say *in the present* that a decision *is* just."[82] Rather, "[a] just decision is found in the distance between a blind and universal law and the singularity of the situation before us."[83]

Another way of considering this paradox is in terms of deferred meaning, in which

> [t]he meaning of a writing is neither immediately given nor self-present, but depends on some future reading (or recollecting) of that writing's past. And since all reading involves a rewriting, all meaning depends on a future rewriting of past writings as rewritten in the present writing which confronts the interpreter. A present writing is a rewritten past writing and a not yet rewritten future writing.[84]

For instance, sodomy decisions often involve distributive justice,[85] in which "a judge must project a present into the future in order to fashion an appropriate distributive remedy," even though the criteria for the decision "always appears embedded in a past."[86] Meaning is deferred; decisions rewrite precedent inscribing or subverting the straight mind. Thus, *Bowers* interprets precedent to reinscribe the straight mind, whereas the four state cases—*Wasson*, *Morales*, *Gryczan*, and *Campbell*—subvert the straight mind.

Related to the first aporia of the "suspension of the rule" is the second aporia, *"the ghost of the undecidable,"* which is more than the tension between a decision and precedent, but is the fleeting moment of undecidability, of impossibility.[87] A decision that does

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[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 137.

[84] Rosenfeld, *supra* note 24, at 157.

[85] Distributive justice allocates the benefits and burdens of social cooperation, and it contrasts with corrective justice, which involves damages and wrongdoing, as in criminal and tort law. *See id.* at 180-81.

[86] *Id.* at 195.

[87] Derrida, *supra* note 67, at 24. Derrida writes that "The undecidable is not merely the oscillation or the tension between two decisions; it is the experience of that which, though

not go through "the ordeal of the undecidable" is not a just decision.[88] Glossing this second aporia, John Caputo's commentary contrasts "the ordeal of the undecidable" with automatic application of laws to situations, and explains that "a 'just' decision . . . goes eyeball to eyeball with undecidability, stares it in the face (literally), looks into that abyss, and then makes the leap, that . . . 'gives itself up to the impossible decision.'"[89]

Paradoxically, Derrida states that we can never say a decision is just because "either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule."[90] We can never determine whether a decision is just, whether a judge went through the ordeal of the undecidable in making a decision.[91] As Caputo comments, "[j]ustice must be continually invented, or reinvented, from decision to decision."[92] In analyzing these sodomy decisions, we can never say that a decision is just. The most we can do is seek the ghost of undecidability: the way a court responds to previous decisions and to the "'idea of justice'" that is "owed to the other."[93]

The third aporia Derrida presents is "*the urgency that obstructs the horizon of knowledge.*"[94] The horizon—"both the opening and the limit that defines an infinite progress or a period of waiting"—is obstructed by justice because "a just decision is always required *immediately*," so there is no time to analyze "the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it."[95] This third aporia is a pragmatic limiting factor. Consequently, as Derrida refers to Kierkegaard as saying, "[t]he instant of decision is a madness."[96] Urgency limits the ability to leisurely consider the horizon; thus, justice is always "'[p]erhaps'": "Justice remains, is yet, to come."[97]

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heterogeneous, foreign to the order of the calculable and the rule, is still obliged . . . to give itself up to the impossible decision, while taking account of law and rules." *Id.*

88 *Id.*

89 DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 137.

90 Derrida, *supra* note 67, at 24.

91 For this reason, the undecidable is a ghost because it "remains caught, lodged, at least as a ghost—but an essential ghost—in every decision, in every event of decision. Its ghostliness deconstructs from within any assurance of presence, any certitude . . . that would assure us of the justice of a decision, in truth of the very event of a decision." *Id.* at 24-25.

92 DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 138.

93 Derrida, *supra* note 67, at 25.

94 *Id.* at 26.

95 *Id.*

96 *Id.*

97 *Id.* at 27.

For Derrida, the urgency that obstructs the horizon of knowledge does not justify our staying out of politics.[98] Even though "justice exceeds law and calculation," he believes that the "incalculable justice *requires* us to calculate."[99] We have an obligation "to *change* things and to intervene in an efficient and responsible . . . way, not only in the profession but in what one calls the *cité*, the *polis* and more generally the world."[100] Thus, against charges that deconstruction is "a kind of anarchistic relativism in which 'anything goes,'" or that traditions are empty concepts to be deconstructed, Derrida urges world involvement and change.[101] He states that "[n]othing seems to me less outdated than the classical emancipatory ideal."[102] The following sections of this Article provide a deconstructive reading of selected state and federal sodomy cases for which the ultimate goal is to calculate one contemporary register of this classical emancipatory ideal.

III. *BOWERS v. HARDWICK*: "TAKE THE MORAL LAW AND MAKE A NAVE OF IT"[103]

Bowers takes "the moral law" and builds a "haunted heaven."[104] In 1982, Hardwick was charged with committing sodomy with another male in his bedroom.[105] The district attorney decided not to indict, so Hardwick brought suit in federal court to challenge the constitutionality of Georgia's sodomy statute.[106] The district court dismissed Hardwick's claim, the Eleventh Circuit reversed and held the statute violated fundamental rights, and the Supreme Court reversed and held the statute constitutional.[107] Before considering how the Supreme Court's holdings and reasoning accept and reinscribe the straight mind, two prefatory points about the decision will be made. First, the majority decision re-interpreted Georgia's heterosexual sodomy statute[108] as a homosexual sodomy statute:

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98 *See id.* at 28 ("That justice exceeds law and calculation . . . cannot and should not serve as an alibi for staying out of juridico-political battles.").

99 *Id.*

100 *Id.* at 8-9.

101 DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 37-38.

102 Derrida, *supra* note 67, at 28.

103 STEVENS, *supra* note 7, at 77.

104 *Id.*

105 *See* Bowers v. Hardwick, 478 U.S. 186, 187-88 (1986).

106 *See id.* at 188-89 (noting that Hardwick felt that because he was a practicing homosexual he was in imminent danger of being arrested because of the statute).

107 *See id.*

108 Georgia's statute provided (as quoted in *Bowers*):

"[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[109] As both dissents point out, however, the statute covers both heterosexual and homosexual sodomy.[110] The majority's re-interpretation of the statute paved the way for the Court's reinforcement of the straight mind when it analyzed two constitutional challenges: the right to privacy and due process.[111]

Second, in determining a case of consensual homosexual sodomy that occurred in the privacy of Hardwick's bedroom,[112] the Supreme Court outrightly denied its judicial power to privilege and to reinscribe the straight mind by stating that "[t]his case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable."[113] The Court went on to note that

> [s]triving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection.[114]

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .

Id. at 188 n.1.

[109] *Id.* at 190. This reinterpretation also demonstrates another feature of deconstruction—the indeterminacy of language. *See* Collins, *supra* note 57, at 232 (discussing the "fixed meaning of legal texts").

[110] *See Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting); *id.* at 214 n.2 (Stevens, J., dissenting).

[111] The rhetorical analysis by Andrew Jacobs provides helpful insight in this analysis. Jacobs examines what he calls Track One and Track Two discourse in gay rights cases:

> Track One opinions . . . reenact the *Bowers* argument about the intrinsic wrongness of homosexuality, which equates gays with the criminal act of sodomy, thereby constructing gays in epitome as a deviant and criminal sex act, and not a discrete social group. Track Two opinions recognize that gays are a class of victims, and consider whether to extend particular legal benefits or antidiscrimination protections to them . . . .

Jacobs, *supra* note 11, at 902.

[112] *See Bowers*, 478 U.S. at 187-88 (noting where the act took place).

[113] *Id.* at 190.

[114] *Id.* at 191. Such a statement of judicial objectivity may often "betray a hint of moral ambivalence," as here, where Justice White's disclaimers can be read ironically to mean just the opposite. Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1932 (1991). Delgado and Stefancic label *Bowers* an example of "serious moral error," which they define as a decision which (1) "lacks nuance to an embarrassing degree"; (2) is condemned by later generations; and (3) makes assumptions that are later refuted. *Id.* at 1930 n.2.

Despite these assertions of judicial objectivity that the Court is not determining whether homosexual sodomy is "wise or desirable" or whether the Justices are "impos[ing] . . . [their] own choice of values," *Bowers* results in a choice of values based on and perpetuating the straight mind.[115] *Bowers* is like the nave in Stevens' poem that is based on moral values.

By rewriting the lower court decision to reverse the Eleventh Circuit's holding that the statute was unconstitutional, *Bowers*' interpretation was grounded in the straight mind. The Court rejected the Eleventh Circuit's determination that prior cases had favorably decided the issue of whether the right of privacy extended to homosexual sodomy.[116] In citing a long line of privacy cases, the Court failed to distinguish these past cases, but instead, merely concluded that "we think it evident that none . . . bears any resemblance . . . [:] [n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[117] The Court's refusal to see any "resemblance" between "family, marriage, or procreation" and "homosexual activity" ignores a logical and obvious conclusion, and, in effect is a regulation of sexuality based on the straight mind. This is a continuation of the universalizing tendency which Wittig critiques,[118] as well as an example of the socialization of procreative behavior that Foucault sees as one measure/mechanism of power and knowledge regarding

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[115] *Bowers*, 478 U.S. at 190. Thomas Stoddard makes a similar claim that

> [a] careful review of [*Bowers v. Hardwick*], including the decisions of the two lower courts, makes clear that the Court's opinion in *Hardwick* rests upon nothing more substantial than the collective distaste of the five justices in the majority for the conduct under scrutiny. The opinion is, to be blunt, devoid of logic.

Thomas B. Stoddard, Bowers v. Hardwick*: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 649 (1987).

[116] *See Bowers*, 478 U.S. at 190. The court of appeals held that homosexual sodomy was a fundamental right, and relied on *Roe v. Wade*, 410 U.S. 113 (1973) (holding the Texas statute that criminalizes abortion at any stage unconstitutional); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the Massachusetts law forbidding distribution of contraceptives to single people violated equal protection); *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the First and Fourteenth Amendments prohibit making mere possession of obscene materials a crime); and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding Connecticut's law banning contraceptives as an unconstitutional invasion of marital privacy). *See* Hardwick v. Bowers, 760 F.2d 1202, 1213 (11th Cir. 1985), *overruled by* Bowers v. Hardwick, 478 U.S. 186 (1986).

[117] *Bowers*, 478 U.S. at 190-91. These other cases involved the education of children in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923); family relationships in *Prince v. Massachusetts*, 321 U.S. 158 (1944); procreation in *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942); and interracial marriage in *Loving v. Virginia*, 388 U.S. 1 (1967).

[118] *See* WITTIG, *supra* note 6, at 27-28 (discussing the "oppressive character of the straight mind").

sexuality.[119] The Court regulated sexuality based on an assumption of compulsory heterosexuality.[120] *Bowers*' holding that past cases did not extend the right to privacy to homosexual sodomy had the effect of rewriting the past cases—by narrowing them under the aegis of the straight mind. As Justice Blackmun stresses in the dissent, however, past cases do not have to be interpreted in terms of heterosexual family values, but could be rewritten in terms of sexual privacy of individuals.

> We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. [T]he concept of privacy embodies the "moral fact that a person belongs to himself and not others nor to society as a whole."[121]

After rejecting the argument that precedent establishes a privacy right in homosexual sodomy, the majority next considered the issue of whether such a right should be created and despite previously denying its judicial power, curtly declared: "[t]his we are quite unwilling to do."[122] In determining that there is not a fundamental right to engage in sodomy, *Bowers* rewrites past cases to emphasize the protection of fundamental rights "'implicit in the concept of ordered liberty'" and/or "'deeply rooted in this Nation's history and tradition.'"[123] The Court also relies on a historical survey of sodomy statutes to bolster its conclusion that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, fa-

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[119] *See* 1 FOUCAULT, *supra* note 35, at 103-05 (noting that sexuality influences many relationships in virtually all societies).

[120] The state court decisions that follow *Bowers* also narrowly interpret precedent in order to reinscribe the straight mind. *See, e.g.*, State v. Lopes, 660 A.2d 707, 710 (R.I. 1995) (holding that a state constitution privacy right of unmarried adults to engage in heterosexual sodomy was not violated because "[n]one of the fundamental rights enunciated in those cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case"); State v. Santos, 413 A.2d 58, 67-68 (R.I. 1980) ("[T]he right of privacy [under the state and federal constitutions] is inapplicable to the private unnatural copulation between unmarried adults" because "the right of privacy is closely related to the decision whether or not to have a child"). Several commentators have noted this heterosexual assumption. *See, e.g.*, Amy D. Ronner, *Amathia and Denial of "In the Home" in* Bowers v. Hardwick *and* Shahar v. Bowers*: Objective Correlatives and the Bacchae as Tools for Analyzing Privacy and Intimacy*, 44 U. KAN. L. REV. 263, 294-97 (1996).

[121] *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring)).

[122] *Id.* at 191.

[123] *Id.* at 191-92 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

cetious."[124] This historical survey is used to demonstrate that "[p]roscriptions against that conduct have ancient roots":[125]

> [s]odomy was a criminal offense at common law and was forbidden by laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all 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.[126]

Chief Justice Burger's concurrence relies exclusively on evidence that "the proscriptions against sodomy have very 'ancient roots.'"[127] Burger refers to prohibitions against sodomy passed in ancient Rome and during the English Reformation.[128] The use of this historical survey illustrates Foucault's observation concerning the juridico-discursive character of power that is "centered on nothing more than the statement of the law and the operation of taboos."[129] However, as Foucault argues, the effect of these juridical powers is

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[124] *Id.* at 194. Moreover, Anne Goldstein argues that Justice White's analysis rewrites the history of sodomy laws because in 1868 only three states had *homosexual* sodomy laws; therefore, "the evidence does not support Justice White's conclusion that the framers could not have intended the Constitution to 'extend a fundamental right to homosexuals to engage in acts of consensual sodomy.'" Goldstein, *supra* note 18, at 1085.

[125] *Bowers*, 478 U.S. at 192.

[126] *Id.* at 192-94 (footnotes omitted). As of 1998, twenty-two states continue to have sodomy laws: Alabama (ALA. CODE § 13A-6-63 (1994)); Arizona (ARIZ. REV. STAT. ANN. § 13-1411 (West 1989)); Arkansas (ARK. CODE ANN. § 5-14-122 (Michie 1997)); Florida (FLA. STAT. ANN. § 800.02 (West Supp. 1997)); Georgia (GA. CODE ANN. § 16-6-2 (1996)); Idaho (IDAHO CODE § 18-6605 (1997)); Kansas (KAN. STAT. ANN. § 21-3505 (1995)); Louisiana (LA. REV. STAT. ANN § 14:89 (West 1986)); Maryland (MD. CODE ANN., CRIMES AND PUNISHMENTS § 553 (1996)); Michigan (MICH. COMP. LAWS §§ 750.158, 750.338-.338(b) (1991)); Minnesota (MINN. STAT. § 609.293 (1987)); Mississippi (MISS. CODE ANN. § 97-29-59 (1994)); Missouri (MO. ANN. STAT. § 566.090 (West Supp. 1997)); Montana (MONT. CODE ANN. §§ 45-2-101, 45-5-505 (1987)); Nevada (NEV. REV. STAT. § 201.190 (1987)); North Carolina (N.C. GEN. STAT. § 14-177 (1993)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 1995-96)); South Carolina (S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985)); Texas (TEX. PENAL CODE ANN. § 21.06 (West 1994)); Utah (UTAH CODE ANN. § 76-5-403(1) (1995)); Virginia (VA. CODE ANN. § 18.2-361 (Michie 1996)). In 1998, Rhode Island repealed section 11-10-1 "Crimes Against Nature." *See* R.I. GEN. LAWS § 11-10-1 (Supp. 1998) (deleting "either with mankind" language from the statute and thereby de-criminalizing sodomy between two consenting adults). Also, in 1996, the Tennessee Court of Appeals ruled that § 39-13-510 was an unconstitutional violation of the right to privacy. *See* Campbell v. Sundquist, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996) ("[W]e hold that the Homosexual Practices Act, T.C.A. § 39-13-510, which criminalizes such conduct, is unconstitutional."). This section was subsequently repealed. *See* TENN. CODE ANN. § 39-13-510 (Supp. 1997).

[127] *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

[128] *See id.* at 196-97 (discussing the criminalization of sodomy).

[129] 1 FOUCAULT, *supra* note 35, at 85.

not just to repress sexuality, but to extend various forms of sexuality by an "implantation of multiple perversions."[130] Thus, ironically, while the majority and concurrence may intend to implement the morality view repressing homosexuality, the Foucaultian effect of *Bowers* is that it discursively contributes to a resistance against majority morals.[131] The lawsuit itself, as well as subsequent analyses of *Bowers*, formed part of a reverse discourse in which homosexuality began to demand legitimacy.[132]

Bowers' refusal to announce the creation of a fundamental right to engage in homosexual sodomy illustrates a (failed) reconciliation between self and other. Derrida's remarks about Kafka's parable *Before the Law* apply equally here:

> [b]efore the law, the man is a subject of the law in appearing before it. This is obvious, but since he is *before* it because he cannot enter it, he is also *outside the law* (an outlaw). He is neither under the law nor in the law. He is both a subject of the law and an outlaw.[133]

Kafka's man from the country is a material representation of both the nave and the peristyle. Likewise, in sodomy decisions such as *Bowers*, the defendant is an outlaw charged with a crime, an outlaw judged deviant by the straight mind, and thus an outlaw standing outside the law. As Andrew Jacobs points out, a consequence of *Bowers* was the determination that "gays were not like the 'us' of American society for whom Justice White spoke . . . [i]nstead, they were the Other—defined by a criminal act that the Supreme Court announced was necessarily a source of moral opprobrium."[134]

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130 *Id.* at 47-48.

131 *See id.* at 101 (discussing how social controls in this area of "perversity" paved the way for a "reverse" discourse).

132 Jacobs traces the development of the reverse discourse leading from *Bowers* to *Romer* in his analysis of "Track One" and "Track Two" rhetoric. *See* Jacobs, *supra* note 11, at 905, 917. Although Jacobs' reading is enlightened and persuasive, his description of two tracks is too neat. "There is not, on the one side, a discourse of power, and opposite it, another discourse that runs counter to it." 1 FOUCAULT, *supra* note 35, at 101.

133 JACQUES DERRIDA, *Before the Law, reprinted in* ACTS OF LITERATURE 181, 204 (Derek Attridge ed., 1992). In Derrida's reading of Kafka's famous parable in *The Trial*, Derrida argues that the law is inaccessible for man because "between the guardian of the Law and the man from the country there is no essential difference: they are in oppositional but symmetric positions." Jacques Derrida, *Women in the Beehive: A Seminar with Jacques Derrida, reprinted in* MEN IN FEMINISM 189, 191-92 (Alice Jardine & Paul Smith eds., 1987). They are both before the law—the man from the country stands facing the law; the doorkeeper stands with his back to the law. Thus, they are in oppositional positions, but since the law remains inaccessible their positions are "symmetric." *Id.* at 192.

134 Jacobs, *supra* note 11, at 905.

Chief Justice Burger's concurrence states the obvious consequences of this judicial power: "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[135] Burger's reasoning reinscribes the notion that "'you-will-be straight-or-you-will-not-be,'"[136] therefore keeping an outlaw in his or her place. The majority analysis exemplifies Michel Rosenfeld's critique of "modern legal discourse with its universalist aspirations—[that] cannot achieve coherence and reconciliation so long as it produces writings that cannot eliminate from their margins ideological distortions, unaccounted differences or the lack of full recognition of any subordinated other."[137]

A specific example illustrating Rosenfeld's critique and demonstrating an inversion of privileged terms is *Bowers*' analysis of the right to privacy, which by its very terms implies a privileging of the private over the public. The majority's analysis, however, inverts the private/public hierarchy by reasoning that the right to privacy has only been extended to what most people would think of as the public goals of perpetuating society through heterosexual marriage and child rearing.[138] Similarly, *Bowers* analyzes the individual's fundamental right to engage in sodomy—an analysis based on the Due Process Clause in the Fifth and Fourteenth Amendments, which again implies the privileging of the private over the public—but the Court bases its refusal to privilege private rights on public "[p]roscriptions against that conduct."[139] So once again, the analysis based on public values undermines the privileged individual rights. In refusing to look beyond the mere existence of the sodomy law and moral views favoring the law, the Court validates or reinscribes the heterosexual institution, and contrary to its initial assertion/premise, indeed passes judgment "on whether [such laws] . . . are wise or desirable."[140]

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135 Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

136 WITTIG, *supra* note 6, at 28.

137 Rosenfeld, *supra* note 24, at 153.

138 *See Bowers*, 478 U.S. at 189-91 (1986) (finding that there is no fundamental right to engage in sodomy).

139 *Id.* at 192.

140 *Bowers*, 478 U.S. at 190. Kendall Thomas persuasively argues that the Supreme Court cross-dressed in *Bowers* by switching from a paternal to a maternal metaphor. *See* Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1819-21 (1993). This switch allowed the Court to discursively construct a heterosexual identity. *See id.* at 1813.

The blind spots in the Court's analysis of the right to privacy reappear in the Court's due process analysis that refuses "to discover new fundamental rights imbedded in the Due Process Clause."[141] After noting that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution,"[142] the Court rejects the argument in *Stanley v. Georgia*[143] that greater protection should be afforded to conduct occurring in the privacy of one's home.[144] In addition to distinguishing *Stanley v. Georgia* on the ground that it involved a First Amendment claim,[145] the Court makes a slippery-slope argument that promotes the straight mind by equating homosexual conduct solely with sodomy:

> if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.[146]

Finally, the Court upheld the Georgia sodomy statute under the rational basis test.[147] The Court did not question respondent's claim that the rational basis "is none . . . other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[148] While not analyzing any (other) rational basis, the Court merely gave a stamp of approval to majority morals: "[t]he law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[149] Several state decisions repeat this morality justification in upholding sodomy statutes against

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141 *Bowers*, 478 U.S. at 194.

142 *Id.*

143 *See generally* Stanley v. Georgia, 394 U.S. 557 (1969) (noting that the state may not prohibit the mere possession of obscene matter in one's home).

144 *See Bowers*, 478 U.S. at 195 ("*Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods.").

145 *See id.* ("Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; *but the decision was firmly grounded in the First Amendment.*") (emphasis added).

146 *Id.* at 195-96.

147 *See id.* at 196.

148 *Id.*

149 *Id.*

state or federal constitutional challenges.[150] The explicit reliance on majority morals to uphold Georgia's sodomy statute is perhaps the most obvious re-inscription of the straight mind and demonstrates the most blatant failure to reconcile self and other. To reject majority morals, however, would, as Stevens declares in *A High-Toned Old Christian Woman*, make "widows wince."[151]

Thus, *Bowers* fails to reconcile self and other, fails to live up to James Boyd White's characterization of the law as "a way in which people can live together in spite of their differences,"[152] and instead, exemplifies the straight mind's oppression of the homosexual other. The dissent, which recasts the due process issue as a question about "'the right to be let alone,'"[153] rejects the "millennia of moral teaching,"[154] and rewrites past opinions to focus on the right of an individual to choose among diverse intimate practices in the privacy of his or her own home. "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships."[155] The dissent attempts another rewriting of past cases by focusing, for instance, on similarities such as in *Loving v. Virginia*, the interracial marriage case, which declared the prohibition unconstitutional despite the long-standing Judeo-Christian tradition.[156] *Bowers'* dissents form the basis for state court decisions, such as *Wasson*, *Campbell*, *Gryczan*, and *Morales*, that hold homo-

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[150] *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487, 511 (Ky. 1993) (Wintersheimer, J., dissenting) ("There is a long history of laws against sodomy in Kentucky and elsewhere. Of course it has been considered morally wrong since the beginning of time, but this is a secular legal question here."). *But see, e.g.*, State v. Walsh, 713 S.W.2d 508, 511 (Mo. 1986) (en banc) ("Nowhere does the Constitution state that the promotion of morality is an impermissible state objective.").

[151] STEVENS, *supra* note 7, at 78.

[152] WHITE, *supra* note 1, at 47.

[153] *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

[154] *Id.* at 197 (Burger, C.J., concurring). Blackmun quotes Holmes' opinion that: "'[i]t is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'" *Id.* at 199 (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

[155] *Id.* at 205. The dissent argues that "certain rights associated with the family have been accorded shelter . . . not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life." *Id.* at 204 (Blackmun, J., dissenting).

[156] *See* 388 U.S. 1, 2 (1967) (holding that a statute criminalizing interracial marriages violates the 14th Amendment); *see also Bowers*, 478 U.S. at 210 n.5 (Blackmun, J., dissenting) ("The parallel between *Loving* and this case is almost uncanny.").

sexual sodomy statutes invalid under state constitutions, as discussed in the following section.

IV. STATE DECISIONS: "[T]AKE / THE OPPOSING LAW AND MAKE A PERISTYLE"[157]

In Stevens' poem *A High-Toned Old Christian Woman*, the masque "project[ed]" from the "opposing law," results in "bawdiness" "[s]quiggling like saxophones," as contrasted with the "haunted heaven" built from "the moral law," which results in "conscience" "hankering for hymns."[158] In the second half of the poem, Stevens describes the bawdy masque as follows:

> . . . Allow,
> Therefore, that in the planetary scene
> Your disaffected flagellants, well-stuffed,
> Smacking their muzzy bellies in parade,
> Proud of such novelties of the sublime,
> Such tink and tank and tunk-a-tunk-tunk,
> May, merely may, madame, whip from themselves
> A jovial hullabaloo among the spheres.
> This will make widows wince. But fictive things
> Wink as they will. Wink most when widows wince.[159]

Decisions including *Morales*, *Campbell*, *Gryczan*, and *Wasson* "take . . . [t]he opposing law and make a peristyle," which indulges "bawdiness" that "make[s] widows wince" by subverting the straight mind. While not all challenges at the state level have been successful,[160] in this Part the decisions that have rejected *Bowers* are examined to determine the consequences of judicial power that does not necessarily reinscribe the straight mind.[161]

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157 STEVENS, *supra* note 7, at 77.

158 *Id.*

159 *Id.* at 77-78.

160 *See, e.g.*, Christensen v. State, 468 S.E.2d 188 (Ga. 1996) (declining to reverse a sodomy conviction); Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. Crim. App. 1995) (holding that city ordinances that prohibited sodomy did not violate equal protection); State v. Lopes, 660 A.2d 707 (R.I. 1995); State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (en banc) (upholding statute criminalizing deviate sexual intercourse).

161 Two state decisions are not considered in this Article that declared sodomy statutes unconstitutional before *Bowers* was decided: Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (holding that a statute prohibiting sodomy between unmarried persons exceeded the police power and violated the equal protection doctrine); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (reversing a sodomy conviction and declaring the statute unconstitutional).

In *Morales*, a group of gay and lesbian plaintiffs sought a declaratory judgment to challenge Texas's homosexual sodomy law.[162] In striking down the statute, the Texas Court of Appeals held that it violated plaintiffs' right to privacy under the state constitution and that the state failed to show a compelling government interest to justify the statute.[163] In another declaratory judgment action, the Nashville Court of Appeals in *Campbell* likewise determined that Tennessee's homosexual sodomy act[164] violated plaintiffs'[165] state constitutional right to privacy.[166] In a third declaratory judgment action, the Supreme Court of Montana held in *Gryczan* that the state's homosexual sodomy statute[167] violated plaintiffs'[168] state

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[162] *See* State v. Morales, 826 S.W.2d 201, 202 (Tex. App. 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994) (noting that appellees claimed that the law "violated their rights of privacy, equal protection, and due process of law"). Section 21.06 "Homosexual Conduct," from the Texas Penal Code, provides as follows: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. An offense under this section is a Class C misdemeanor." TEX. PENAL CODE ANN. § 21.06 (West 1989).

Section 21.01(1) defines "Deviate sexual intercourse" as follows: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE ANN. § 21.01(1) (West 1989).

[163] *See Morales*, 826 S.W.2d at 205. The Court of Appeals did not address plaintiffs' claims that the statute violated the state due process and equal protection guarantees. *See id.* The Texas Supreme Court held that plaintiffs lacked standing and dismissed for want of jurisdiction. *See* State v. Morales, 869 S.W.2d 941, 949 (Tex. 1994).

[164] The Homosexual Practices Act, § 39-13-510 (1991) provided: "It is a Class C misdemeanor for any person to engage in consensual sexual penetration, as defined in § 39-13-501(7), with a person of the same gender." TENN. CODE ANN. § 39-13-510 (1991).

Section 39-13-501(7) provided: "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required . . . . " TENN. CODE ANN. § 39-13-501(7) (1991).

[165] Five plaintiffs filed for declaratory judgment and to enjoin enforcement of the Act. Campbell v. Sundquist, 926 S.W.2d 250, 253 (Tenn. Ct. App. 1996). The plaintiffs alleged standing based on the following:

> Each of the plaintiffs admitted that they have violated the HPA [Homosexual Practices Act] in the past, and that they intend to continue violating the HPA in the future. Plaintiffs allege that they are each harmed by the HPA because it criminalizes their private, intimate conduct, and that . . . [it] could result in plaintiffs losing their jobs, professional licenses, and/or housing should they be convicted.

Id.

[166] *See Campbell*, 926 S.W.2d at 262 (neglecting to address whether there was an equal protection violation).

[167] Montana's "Deviate Sexual Conduct" statute provided:

> (1) A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.
>
> (2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

right to privacy.[169] *Wasson* involved a criminal charge for solicitation of sodomy.[170] Jeffrey Wasson was arrested after he invited an undercover police officer home for consensual "deviate sexual intercourse."[171] The Kentucky Supreme Court determined that the homosexual sodomy statute, which "punishes 'deviate sexual intercourse' with another person of the same sex," violated Wasson's state constitutional privacy and equal protection guarantees.[172]

Each case will be examined to consider how these state sodomy decisions subvert the straight mind in rejecting the law of the father, i.e., the authority of the United States Constitution and *Bowers*, in favor of state constitutions, which are found to offer greater protection. In rejecting *Bowers,* these decisions reinterpret the law to privilege private rights over public rights. Thus, for instance, the Kentucky court in *Wasson* focused solely on the Kentucky Constitution and found that it offered greater protection of the right of privacy and equal protection than provided by the United States Constitution.[173] To reach this holding, the court determined that the Kentucky Bill of Rights[174] was textually more explicit than the Fed-

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(3) The fact that a person seeks testing or receives treatment for the HIV-related virus or another sexually transmitted disease may not be used as a basis for a prosecution under this section and is not admissible in evidence in a prosecution under this section.

MONT. CODE ANN. § 45-5-505 (1997). Section 45-2-101(2) defined "deviate sexual relations" as "sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal." *Id.* § 45-2-101(2).

168 Three men and three women filed the declaratory judgment action alleging that they were homosexuals and that "they have in the past and intend in the future to engage in conduct that violates" the Deviate Sexual Conduct statute. Gryczan v. State, 942 P.2d 112, 115-16 (Mont. 1997).

169 *See id.* at 126. The Montana Supreme Court also held that the plaintiffs had standing, but declined to decide whether the statute infringed on plaintiffs' "dignity as human beings," discriminated against them on the basis of sex, or denied them equal protection of the laws. *Id.* at 115.

170 *See* Commonwealth v. Wasson, 842 S.W.2d 487, 488 (Ky. 1993).

171 *Id.* The recitation of facts states that "[n]o money was offered or solicited." *Id.* at 489.

172 *Id.* at 488. Kentucky's Sodomy in the Fourth Degree § 510.100 provided:

(1) A person is guilty of sodomy in the fourth degree when he engages in deviate sex ual intercourse with another person of the same sex.

(2) Notwithstanding the provisions of KRS 510.020, consent of the other person shall not be a defense under this section, nor shall lack of consent of the other person be an element of this offense.

(3) Sodomy in the fourth degree is a Class A misdemeanor.

KY. REV. STAT. ANN. § 510.100 (Michie 1990).

173 *See Wasson*, 842 S.W.2d at 491-92 ("[W]e hold the guarantees of individual liberty provided in our 1891 Kentucky Constitution offer greater protection of the right of privacy than provided by the Federal Constitution . . . .").

174 The relevant sections included the following:

§ 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

eral Bill of Rights, and that "[b]oth the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties significantly greater than the selective list of rights addressed by the Federal Bill of Rights."[175]

Although the Kentucky Constitution does not mention a "right to privacy," the court construed the state constitutional debates to implicitly protect the right to privacy.[176] From a deconstructive viewpoint, the court's analysis rewrites or reinterprets the constitutional debate rather than discovering the intent of the founding fathers, state justices, or delegates. Unlike *Bowers'* emphasis on a historical survey of statutes criminalizing sodomy, *Wasson's* historical review of the constitutional convention comes to an opposite conclusion by privileging private rights over public rights.[177] *Wasson* quoted the remark of one delegate that

> "with the whole of such power [of an organized society] residing in the people, the people as a body rest under the highest of all moral obligations to protect each individual in the rights of life, liberty, and the pursuit of happiness, *provided that he shall in no wise injure his neighbor in so doing*."[178]

Another delegate argued that "'majorities cannot and ought not exercise arbitrary power over the minority.'"[179] Although *Wasson* rewrote history to reach a different conclusion from *Bowers*, *Wasson* is not necessarily just, nor does it necessarily subvert the straight mind, as argued below.

First: The right of enjoying and defending their lives and liberties.

. . .

Third: the right of seeking and pursuing their safety and happiness.

. . .

§ 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

KY. CONST. of 1850, art. XIII, §§ 1, 2 (1891).

175 *Wasson*, 842 S.W.2d at 494.

176 *See id.* The court noted that the concept of a right to privacy arose only after the "disseminat[ion]" of the famous article by Brandeis and Warren, *The Rights of Privacy*, 4 HARV. L. REV. 193 (1890), but that "[t]he ideas Brandeis and Warren expressed in that Article as the 'right of privacy' were neither unique to the authors nor confined to the Harvard Law School. They were an expression of contemporary thought." *Wasson*, 842 S.W.2d at 494.

177 *See id.* at 495 (finding that privacy rights have "been recognized as an integral part of the guarantee of liberty in our 1891 Kentucky Constitution since its inception").

178 *Id.* at 494.

179 *Id.*

In addition to relying on the constitutional debates, *Wasson* relied on the 1909 case of *Commonwealth v. Campbell*[180] to support the conclusion that "Kentucky has a rich and compelling tradition of recognizing and protecting individual rights from state intrusion."[181] Whereas the United States Supreme Court rejected any connection between *Bowers* and cases such as *Griswold, Eisenstadt,* and *Roe*[182] involving issues of sexual intimacy, the Kentucky court found great similarities between *Wasson* and *Campbell*, which involved an ordinance that prohibited an individual from possessing "intoxicating liquor, even for 'private use.'"[183]

The chief similarity the Kentucky court saw between the two cases stemmed from the characterization of sodomy and Prohibition as the "great moral issue[s] of [their] time."[184] Even though the *Campbell* court believed that "drinking was immoral,"[185] it held that the ordinance violated the Kentucky Bill of Rights: "'let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws.'"[186] The *Wasson* court applied this rationale to sodomy prohibitions and also cited with approval the argument in *Campbell* that "[u]nder our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard, not of their own choosing, but the choosing of the lawgiver."[187] Thus, up to this point, *Wasson* has focused on questions of liberty and democracy, but has not directly subverted the straight mind.

Wasson directly rejected the straight mind's oppression of the homosexual other when it rejected the Commonwealth's argument that *Bowers* controlled the outcome.[188] *Wasson* rejected the state's

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180 117 S.W. 383, 387 (Ky. Ct. App. 1909) (holding that the legislature does not have the authority to prohibit a citizen from having intoxicating liquors in his possession for his own use, as long as the use is without "direct injury to the public").

181 *Wasson*, 842 S.W.2d at 492.

182 *See* Bowers v. Hardwick, 478 U.S. 186, 192 ("It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.").

183 *Wasson*, 842 S.W.2d at 494.

184 *Id.* at 495.

185 *Id.*

186 *Id.* (quoting Commonwealth v. Campbell, 117 S.W. 383, 386 (Ky. Ct. App. 1909)).

187 *Id.* (quoting *Campbell*, 117 S.W. at 387).

188 *See id.* at 493 (noting that "state constitutional jurisprudence in this area is not limited by the constraints inherent in federal due process analysis").

claim of power "to criminalize sexual activity it deems immoral,"[189] pithily asserting that "[t]he majority has no moral right to dictate how everyone else should live."[190] Although *Wasson* could easily have rejected *Bowers* without critiquing it, *Wasson* labeled *Bowers* "a misdirected application of the theory of original intent" as evidenced by its contradiction of the reasoning and outcome of *Loving*.[191] According to *Wasson,* a court should take into account a "contemporary, enlightened interpretation of the liberty interest involved in the sexual act" in order to overrule outdated statutes based on majority morals.[192] Indeed, *Wasson* registered its approval of other cases, including *Morales*, that rejected *Bowers*, and used these other cases as evidence of a judicial trend: "[t]hus our decision, rather than being the leading edge of change, is but a part of the moving stream."[193] Following Foucault's analysis, the reason these decisions are part of a moving stream is that they are merely one part of the discursive practices concerning sodomy prohibitions.

Returning to the use of Stevens' poem as a metaphor for the two different analyses of the right to privacy, *Bowers* and *Wasson* diverge by privileging different binary terms. *Bowers* privileges the moral law of public rights in order to build a "nave" reinscribing the straight mind. *Wasson* privileges the "immoral law" (from the perspective of a high-toned old Christian woman) of private rights to build a "peristyle" subverting the straight mind. Although *Wasson's* rejection of the Federal Constitution represents a subversion of the law of the father, the analysis is not free from totalizing gestures, such as the desire to expose law's foundations. For instance, in privileging the private over the public, *Wasson's* equal protection argument was based on section three of the Kentucky Constitution, which states: "[a]ll men, when they form a social compact, are equal."[194]

The very notion of men forming a social compact is suspect, however, because from whence came the authority to form a represen-

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[189] *Id.* at 490.

[190] *Id.* at 496.

[191] *Id.* at 497. The *Wasson* court contrasted *Bowers* with *Loving* by pointing out that although "[i]t is highly unlikely that protecting the rights of persons of different races to copulate was one of the considerations behind the Fourteenth Amendment," the United States Supreme Court still held in *Loving* that the statute prohibiting miscegenation violated the Fourteenth Amendment. *Id.*

[192] *Id.*

[193] *Id.* at 498.

[194] *Id.* at 491.

tative democracy based on a social compact?[195] According to Derrida, any myth of origins is suspect because from our present historical perspective we cannot conclusively determine, for instance, what the founding fathers intended.[196] At most, the grounding of the law is a legitimate fiction. In following Derrida, this analysis "wants to bring out . . . the moment of authoritarian appeal—the recourse to an ultimate, legitimizing power—involved in all such fabulous myths of origin."[197] For instance, this myth of origins and of authority is perpetuated in judicial interpretation when the Kentucky court purports to interpret what its constitutional framers intended by section three, "All men, when they form a social compact, are equal . . ." and what they intended by section two, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."[198] The court's authoritative interpretation of the framers' intent is, under a deconstructive view, a false pretense, because meaning is indeterminate. Furthermore, the interpretation of the framers' intent is problematic because, as Derrida argued in *Otobiographies*, even the framers' legitimacy is in question: "what entitled those first delegates to speak on behalf of an American people whose consent they could only assume by administrative fiat, since as yet there existed no written constitution in which it was enshrined?"[199]

Regarding the equal protection challenge, the *Wasson* court refused to speculate whether the United States Supreme Court would consider homosexuals a protected class, but held, "[t]hey are a separate and identifiable class for Kentucky constitutional law analysis because *no class of persons* can be discriminated against under the Kentucky Constitution. *All* are entitled to equal treatment, unless there is a substantial governmental interest, a rational basis, for different treatment."[200] Although extending protec-

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195 "[Derridean deconstruction] does not purport to stand on the outside and judge since it can never discover that non-contrived outside measure." Collins, *supra* note 57, at 237.

196 *See* NORRIS, *supra* note 59, at 195-96 (discussing the debate surrounding the intentions of the framers of the Constitution).

197 *Id.* at 198.

198 *Wasson*, 842 S.W.2d at 491.

199 NORRIS, *supra* note 59, at 196.

200 *Wasson*, 842 S.W.2d at 500 (emphasis added). The state's equal protection provisions include Section Two and Three of the Kentucky Constitution, which provide: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." KY. CONST. of 1850, art. XIII, § 2 (1891).

> All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as

tion to homosexuals as a separate class refuses to oppress homosexuals as "other," the conclusion that "no class . . . can be discriminated against"[201] should alleviate the necessity of declaring any group a separate class. The court's reasoning ignores this internal contradiction which undermines a subversion of the straight mind.

In ruling on the Commonwealth's asserted interests to legitimize the statute, the decision successfully subverts the straight mind concept that heterosexuality constitutes a singularity. *Wasson* indicated that "[m]any of the claimed justifications are simply outrageous: that 'homosexuals are more promiscuous than heterosexuals . . . that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public.'"[202] The one "superficial[ly] valid[ ]" justification the decision analyzed concerns the spread of infectious diseases.[203] However, the court rejected this justification on the basis that AIDS and other sexual diseases are spread by unprotected sexual contact, whether homosexual or heterosexual.[204] The court held that it could find "no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform."[205] Finally, the *Wasson* court again critiqued *Bowers* and the United States Supreme Court by purporting to carry out "the unique goal to which all humanity aspires" and which is inscribed above the United States Supreme Court entrance: "Equal Justice Under Law."[206] *Wasson* proudly exclaimed "[i]n Kentucky it is more than a mere aspiration."[207] This exclamation is ironic because justice is merely aspiration and law's meaning is always deferred.

Gryczan also aspired to justice in interpreting the Montana Constitution to strike down the state's homosexual sodomy statute. In concluding that the state constitution provided broader protection

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provided in this Constitution, and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

Id. § 3.

201 *Wasson*, 842 S.W.2d at 500.

202 *Id.* at 501; *see* Amy D. Ronner, Bottoms v. Bottoms: *The Lesbian Mother and the Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341, 342-45 (1995) (exploring how "homophobic attitudes pervade judicial decisions").

203 *Id.*

204 *See id.* ("The growing number of females to whom AIDS . . . has been transmitted is stark evidence that AIDS is not only a male homosexual disease.").

205 *Id.*

206 *Id.*

207 *Id.*

of the right to privacy than did the Federal Constitution,[208] the court rejected the state's argument that *Bowers* resolved the issue, and instead, applied the privacy test articulated in *Katz v. United States*.[209] Concluding that "all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation," the court held that the first prong of the *Katz* test was met.[210] The second prong likewise was fulfilled because society recognized the privacy expectation as reasonable, even if it did "not approve of the sexual practices of homosexuals."[211]

In addition to its somewhat unique application of the *Katz* test, the court concluded that even under the *Palko*-derived test extending the right to privacy "only to those rights which are fundamental or implicit in the concept of ordered liberty," the statute implicated the right to privacy because Montana's Constitution explicitly protected "personal-autonomy privacy protection as a fundamental right," and because "it is hard to imagine any activities that adults would consider more fundamental, more private and, thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity."[212] In rejecting the state's argument that the 1972 Constitutional Convention delegates' refusal to add a provision that "[p]rivate sexual acts between consenting adults do not constitute a crime" indicated the delegates' intent not to protect consensual sodomy, the court pointed out that the intent of the delegates was not recorded, and that the refusal to add the provision could just as likely indicate that "the delegates believed [private sexual acts were] already protected under the privacy clause."[213]

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[208] *See* Gryczan v. State, 942 P.2d 112, 121 (Mont. 1997). The court noted that "we have long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution." *Id.* at 121. The specific constitutional provision that provides an explicit right to privacy provides: "[r]ight of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10.

[209] *See Gryczan*, 942 P.2d at 121-22 (rejecting the *Bowers* test of whether statute "'violate[s] those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"'" in favor of the *Katz* privacy test: "'first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as "reasonable"'").

[210] *Id.* at 122.

[211] *Id.* at 122 (remarking that "[q]uite simply, consenting adults expect that neither the state nor their neighbors will be co-habitants of their bedrooms").

[212] *Id.* at 123.

[213] *Id.*

Gryczan next analyzed the state's two asserted government interests, protecting health by preventing the spread of AIDS and protecting public morals, and found that neither was compelling.[214] This part of the court's analysis clearly rejects the straight mind by pointing out the "faulty logic and invalid assumptions" underlying the first interest, and the tension between public morals and individual privacy underlying the second interest.[215] Noting that the statute was enacted in 1973, "almost ten years before the first AIDS case was detected in Montana," and that AIDS is spread by contact other than same-gender sexual contact, the court rejected the asserted government interest in preventing the spread of AIDS as based on faulty rationales.[216] Moreover, the court held that the statute was not narrowly tailored to prevent the spread of AIDS because it prohibited conduct "unrelated to the spread of HIV," such as "touching, caressing and kissing," and because it prohibited conduct between two people with the HIV virus, or between two people practicing "safe sex."[217]

The court next rejected the second asserted government interest, protecting public morals.[218] In a lengthy discussion balancing the competing interests of the legislature to make public policy and of the state constitution to limit that power, the court pointed out that the legislature's power "to regulate morals and to enact laws reflecting moral choices is not without limits."[219] Specifically, in rhetorically charged language, the court stated:

> [o]ur Constitution does not protect morality; it does, however, guarantee to all persons, whether in the majority or in a minority, those certain basic freedoms and rights which are set forth in the Declaration of Rights, not the least of which is the right of individual privacy. Regardless that majoritarian morality may be expressed in the public-policy pronouncements of the legislature, it remains the obligation of the courts--and of this court in particular--to scrupulously

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214 *See id.*

215 *Id.*

216 *Id.* at 124. The decision points out that "[s]exual contact between women has an extremely low risk of HIV transmission" and that "heterosexual contact is now the leading mode of HIV transmission in this country." *Id.*

217 *Id.* The court also noted that the statute was counter-productive to "public education and disease prevention efforts" because that statute "caused individuals to conceal or distort relevant information." *Id.*

218 *See id.*

219 *Id.* at 125.

> support, protect and defend those rights and liberties guaranteed to all persons under our Constitution.[220]

Furthermore, the court privileged individual rights protected by the state constitution, especially the fundamental right of individual privacy, and emphasized "Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives," relying on James Madison's caution against a tyranny of the majority and C.S. Lewis' warning that "[i]t may be better to live under robber barons than under omnipotent moral busybodies."[221] Like the other state decisions that reject *Bowers*, *Gryczan* "take[s]/ The opposing law and make[s] a peristyle,"[222] that refuses the straight mind's "nave."

In reaching the same result as *Wasson* and *Gryczan* the Tennessee Court of Appeals in *Campbell* determined that the right of privacy protected by the Tennessee Declaration of Rights exceeded the federal right.[223] Although the declaratory judgment limited the facts to "private, consensual, non-commercial, sexual conduct," the *Campbell* decision granted greater privacy protection under the Tennessee Constitution than available under the Federal Constitution.[224] Rather than performing an historical analysis of past cases or constitutional debates, *Campbell* reinterpreted a case decided four years earlier, *Davis v. Davis*, which "first expressly recognized" a right to privacy embedded in the state constitution.[225] According to the facts and holding recited in *Campbell*, *Davis* involved a determination of the parental rights of a divorced couple to frozen embryos; Mrs. Davis wanted to donate the embryos to another couple, but Mr. Davis did not want the embryos donated because that "would . . . force him to become a father against his will."[226] In determining the parameters of the state right to privacy, the court in *Davis* held that Mr. Davis did indeed have a right to prevent his ex-

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220 *Id.*

221 *Id.* (citing THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961), and C.S. Lewis, *The Humanitarian Theory of Punishment, in* GOD IN THE DOCK 287, 292 (1970)).

222 STEVENS, *supra* note 7, at 77.

223 *See* Campbell v. Sundquist, 926 S.W.2d 250, 260-61 (Tenn. Ct. App. 1996) (relying on *Davis's* holding that the source of the right to privacy emanated from "sections 3, 7, 19, and 27 of the Declaration of Rights contained in Article I" of the Tennessee Constitution).

224 *Id.* at 259.

225 *Id.* (analyzing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)).

226 *Id.* at 260.

wife's donation of frozen embryos because the "right to privacy . . . included the right not to procreate."[227]

Campbell's holding extended *Davis* to emphasize the "strong historic commitment by the citizens of this State to individual liberty and freedom from governmental interference in their personal lives."[228] Quoting *Davis's* holding that this strong liberty interest "is so deeply imbedded in the Tennessee Constitution that it, alone among American constitutions, gives the people, in the face of governmental oppression . . . the right to resist that oppression even to the extent of overthrowing the government,"[229] *Campbell,* like *Wasson*, valorizes private over public, and especially emphasizes "[t]he sanctity of the home"[230] in extending the right to privacy to include the "right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home . . . [even] when the adults engaging in that private activity are of the same gender."[231] By privileging private rights, these cases demonstrate the impossible reconciliation between private other and public self.[232]

The effect of *Campbell's* holding up to this point, extending the state right to privacy to include homosexual sodomy, subverts the straight mind by including homosexual sodomy within the category of intimate sexual activities. The second half of the decision, which weighs the state's asserted compelling interests, also unsettles heterosexual presumptions.[233] The court quickly disposed of the first compelling state interest: "the statute discourages activity which cannot lead to procreation."[234] Citing *Griswold* and *Davis*, the court held that sexual activity is constitutionally protected even if it does not result in procreation.[235] The second asserted compelling interest is that the statute "discourages a socially stigmatized lifestyle which leads to higher rates of suicide, depression, and substance

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227 *Id.* (noting the holding of *Davis*).

228 *Id.* at 261.

229 *Id.*

230 *Id.*

231 *Id.* at 262.

232 The *Wasson* dissent underscores this failure when it criticizes the judgment: "It is ironic that in the rambling rhetoric of over 9,000 words, the majority opinion blithely tramples on the rights of the majority of the public." *Wasson*, 842 S.W.2d at 510 (Wintersheimer, J., dissenting).

233 *See Campbell,* 926 S.W.2d at 258 (discussing privacy rights afforded to individuals under Tennessee's Constitution).

234 *Id.* at 263.

235 *See id.* (noting that the U.S. Supreme Court's decision in *Griswold* "establish[ed] that the State cannot outlaw certain intimate sexual activities of its citizens simply because those activities do not or cannot lead to procreation").

abuse."[236] In rejecting these straight mind assumptions, the court stated "there is no one 'homosexual lifestyle' in which all or even a majority of homosexuals engage."[237]

For the same reason, the court rejected the third interest that "homosexual relationships are instable," "short lived, shallow, and promiscuous."[238] In considering the state's fourth asserted interest, that the statute "prevents the spread of infectious disease,"[239] the court held that the statute is not narrowly tailored because the statute prohibits homosexuals from engaging in sex even if both partners are disease free or practicing safe sex.[240] Moreover, the court agreed with the *amicus curiae* brief of the American Public Health Association "that the statute is actually counterproductive to public health goals" because homosexuals are reluctant to seek medical treatment for sexual diseases since they fear being reported and prosecuted.[241] Finally, the court rejected the state's fifth compelling interest, that the statute furthers public morals, by holding that the interest is not compelling enough to prohibit private sexual conduct between adults who "happen to be of the same gender."[242] Like *Wasson* and *Gryczan*, the court in *Campbell* subverts the straight mind by rejecting its assumptions that heterosexuality is "natural" and that it entails "the rigid obligation of the reproduction of the 'species,' that is, the reproduction of heterosexual society."[243] These decisions reject the obligation that "'you-will-be-straight-or-you-will-not-be.'"[244]

Likewise, in *Morales* the Texas appellate court subverts this obligation to be straight. The first sentence of the decision casts the issue in the following terms: "[t]his appeal involves the limits on the government's right to intrude into an individual's private life, and the extent of an individual's right to be let alone."[245] After estab-

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236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.*

240 *See id.* (recognizing, however, that "the State certainly has a compelling interest in preventing the spread of infectious disease among its citizens").

241 *Id.* at 264.

242 *Id.* at 265.

243 WITTIG, *supra* note 6, at 6.

244 *Id.* at 28.

245 State v. Morales, 826 S.W.2d 201, 202 (Tex. Ct. App. 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994). The decision echoes the way Justice Blackmun framed the issue in *Bowers*: "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" Bowers v. Hardwick, 478 U.S. 186, 199 (Blackmun, J.,

lishing that the Texas Constitution provides greater constitutional protection for the right to privacy than does the Federal Constitution,[246] the court extended the right to privacy to homosexual conduct by short-circuiting possible objections. Unlike the court's analysis in *Bowers*, *Morales* did not evaluate whether homosexual conduct is deeply rooted in tradition, nor did *Morales* analogize other cases extending the right to privacy. Rather, in rhetorically clear and concise language, the court held:

> we can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private. If consenting adults have a privacy right to engage in sexual behavior, then it cannot be constitutional, absent a compelling state objective, to prohibit lesbians and gay men from engaging in the same conduct in which heterosexuals may legally engage. In short, the State cannot make the same conduct criminal when done by one, and innocent when done by the other.[247]

The court then rejected the State's only offered compelling interest, public morality, by concluding that the State had failed to demonstrate "that criminalizing private conduct engaged in by consenting adults in any way advances public morality."[248] The language of the decision refuses to implement the straight mind's domination over the homosexual other by casting the issue not in binary terms (homosexual/heterosexual), but rather in terms of "an individual[ ]" or "consenting adult[ ]."[249] In effect, *Morales* rejected the definition in *Bowers* equating homosexuality with sodomy.

The next Part of this Article considers ethical concerns raised by *Bowers* and by the straight mind's insistence on sodomy laws, and finally, concludes by returning to *Wasson*, *Campbell*, *Gryczan*, and *Morales* to challenge their degree of success in subverting the straight mind.

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dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

246 *See Morales*, 826 S.W.2d at 204 (concluding that "the federal constitution provides only a floor below which the State may not fall in affording protection to individuals"). The decision relies on *Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) which involved a challenge to mandatory polygraph tests of state employees and determined the parameters of the state constitutional right to privacy found in sections 6, 8, 9, 10, 19, and 25 of the Texas Bill of Rights.

247 *Morales*, 826 S.W.2d at 204.

248 *Id.* at 205.

249 *Id.* at 202, 205.

V. "PROUD OF SUCH NOVELTIES OF THE SUBLIME"[250]: ETHICAL CONSIDERATIONS

Contrary to the view that deconstruction is arbitrary,[251] Christopher Norris, an acknowledged authority on Derrida, defends Derrida's enterprise as having a non-arbitrary and "ultimately ethical nature."[252] A few examples illustrate Norris's claim. For instance, *Plato's Pharmacy* announces that "the question of writing opens as a question of morality,"[253] and *Force of Law* argues that "deconstructionist" texts "*seem* . . . not to foreground the theme of justice" but "this is only *apparently so*."[254] An overall concern of *Force of Law* is the question of justice. Similarly, although a deconstructive approach to sodomy cases has been taken, this Article attempts to disabuse any notion that deconstruction only results in nihilist and relativistic conclusions. The analysis matters from a pragmatic standpoint because of the ethical conclusions and political ramifications that are drawn in these concluding sections. As Butler asks in her book, "[w]hat happens to the subject and to the stability of gender categories when the epistemic regime of presumptive heterosexuality is unmasked as that which produces and reifies these ostensible categories of ontology?"[255] Parts III and IV attempt to de-center *Bowers'* compulsory heterosexuality. This Part critiques the ethical consequences of *Bowers'* straight mind.

Several ethical questions are raised in these cases. One concerns the question of violence, both the violence Derrida and Robert Cover see as inseparable from the enforcement of law and also homophobic violence. Law, and law's enforcement, require violence. As Derrida points out, "there is no law without enforceability."[256] The question becomes: when is this force legitimate?[257] Cover has similarly argued that "[l]egal interpretive acts signal and occasion the imposition of violence upon others."[258] The violence of enforcing

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250 STEVENS, *supra* note 7, at 78.

251 *See, e.g.*, Alexander Nehamas, *Truth and Consequences: How to Understand Jacques Derrida*, THE NEW REPUBLIC, Oct. 5, 1987, 31, 32-33 (discussing the controversy surrounding Derrida's theories).

252 NORRIS, *supra* note 59, at 230.

253 DERRIDA, *supra* note 5, at 74.

254 Derrida, *supra* note 67, at 7.

255 BUTLER, *supra* note 41, at viii.

256 Derrida, *supra* note 67, at 6; *see infra* Part II (discussing deconstruction generally).

257 *See* Derrida, *supra* note 67, at 6 (contemplating: "What is a just force or a non-violent force").

258 Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

sodomy statutes is an illegitimate or unjust force because it imposes punishment for private sexual behavior. Justice Powell's concurring opinion in *Bowers* suggested this violence when he raised the possibility of invalidating the Georgia statute under the Eighth Amendment, not because of homophobic violence, but because of the overly long sentence (up to twenty years) for a sodomy conviction.[259]

Another form of violence associated with sodomy laws is homophobic violence. For instance, in recounting the "untold" facts of *Bowers*, Kendall Thomas described Hardwick's beating three weeks after his original arrest (for drinking in public) by three men who may have been plainclothes officers.[260] The *Bowers* Court failed to address this problem of violence that straight mind morals could engender;[261] however, the *Morales* and *Gryczan* courts did acknowledge homophobic violence in their standing analyses.[262] The *Morales* court held that one reason plaintiffs had standing and were entitled to equitable relief was that the Texas sodomy statute not only criminalized behavior but encouraged hate crimes and discrimination.[263] Regrettably, the Texas Supreme Court rejected this conclusion and noted that "none of the plaintiffs alleges having been the victim of a hate crime, or a fear of becoming the victim of any

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[259] *See* Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Powell, J., concurring) (stating that "a prison sentence for such conduct–certainly a sentence of long duration–would create a serious Eighth Amendment issue"). Four years after *Bowers* was decided, Justice Powell remarked that he "probably made a mistake" in ruling with the majority. Linda Greenhouse, *When Second Thoughts in Case Come Too Late,* N.Y. TIMES, Nov. 5, 1990, at A14; Ruth Marcus, *Powell Regrets Backing Sodomy Laws,* WASH. POST, Oct. 26, 1990, at A3.

[260] *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1438 (1992) (describing Hardwick's account of his attack: "I got out of the car, turned around, and they said 'Michael' and I said yes, and they proceeded to beat the hell out of me"). Derrida discusses police violence in *Force of Law*, arguing that modern police are "ignoble" because, using violence, they both enforce the law and make the law. Derrida, *supra* note 67, at 42-43.

[261] As discussed below, the Supreme Court later considered this problem of violence, or "animus" in *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see infra* notes 294-98 and accompanying text. The recent killing of Matthew Shepard, a gay student at the University of Wyoming, tragically illustrates this homophobic violence, which studies indicate has increased nationally by two percent in 1997. *See* Elaine Herscher, *Wyoming Death Echoes Rising Anti-Gay Attacks*, S.F. CHRON., Oct. 13, 1998, at A7.

[262] *See* State v. Morales, 826 S.W.2d 201, 202-03 (Tex. Ct. App. 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994) (concluding that a Texas sodomy statute had the practical effect of "caus[ing] actual harm which goes far beyond the mere threat of prosecution"); *see also* Gryczan v. State, 942 P.2d 112, 120 (Mont. 1997) (relying on evidence by the National Institute for Justice "show[ing] that there is a correlation between homosexual sodomy laws and homophobic violence").

[263] *See id.* (noting that gay men and lesbians suffered actual harm and did not have an adequate legal remedy).

specific threatened future event."[264] However, as Butler points out, violence can occur when one is named, a "sodomite" in this case, because of the "power of the name": "[o]ne is . . . brought into social location and time through being named."[265] Here, the moral majority (a high-toned old Christian woman) names or constitutes a subject: "[t]he mark interpellation makes is not descriptive, but inaugurative. It seeks to introduce a reality rather than report on an existing one."[266] As an inaugurative act, this naming can be a violence when the subject does not want a particular signification.

> After all, to be named by another is traumatic: it is an act that precedes my will . . . . Because I have been called something, I have been entered into linguistic life, refer to myself through the language given by the Other, but perhaps never quite in the same terms that my language mimes. The terms by which we are hailed are rarely the ones we choose.[267]

Thus, the force of law, by enforcing sodomy statutes, constitutes an act of violence—both in naming and criminalizing sexual behavior as deviant, and in enforcing sodomy statutes.

Thomas, who has examined the relation between homophobic violence and sodomy laws, argues that the reason courts have a duty to prevent

> violence against gays and lesbians perpetrated by other citizens represents the states' *constructive delegation* of governmental power to these citizens. . . . To state the point in slightly different terms, the fact that homophobic violence occurs within the context of "private" relations by no means implies that such violence is without "public" origins or consequence.[268]

Thomas argues that because this "homophobic violence is an exercise of political power,"[269] its very existence may be a way to invalidate sodomy statutes under the Eighth Amendment's prohibition of cruel and unusual punishment.[270]

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[264] State v. Morales, 869 S.W.2d 941, 943 (Tex. 1994).

[265] JUDITH BUTLER, EXCITABLE SPEECH 29 (1997).

[266] *Id.* at 33.

[267] *Id.* at 38.

[268] Thomas, *supra* note 260, at 1481-82.

[269] *Id.* at 1469.

[270] *See id.* at 1486-88 (noting that the criminalization of homosexual sodomy functions as an infliction of cruel and unusual punishment). Additionally, as pointed out above, Justice Powell's concurring opinion in *Bowers* raised the possibility of invalidating the Georgia stat-

A second ethical feature is the catch-22 dilemma created by the state's failure to enforce sodomy statutes.[271] That sodomy statutes are rarely enforced (except as additional charges in a rape case) presents the problem that behavior that is widely tolerated is nonetheless criminal. This illustrates Foucault's description of the multiple discourses regarding sodomy as a "twofold operation" of extreme severity and tolerance.[272] Moreover, an unenforced statute carries the possibility of what Cover calls a violent interpretation of law, the threat that one may be prosecuted.[273] Ironically, as a result of the failure to prosecute, individuals may lack standing to challenge the statute, but are nonetheless "irreparabl[y] injur[ed] simply from the statute's existence."[274]

A third ethical problem lies in the enforcement of majority morals to the exclusion of an ethics of care for the other. As argued in the first section of this Article, cases such as *Bowers*, which uphold sodomy laws, often do so based on an explicit enforcement of majority morals. Conversely, courts that have ruled sodomy statutes unconstitutional have done so by ignoring or explicitly rejecting majority morals. The split between majority and minority morals reflects a failure of reconciliation between self and other, or stated another way, demonstrates a failure to *care* for the other. Justice is not possible unless we enforce the law by taking the other into account.

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ute under the Eighth Amendment. *See* Bowers v. Hardwick, 478 U.S. 186, 197 (Powell, J., concurring) (stating that an imprisonment term of 20 years for a single act of consensual homosexual sodomy could constitute cruel and unusual punishment). The issue of cruel punishment was also raised in the lower court level in *Wasson*, but was not discussed by the Kentucky Supreme Court because it was not preserved for appellate review. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 489 (Ky. 1993) (noting the decision not to review).

271 *See Bowers*, 478 U.S. at 198 n.2 (noting that "there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades" and that the state had "declined to present the criminal charge against Hardwick to a grand jury"); *id.* at 219 n.11 (Stevens, J., dissenting) (mentioning that the Georgia Attorney General stated at oral argument that the last prosecution he could remember under the statute was in the 1930s or 1940s); *see also* Gryczan v. State, 942 P.2d 112, 117, 120 (Mont. 1997) (rejecting the State's argument that the plaintiffs lacked standing, in part, because there had been no prosecutions under the statute since it was enacted).

272 *See* 1 FOUCAULT, *supra* note 35, at 101 (discussing the phenomenon of severe punishment yet infrequent enforcement).

273 *See* Cover, *supra* note 258, at 1601 (noting the detrimental effect legal interpretation can have on peoples' lives).

274 City of Dallas v. England, 846 S.W.2d 957, 959 (Tex. App. 1993). Decided on the same basis as *Morales*, *England* concerned a challenge to the Texas sodomy statute brought by a lesbian police officer who had been denied the processing of her employment application. *See id.* at 959 (noting that "England, who was prevented from completing the job application process with the Dallas Police Department, has actually suffered the concrete injury that the plaintiffs in *Morales* alleged they would suffer"). After this intermediate level judgment, the State did not file an appeal to the Texas Supreme Court.

Several French contemporary critical theorists have urged an ethics of care. For instance, the philosopher Emmanuel Levinas describes an ethics of alterity in which being or selfhood is "the responsibility for the Other, being-for-the-other."[275] For Levinas, what it means to be human and responsible is to act in response to the other: "being human is a concrete and physical sensitivity to the claims revealed by the Other."[276] The encounter with the other is the heart of being; it is an ethical bond because "only by discovering the irreducibility of the alterity of the Other can I understand that I am neither solipsistically alone in the world nor part of a totality to which all others also belong."[277]

Levinas' belief in law's ethical responsibility can be seen from his statement that "[j]ustice well ordered begins with the Other."[278] He believes that we are responsible to the extent that we consider the other.[279] Although Derrida has criticized Levinas, he has referred to Levinas' ethics of alterity in his discussions on deconstruction and the possibility of justice.[280] During the Villanova roundtable, for instance, Derrida stated:

> Levinas says . . . that justice is the relation to the other. . . . Once you relate to the other as the other, then something incalculable comes on the scene . . . That is what gives deconstruction its movement . . . to criticize the given determinations of culture, of institutions, of legal systems, not in order to destroy them or simply to cancel them, but to be just with justice, to respect this relation to the other as justice.[281]

Similarly, another French philosopher, Hélène Cixous, describes the awareness and love for the other as "the mystery of pain and

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[275] EMMANUEL LEVINAS, ETHICS AND INFINITY: CONVERSATIONS WITH PHILIPPE NEMO 52 (Richard A. Cohen trans., 1985). Levinas, who has an "unmatched reputation" in France, is considered to have "almost single-handedly restored philosophical respectability to ethics in post-war French thought." COLIN DAVIS, LEVINAS: AN INTRODUCTION 47 (1996).

[276] ADRIAAN PEPERZAK, TO THE OTHER: AN INTRODUCTION TO THE PHILOSOPHY OF EMMANUEL LEVINAS 26 (1993).

[277] DAVIS, *supra* note 275, at 48.

[278] PEPERZAK, *supra* note 276, at 112.

[279] *See id.* at 116. Peperzak explains the importance for Levinas of the face of the other as an indicator of injustice: "The Other's face is the revelation not of the arbitrariness of the will but its injustice. Consciousness of my injustice is produced when I incline myself not before facts, but before the Other." *Id.* at 116.

[280] *See* DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 17-18 (noting Levinas's construct of justice, and noting that Derrida commented that it was a very minimal definition but one that he loved).

[281] *Id.*

compassion: in times of injustice, the 'subject' of pain is not me, but you. Your pain makes my own more bitter and more generous."[282]

One difficulty of urging an ethics of care, or an ethics of alterity, is the "unbridgeable separation of the self from the other," which may be supplemented by an ethics of care, but which can never be resolved because the "self always remains (somewhat) estranged from the other."[283] These limits of reconciliation do not dictate against attempting an ethics of care, but rather, offer a hope for a more ethical vision and "suggest to the about to be renewed ethical call to the other which particular failures should be avoided, and which obstacles need to be overcome."[284]

Thus, whereas the majority in *Bowers* relies on an application of majority morals that rejects an ethics of care for the homosexual other, cases such as *Campbell* incorporate an ethics of care, which is informed by the awareness of the gap between self and other. For instance, in *Campbell*, after a lengthy discussion of whether majority morals provides a compelling state interest on which to uphold the Tennessee sodomy law, the court reasoned that even laws that "reflect 'moral choices' regarding [citizens'] standard of conduct . . . have constitutional limits."[285] In overturning the sodomy statute as unconstitutional, the court applied an ethics of care for the other. This ethics of care can be seen in the court's rationale that

> an adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of Tennessee's protection of the right to privacy, and that this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender.[286]

This protection of intimate privacy rights of homosexuals is itself a moral choice, contrary to the court's assertion that it "'does not sit as moral arbiters making judgments on what is acceptable social behavior.'"[287]

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[282] Hélène Cixous, *We Who Are Free, Are We Free?*, 19 CRITICAL INQUIRY 201, 206 (Chris Miller trans., 1993).

[283] Rosenfeld, *supra* note 24, at 158.

[284] *Id.* at 159.

[285] Campbell v. Sundquist, 926 S.W.2d 250, 264 (Tenn. Ct. App. 1996).

[286] *Id.* at 262.

[287] *Id.* at 266 (quoting *In re* Parsons, 914 S.W.2d 889, 894 (Tenn. App. 1995)).

Justice Blackmun's dissent in *Bowers* also shows an ethic of care when he argues that

> [t]his case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.[288]

Blackmun's dissent also quotes *Wisconsin v. Yoder's* insight that "'[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.'"[289] The acknowledgment of difference and of "different choices,"[290] and the rejection of laws based on "'mere public intolerance or animosity'"[291] exemplify this ethics of care. Derrida underscores the importance for a state to acknowledge differences:

> [a] state without plurality and a respect for plurality would be, first, a totalitarian state, and not only is this a terrible thing, but it does not work . . . . [A] state as such must be attentive as much as possible to plurality, to the plurality of peoples, of languages, cultures, ethnic groups, persons, and so on. That is the condition for a state.[292]

A more recent United States Supreme Court case demonstrating plurality and an ethics of care is *Romer v. Evans*.[293] Decided ten years after *Bowers, Romer* invalidated Colorado's Constitutional "Amendment 2," which the Court described as "prohibit[ing] all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians."[294] Although

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[288] Bowers v. Hardwick, 478 U.S. 186, 213 (1986) (Blackmun, J., dissenting) (citation omitted).

[289] *Id.* at 206 (quoting Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972)).

[290] *Id.* Justice Blackmun's dissent reiterates this when he quotes *West Virginia Board of Education*: "'[f]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.'" *Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting) (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 641-42 (1943)).

[291] *Id.* at 212 (quoting O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).

[292] DERRIDA, *supra* note 5, at 15.

[293] 517 U.S. 620 (1996).

[294] *Id.* at 624. Article 2, section 30b of Colorado's Constitution, which was held unconstitutional in *Romer v. Evans*, provided:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or

Romer did not involve the violation of or challenge to a sodomy statute, many commentators have argued that *Romer* indicates a shift in the Supreme Court's analysis of laws affecting homosexuals indicating the willingness of the Court to reconsider its holding in *Bowers*.[295] This shift can be seen as an example of an ethics of caring. Because the decision did not involve a sodomy statute and was decided on the basis of equal protection rather than due process, it will not be analyzed in great detail, but it is offered as a recent example of an ethics of care.

Justice Kennedy's majority opinion begins with a quote by the first Justice Harlan that "the Constitution 'neither knows nor tolerates classes among citizens.'"[296] This quote sets the tone for an ethics of alterity which plays out in the Court's determination that "the amendment seems inexplicable by anything but animus toward the class it affects."[297] The Court's labeling of animus for the homosexual other indicates a shift in Supreme Court analysis.[298] The extent of the Supreme Court's shift is unclear in light of its recent denial of petition for writ of certiorari in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.[299] The city charter

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bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b.

[295] *See* G. Sidney Buchanan, *Sexual Orientation Classifications and the Ravages of* Bowers v. Hardwick, 43 WAYNE L. REV. 11, 90 (1996) (finding, however, that "it is still too early to know whether *Romer* or *Bowers* will emerge as the dominant precedent in this area of the law"); Jacobs, *supra* note 11, at 966-67 (noting that *Romer's* most noteworthy achievement "was its failure to cite anything to which the continued vitality of *Bowers* could be moored"); *see also Romer*, 517 U.S. at 636 (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick* . . . and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.").

[296] *Romer*, 517 U.S. at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[297] *Id.* at 632; *see id.* at 634 (holding that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"). The dissent counters this with the argument that

one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.

Id. at 644 (Scalia, J., dissenting).

[298] *See* Jacobs, *supra* note 11, at 955.

[299] 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3749, 1998 WL 248349 (Oct. 13, 1998).

amendment at issue in *Equality Foundation* was similar to the ordinance in *Romer*, however, the Sixth Circuit concluded that the charter amendment "was not facially animated solely by an impermissible naked desire of a majority of the City's residents to injure an unpopular group of citizens."[300] In a three-justice opinion regarding the denial for the petition for writ of certiorari, Justice Stevens emphasized that "the denial . . . is not ruling on the merits," and that "[t]his Court does not normally make an independent examination of state law questions that have been resolved by a court of appeals."[301] Despite the uncertainty that *Equality Foundation* raises, with trends evidenced in state court decisions, it will be interesting to see whether the same ethics of care will guide a future due process challenge to a homosexual sodomy statute.

VI. CONCLUSION: TOTALIZING GESTURES, POSSIBLE SUBVERSIONS, AND AN UNWEAVING

"Every thread of summer is at last unwoven," writes Stevens.[302] "[T]he dissimulation of the woven texture can in any case take centuries to undo its web," writes Derrida.[303] We do not have centuries. One of the most troubling ethical threads involves the possibility of justice. *Bowers* and these several state sodomy cases come to opposite conclusions. Is either just? Law is not justice. Justice is possible only when law makers and enforcers take into account the other. And even then, Derrida argues that we can never be certain that any decision is just because the decision must go through the "ordeal of the undecidable,"[304] which then "remains caught, lodged, at least as a ghost . . . in every decision" and "deconstructs from within any assurance of presence, any certitude or any sup-

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[300] *Id.* at 300. The court also distinguished the charter amendment from the ordinance in *Romer* by holding that the charter amendment "did not disempower a group a citizens from attaining special protection at all levels of state government, but instead merely removed municipally enacted special protection from gays and lesbians." *Id.* at 301.

[301] *Equality Found. of Greater Cincinnati, Inc.*, 1998 WL 248349, at *1.

[302] WALLACE STEVENS, *Puella Parvula*, *in* THE PALM AT THE END OF THE MIND, *supra* note 7, at 330.

[303] DERRIDA, *supra* note 5, at 65.

[304] Derrida, *supra* note 67, at 24. The ordeal of the undecidable involves the paradox that

> [t]here is apparently no moment in which a decision can be called presently and fully just: either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule . . . which in its turn is not absolutely guaranteed by anything; and, moreover, if it were guaranteed, the decision would be reduced to calculation and we couldn't call it just.

Id.

posed criteriology that would assure us of the justice" which is an infinite idea, anyway.[305] We can never re-create this ghost; we can never guarantee original intention. Nor can we determine justice as the foundation of the law. Derrida asks, "What is a legitimate fiction? What does it mean to establish the truth of justice?"[306] For Stevens, "[p]oetry is the supreme fiction."[307] The legitimate fiction or supreme fiction turns out to be non-deconstructible justice. Both the moral law and the immoral law can be deconstructed. As Derrida has explained:

> [e]ach time you replace one legal system by another one, one law by another one . . . that is a kind of deconstruction . . . So, the law as such can be deconstructed and has to be deconstructed. . . . But justice is not the law. . . . Without a call for justice we would not have any interest in deconstructing the law.[308]

This call for justice makes deconstruction of the law more than an empty practice. Rather, it is a call to change injustice based on an "'idea of justice' . . . owed to the other."[309] This change should "not [ ] remain enclosed in purely speculative, theoretical, academic discourse but rather . . . aspire to something more consequential, to *change* things and to intervene in an efficient and responsible . . . way, not only in the profession but in what one calls the *cité,* the *polis* and more generally the world."[310]

Setting aside these problematic and theoretical questions about the relations between law and justice and deconstruction, this Article will conclude with a more pragmatic question that "aspire[s] to something more consequential":[311] can state court cases that reject their federal father be said to subvert the straight mind? The answer is in part no, and in part yes. The answer depends on the power of language to effect change in the epistemic hegemony of the straight mind. Butler argues, "[t]he power of language to work on bodies is both the cause of sexual oppression and the way beyond

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[305] *Id.* at 24-25. Collins raises an even more troubling aspect of Derrida's discussion of justice—the possibility that the idea of justice may be "'reappropriated by the most perverse calculation.'" Collins, *supra* note 57, at 246 (quoting Derrida).

[306] Derrida, *supra* note 67, at 12. Derrida's question responds to Montaign's comment that "'even our law, it is said, has legitimate fictions on which it founds the truth of its justice.'" *Id.* (quoting Montaigne).

[307] STEVENS, *supra* note 7, at 77.

[308] DECONSTRUCTION IN A NUTSHELL, *supra* note 2, at 16-17.

[309] Derrida, *supra* note 67, at 25.

[310] *Id.* at 8-9.

[311] *Id.* at 8.

that oppression."[312] Although both *Wasson* and *Morales* decriminalize homosexual sodomy, they both imply it is immoral.[313] Thus, the result in both cases might be considered just, but the means to achieve that result does not necessarily demonstrate an ethics of care for the other. In *Wasson,* the Commonwealth argued it had the right to prohibit sodomy solely because it is immoral.[314] The Kentucky court did not subvert this power by saying sodomy is moral, nor did the court subvert this power in oblique ways. Instead, the court continued to call sodomy "[d]eviate sexual intercourse,"[315] and agreed that it was an "incendiary moral issue."[316] In effect, *Wasson* is an example of what it calls "an enlightened paternalism"—it may be enlightened, but it is still the logos, the Father, the social contract that is a heterosexual social contract because it validates the straight mind's assumptions of procreation and heterosexuality.[317]

Similarly, the court of appeals' decision in *Morales* rejected the State's assertion that it had power to criminalize homosexual sodomy solely on the basis of "implement[ing] . . . public morality."[318] The decision also stated: "[w]e are mindful that homosexual conduct is abhorrent to the morals and deeply held belief of many people."[319] Unlike *Wasson,* however, *Morales* did not adopt the view that homosexual sodomy is deviate behavior. Instead, *Morales* stated:

> [w]e can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private. If consenting adults have a privacy right to engage in sexual behavior, then it cannot be constitutional, absent a compelling state objective, to pro-

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312 BUTLER, *supra* note 41, at 116.

313 *See* Commonwealth v. Wasson, 842 S.W.2d 487, 499 (Ky. 1993) (noting that the issue before the court was "not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference"); State v. Morales, 826 S.W.2d 201, 205 (Tex. Ct. App. 1992), *rev'd,* 869 S.W.2d 941 (Tex. 1994) ("We are mindful that homosexual conduct is abhorrent to the morals and deeply held beliefs of many people.").

314 *See Wasson,* 842 S.W.2d at 490 (noting that the Commonwealth's position that sodomy was immoral did not waiver with "regard to whether the activity is conducted in private between consenting adults . . . [or whether it is] harmful to the participants or to others").

315 *Id.* at 493.

316 *Id.* at 495.

317 *See* Campbell v. Sundquist, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996) ("The Court's opinion should not in any way be deemed to condone or condemn any particular lifestyle or the moral behavior associated therewith.").

318 *Morales,* 826 S.W.2d at 205.

319 *Id.*

> hibit lesbians and gay men from engaging in the same conduct in which heterosexuals may legally engage. In short, the State cannot make the same conduct criminal when done by one, and innocent when done by the other.[320]

This neutral language comes closer to subverting the straight mind. As Butler points out, "[i]f subversion is possible, it will be a subversion from within the terms of law, through the possibilities that emerge when the law turns against itself and spawns unexpected permutations of itself."[321] While *Campbell, Wasson, Gryczan*, and *Morales* seem a possible subversion, a "jovial hullabaloo," for now "we are where we began"—where only "widows wince."[322] We will have to wait awhile longer to see whether the Supreme Court "take[s] The opposing law and make[s] a peristyle"[323] based on an ethics of care for the other.

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[320] *Id.* at 204. Although *Gryczan* rejects as a compelling state interest "a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals," the decision does not accept differences or demonstrate an ethics of care for the other. *See* Gryczan v. State, 942 P.2d 112, 125-26 (Mont. 1997). Rather, *Gryczan* collapses difference by repeating the phrase "regardless of gender" in its privacy analysis. *See id.* at 122, 125, 126.

[321] BUTLER, *supra* note 41, at 93; *see* WITTIG, *supra* note 6, at 30 ("[T]here is another order of materiality, that of language, and language is worked upon from within by these strategic concepts.").

[322] STEVENS, *supra* note 7, at 77-78.

[323] *Id.*