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The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*

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THE ECLIPSE OF REASON: A RHETORICAL READING OF *BOWERS v. HARDWICK*

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[P]assion never fails to wrest the scepter from reason.
—Publius (James Madison)[1]

IN a careful and compelling reading of the text of the Supreme Court's opinion in *Bowers v. Hardwick*,[2] Janet Halley provides a meticulous map of the misprisions by which the *Hardwick* Court "exploit[s] confusion about what sodomy is in ways that create opportunities for the [judicial] exercise of homophobic power."[3] According to Professor Halley, the duplicitous mechanisms the *Hardwick* Court marshals in reasoning about sodomy entail a mobilization of two "incommensurable articulations": the idea of the sodomitical act, on the one hand, and that of personal identity, on the other.[4]

Professor Halley rightly insists that an anti-homophobic critique of *Hardwick* should refuse to confine itself to "questions whether the Court's analysis is more fundamentally act-based or identity-based, and whether it can be better refuted from an act- or identity-based position."[5] Because both paths ultimately lead to the same conceptual cul-de-sac, Professor Halley urges us to focus instead on the dually duplicitous stratagem by which the *Hardwick* Court *simultaneously* deploys act- and identity-based theories of sodomy.

I concur in Professor Halley's judgment that critical examination of the act-based and identity-based theories of sodomy ought not be

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 Professor, Columbia Law School. A shorter version of this Commentary appears in 1 GLQ: A Journal of Lesbian and Gay Studies (1993). This work is dedicated to the memory of Willie L. Moore and Anthony Thomas.

[1] The Federalist No. 55 (James Madison). The Madisonian maxim appears in a passage of the *Federalist* defending constitutional controls on the size of the proposed House of Representatives. In using it here, I do not mean to suggest that Madison foresaw or could have foreseen that the possibility that the mob mentality against which he sought to guard could arise in smaller, arguably unrepresentative bodies such as the Supreme Court.

[2] 478 U.S. 186 (1986).

[3] Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After *Bowers v. Hardwick*, 79 Va. L. Rev. 1721, 1770 (1993).

[4] Id. at 1726.

[5] Id. at 1770.

viewed as mutually exclusive. After *Hardwick*, how could they be? It would be intellectually and ideologically unwise not to engage the "binocular vision"[6] that informs the *Hardwick* opinion—in all its simultaneity. Indeed, we must be prepared to press the project proposed by Professor Halley even further. An analysis of the ways in which the *Hardwick* decision uses act-based and identity-based conceptions of sodomy is important, but standing alone, it does not exhaust the complex meanings inscribed in the Court's double deployment. The complexities increase when the investigation of act-based and identity-based conceptions of sodomy remains inattentive to the possibility that the opposition drawn between sexual acts and sexual identities may be more apparent than real.[7] The relational dependence between act and identity to which Professor Halley calls our attention suggests that our collective project will remain unfinished without an analysis that transposes the anti-homophobic critique of *Hardwick* into another, even more dissonant key. If the exploration of the act-based versus identity-based conceptions of sodomy was the first step in the anti-homophobic critique of *Hardwick*, and the binocular investigation undertaken by Professor Halley the second, the third step in our critical response to the homophobic ideology embraced by the *Hardwick* Court should be a sustained challenge to the very terms of the opposition between sexual acts and sexual identities. This is the task I undertake here.

The most promising target for a deconstruction of the metaphysical infrastructure that subtends both the distinction between sexual acts and sexual identities, and a more nuanced understanding which sees the two as relational and dependent, is neither the act of "homosexual sodomy," nor "homosexual" identity. Instead, we must begin to take rigorous and relentless critical aim at the ideology and institution of normative heterosexuality. I do so in a slightly perverse, but, I hope, productive way.

I have suggested in some of my work in critical race theory that "race" is a verb, that we are "raced" through a constellation of prac-

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[6] Id. at 1746.

[7] Professor Halley argues that the act-based approach to sodomy that governs the Court's analysis in *Hardwick* "both distinguishes itself from and depends upon an identity-based approach." Id. at 1768. Nonetheless, this statement is in tension with Halley's assertion that the "sodomitical act" and the idea of "personal identity" are "incommensurable articulations." Id. at 1726.

tices that construct and control racial subjectivities.[8] Much the same may be said of sexual identity. Sexual identity does not exist apart from the active practices by which it is ascribed, asserted, avowed, and indeed, disavowed. Similarly, the very idea of a human sexual act necessarily presupposes the existence of an identifiable agent or actor who can engage in or "have" (as we Americans say) sex, even where the actor or agent is not understood as a "personage," a "life form," or a "species" in the Foucauldian sense.[9]

We need, therefore, a conceptual vocabulary that tracks the performative act of identification. Heterosexual identity is "performative," in the sense that the content of heterosexual identity has to be produced, fabricated, made up, and acted out. Recall, in this connection, the etymological roots of the word "orientation": heterosexual identity has to be "oriented" or raised up alongside, and against, its identificatory alteruatives. Like all sexualities, heterosexuality has no ontological status apart from the various acts of identification whose performance constitutes its "reality."

A close textual reading of a passage in the *Hardwick* opinion reveals the performative nature of heterosexual identity as staged by the Supreme Court. The starting point for this analysis, however, is Freud's celebrated reading of a text whose author has been described as "by far the most famous mental patient ever."[10] The text in question is *Memoirs of My Nervous Illness*, written by Dr. jur. Daniel Paul Schreber, a German lawyer, judge, and *Senatspräsident* of the Dresden Appeal Court.[11] As anyone who has read his *Psycho-Analytic Notes on an Autobiographical Account of a Case of Paranoia (Dementia Paranoides)* [12] will recall, Freud uses the Schreber *Memoirs* to develop a theory of the catalytic role played by repressed homosexual

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[8] See, e.g., Kendall Thomas, Comments at Frontiers of Legal Thought Conference, Duke Law School (Jan. 26, 1990), *quoted in* Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, *in* Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlé W. Crenshaw, Words That Wound 53, 61 (1993).

[9] See 1 Michel Foucault, The History of Sexuality 43 (Robert Hurley trans., Pantheon Books 1978) (1976).

[10] Psychosis and Sexual Identity: Toward a Post-Analytic View of the Schreber Case 2 (David B. Allison, Prado de Oliveira, Mark S. Roberts & Allen S. Weiss eds., 1988).

[11] Daniel P. Schreber, Memoirs of My Nervous Illness (Ida Macalpine & Richard A. Hunter eds. & trans., 1955).

[12] Sigmund Freud, Psycho-Analytic Notes on an Autobiographical Account of a Case of Paranoia (Dementia Paranoides) (1911), *reprinted in* 12 Standard Edition of the Complete Psychological Works of Sigmund Freud (1911-1913), at 1 (James Strachey trans. & ed., 1958).

wish fantasies in the mechanism of paranoid psychosis. For Freud, the "salient feature"[13] of the *Memoirs* is a "delusion of emasculation" or Judge Schreber's belief that he was "being transformed into a woman."[14] Freud explains that Schreber's psychotic fantasy is triggered one morning "between sleeping and waking" by the thought " 'that after all it really must be very nice to be a woman submitting to the act of copulation.' "[15] "This idea," writes Freud, "was one which [Schreber] would have rejected with the greatest indignation if he had been fully conscious."[16] Indeed, Schreber recounts in the *Memoirs* that he initially construed his transformative "unmanning" (*Entmannung*)[17] as a conspiracy in which " 'God Himself had played the part of accomplice, if not of instigator.' "[18] This divinely ordained scheme, Schreber notes paradoxically, was driven by purposes " 'contrary to the Order of Things' ":[19] Schreber's " 'soul was to be murdered' " and his transformed " 'body used like a strumpet.' "[20] Over time, however, the judge decides that his "emasculation" is in fact part of a "divine miracle," and is thus very much " 'in consonance with the Order of Things.' "[21] Schreber is forced to realize that " 'the Order of Things imperatively demanded [his] emasculation, whether [he] personally liked it or no,' "[22] because he had been chosen for " '[s]omething . . . similar to the conception of Jesus Christ by the Immaculate Virgin.' "[23] The judge comes to interpret his "unmanning" as a sign that God has called him to redeem the world: " 'The further consequence of my emasculation could, of course, only be my impregnation by divine rays to the end that a new race of men might be created.' "[24] Schreber is eventually able to " 'reconcile [himself] to

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[13] Id. at 21.

[14] Id. at 20-21.

[15] Id. at 13.

[16] Id.

[17] This is the term used by Macalpine and Hunter in their English translation of the Schreber *Memoirs*, who note that the primary meaning of the German "Entmannung" is " 'to remove from the category of men,' which is what Schreber intended." Schreber, supra note 11, at 361.

[18] Freud, supra note 12, at 19.

[19] Id.

[20] Id.

[21] Id. at 20.

[22] Id.

[23] Id. at 32 n.1.

[24] Id. at 20-21.

the thought of being transformed into a woman' " and reports in lavish detail the hours he spends before the mirror " 'with the upper portion of [his] body bared, and wearing sundry feminine adornments, such as ribbons, false necklaces, and the like.' "[25] Having transposed his dissonant sexual fantasy into a more harmonious spiritual key, Schreber finally accepts his calling. Schreber confesses that he finds that " 'a little sensual pleasure falls to [his] share' "[26] when he "inscribe[s] upon [his] banner the cultivation of femaleness' "[27] and evokes that " 'sensation of voluptuousness such as women experience,' "[28] without which he cannot discharge his new maternal duty to keep God in a " 'constant state of enjoyment.' "[29] It is thus that the " 'unequal struggle between this one weak man and God himself' "[30] is brought to a happy end. In Freud's formulation, what begins as a "sexual delusion of persecution" is "converted in [Schreber's] mind into a religious delusion of grandeur."[31]

The present analysis explores the uncanny continuities between the psychotic discourse of Judge Schreber's *Memoirs* and the bizarre figural logic that informs a more recent, but no less troubling, judicial text: I refer here, again, to the 1986 opinion of the United States Supreme Court in *Bowers v. Hardwick*,[32] a legal decision whose aftershocks continue to register in our national political discourse about sexual identity and difference.

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[25] Id. at 21.
[26] Id. at 34.
[27] Id. at 33.
[28] Id. at 32.
[29] Id. at 34.
[30] Id. at 19.
[31] Id. at 18.

Freud's reading of the *Memoirs of a Nervous Illness* has suffered a curious fate. Although the project of the *Psycho-Analytic Notes* clearly was to demonstrate the psychopathological effects that the repression of homosexual desire produced in a socially *heterosexual* man, Freud's study was quickly put to very different use. As Eve Kosofsky Sedgwick has noted, later interpretations of the *Psycho-Analytic Notes* deployed Freud's psychoanalysis of the Schreber *Memoirs* "not against *homophobia* and its schizogenic [sic] force, but against *homosexuality*" and homosexuals. Eve K. Sedgwick, Between Men: English Literature and Male Homosocial Desire 20 (1985). This interpretive parapraxis led to a strange state of affairs in which the homosexual, rather than the homophobe, became the subject of mental illness. Needless to say, these misreadings of the *Psycho-Analytic Notes* have blurred the focus and blunted the force of Freud's potentially subversive insights about the violent psychic pressures compulsory heterosexuality exerts on homosexual desire in those who consider themselves to be heterosexual.

[32] 478 U.S. 186.

Hardwick presented a challenge to the constitutionality of a Georgia criminal statute prohibiting "sodomy."[33] The "anti-sodomy" law covered a broad range of private sexual practices between consenting adults, including, but not limited to, those involving individuals of the same sex.[34] Michael Hardwick, the Georgia citizen who challenged the statute, sought a broad judgment from the Supreme Court regarding the "facial" constitutionality of the law: Hardwick argued that the federal Constitution precluded the Georgia legislature from punishing *any* private consensual instance of the sexual activities interdicted by its "anti-sodomy" statute, regardless of the marital status or sex of those who violated it.[35] The Supreme Court, however, resolutely avoided judgment on that broad issue. Instead, the *Hardwick* Court took the view that the only question properly before it was the constitutionality of the Georgia law as applied to private sexual practices between consenting adults of the same sex, acts which the Court denominated "homosexual sodomy."[36] Having thus narrowed the scope of its inquiry, the Court upheld the constitutionality of Georgia's "anti-sodomy" law, at least as it had been applied to Michael Hardwick.[37] In an opinion by Justice Byron R. White, the closely divided Court concluded that the Federal Constitution does not "confer[ ] a fundamental right upon homosexuals to engage in sodomy," and that the Court therefore could not justify judicial invalidation of "the sodomy laws of some 25 States" that "make such conduct illegal and have done so for a very long time."[38]

The decision in *Hardwick* has given rise to a considerable body of critical commentary in legal circles. Most of these discussions debate the question whether the Court's refusal to declare the Georgia stat-

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[33] Id. at 187-88.

[34] Id. at 188 n.1; see Ga. Code Ann. § 16-6-2 (Michie 1984).

[35] *Hardwick*, 478 U.S. at 188. During oral argument before the Supreme Court, then Associate Justice William H. Rehnquist questioned the description of Hardwick's claim as a "facial" challenge to the Georgia statute. Justice Rehnquist insisted that a "facial" constitutional attack on the "anti-sodomy" law would draw no distinction between public and private commission of the prohibited acts. Hardwick's counsel placed great emphasis on the fact that the practices for which Hardwick was arrested took place in the privacy of his home. Oral Argument in *Bowers v. Hardwick*, *in* Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law: 1985 Term Supplement 650-51 (Philip B. Kurland & Gerhard Casper eds., 1987).

[36] *Hardwick*, 478 U.S. at 188 n.2.

[37] Id. at 196.

[38] Id. at 190, 196.

ute unconstitutional comports with, or contradicts, its earlier decisions regarding state regulation of private sexual conduct.[39] This focus on the Court's refusal to extend the doctrine of constitutional privacy has obscured another, equally important dimension of the *Hardwick* opinion: its place in the broader archive of cultural texts about the meaning of legal identity and sexual difference. Attention to the larger social significance of the *Hardwick* case requires analysis not so much of the doctrine as of the discursive strategies the Court employed to explain the doctrinal grounds on which the decision rested. The failure of academic lawyers to attend to the rhetorical register of *Hardwick* in turn may be traced to the undertheorized and ultimately incomplete understanding of the rhetorical forms in which Supreme Court opinions are cast.

Until quite recently, professional students of the Supreme Court have been conditioned to train their interpretive energies on the logic, rather than the language, of the Court's opinions. In short, they have viewed the rhetoric of Supreme Court analysis and argument mainly as a tool for communicating rules of constitutional law, which are taken to be separate and distinct from that rhetoric itself.[40] Happily, a number of legal scholars have come to reject this orthodox view of the relation between legal discourse and legal doctrine.[41] In its most radical moments, this recent writing on the theory and practice of legal interpretation undermines the idea that the content of legal doctrine is separable (even in principle) from its discursive form; concomitantly, this work challenges the longstanding belief that the main mission of legal scholarship is to distill (in order to discuss) the "reasoning" of an opinion from its "rhetoric." Against the standard view, proponents of the "linguistic" turn in legal scholarship have sought to demonstrate that a judicial opinion (or for that matter, *any* legal text)

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[39] See, e.g., Daniel O. Conkle, The Second Death of Substantive Due Process, 62 Ind. L.J. 215, 221-37 (1986); Annamay T. Sheppard, Private Passion, Public Outrage: Thoughts on *Bowers v. Hardwick*, 40 Rutgers L. Rev. 521, 547-58 (1988); Thomas B. Stoddard, *Bowers v. Hardwick*: Precedent by Personal Predilection, 54 U. Chi. L. Rev. 648 (1987).

[40] See, e.g., Louis Henkin, Infallibility Under Law: Constitutional Balancing, 78 Colum. L. Rev. 1022, 1023 (1978) (describing his project as an attempt to "separate rhetoric from live constitutional doctrine and method").

[41] See, e.g., Stanley Fish, Doing What Comes Naturally (1989); Peter Goodrich, Legal Discourse (1987); Interpreting Law and Literature: A Hermeneutic Reader (Sanford Levinson & Steven Mailloux eds., 1988); Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982); Gerald Graff, "Keep Off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev. 405 (1982).

is something more (and other) than its juridic propositions. In this critical perspective, a judicial decision is a complex combination of rules *and* rhetoric that cannot be understood without rigorous attention to its discursive dimensions, or what might loosely be termed its "figural" or "metaphorical" elements.[42]

These interrogations of the discursive foundations of legal doctrine indicate that it is impossible to distinguish definitively between those features of a judicial opinion that derive from its legal "substance," and those which have been thought to be "merely" elements of its contingent linguistic "style." If the judicial decision is simultaneously a configuration of doctrine and discourse, our understanding of any particular legal judgment will remain incomplete unless we are willing to suspend the traditional legal distinctions between idea and expression, between reasoning and rhetoric, between substance and style. Sustained engagement with the "language" of law *as such* alerts us to those aspects of the judicial decision that make possible the rhetorical power of law but elude the rationalist interpretive protocols of doctrinal analysis, or more dangerously, unsettle them altogether. In the terms of Jean-François Lyotard, we must be prepared to exploit the theoretical advantages that flow from sustained investigation of the incommensurability, even antagonism, between the putatively rational "discourse" of constitutional interpretation, on the one hand, and the pre-rational rhetorical "figures" that visibly undermine the former.[43] Indeed, in seeking to overcome the conceptual and political limits imposed by rationalist doctrinal analysis, the rhetorical reading of the Court's decision in *Hardwick* offered here will most emphatically not approach that text "*as if it were free of psychic and sexual processes, as if it operated outside the range of their effects*."[44] I propose, in short, to undertake something like a psychoanalysis of juridical discourse.

I emphasize the need to attend to the figural or metaphorical dimensions of the Supreme Court's opinion in the *Hardwick* case and suggest that the approach to *Hardwick* urged here transgresses the rationalist limits of conventional legal method.[45] Only a rhetorical

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[42] See, e.g., sources cited supra note 41.

[43] Jean-François Lyotard, Discours, Figure (1971).

[44] Jacqueline Rose, Margaret Thatcher & Ruth Ellis, 6 New Formations 3 (1988).

[45] Anyone familiar with contemporary textual theory will find these observations elementary, indeed, axiomatic. In the legal academy, some have viewed acceptance of these ideas as a scandal, if not an act of outright treason.

reading, which goes behind Justice White's doctrinal defense of the result in *Hardwick* to examine the discursive strategies that underwrite that defense, can reveal the "unconscious" of the text. This discussion will focus on those passages in the *Hardwick* decision that most clearly demonstrate the psychic mechanisms of identification around which the Court's interpretation and adjudication of the law of "homosexual sodomy" revolves. As used here, the term "identification" may be understood in something like its standard psychoanalytic sense, to refer to the "[p]sychological process whereby the subject assimilates an aspect, property or attribute of the *other* and is transformed, wholly or partially, after the model the other provides. It is by means of a series of identifications that the personality is constituted and specified."[46] The concept includes the defense mechanism known in psychoanalysis as "identification with the aggressor," the transformative process whereby a subject incorporates aspects of a feared aggression in a "reversal of roles" in which "the aggressed turns the aggressor."[47]

Taking the psychoanalytic notion of identification as a point of reference, I show that the *Hardwick* decision is not primarily or exclusively a judicial discourse about the legal regulation of "homosexuality," or more precisely, that it is only partly so. The Supreme Court's opinion in *Hardwick* is more productively understood as entailing the discursive construction and ideological consolidation of a certain "heterosexual" identity. In upholding the right of the state of Georgia to police and punish the act of "homosexual sodomy," the *Hardwick* Court performs an act of heterosexual identification that produces a distinctive image of heterosexual identity. As we shall see, however, the identificatory imperative that informs the rhetoric of the *Hardwick* decision is inadequate finally to its task. The text of *Hardwick* reveals the degree to which the corpus of heterosexual law not only does not differ from, but crucially depends upon, the figure of the lawless homosexual as its factive foundation.[48]

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[46] J. Laplanche & J.-B. Pontalis, The Language of Psycho-Analysis 205 (Donald Nicholson-Smith trans., 1973) (1967) (emphasis added).

[47] Id. at 209.

[48] Note that here, I am discussing the male varieties of "heterosexuality" and "homosexuality," and their concomitant expressions. This is not because I believe male heterosexuality and homosexuality are the paradigm case of either of these two forms of sexuality; I hold no such view. I restrict my discussion to masculine models of heterosexuality

The decisive moment in the drama of heterosexual identification staged in the text of *Hardwick* occurs in a passage toward the end of the Court's explanation of its decision. Even earlier in his majority opinion, Justice White suggests that consideration of the issue presented in *Hardwick* will require something more than conventional constitutional analysis.[49] This case, he opines, "also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate."[50] After concluding that the modern privacy cases do not justify constitutional protection of consensual "homosexual sodomy," White dismisses as facetious the idea that the asserted right can be brought within the Court's more capacious formulations protecting rights " 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.' "[51] Justice White then turns from the local question of the constitutionality of the challenged statute. Responding to the felt necessity to consider the larger structural problem presented by the case, Justice White remarks about the likely institutional consequences of a judgment in Hardwick's favor:

> [We are not] inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The 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. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[52]

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and homosexuality only because these are the models that govern the logic of the *Hardwick* Court's own analysis.

[49] See *Hardwick*, 478 U.S. at 190.

[50] Id.

[51] Id. at 194.

[52] Id. at 194-95.

This passage is key to the Court's identification and understanding of homosexuals. It confronts us with a complex congeries of conflicting ideas and images. Conceptually speaking, the argument is a familiar one; indeed, it approaches orthodoxy.[53] Justice White plainly fears that a decision upholding the "claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case"[54] would undermine the authority of the Court, and erode the fragile foundations of judicial review. White's recollection of the "face-off between the Executive and the Court in the 1930s" evokes the memory of the humiliations the Court suffered as a result of its "substantive due process" decisions in *Lochner v. New York*[55] and its progeny. In Justice White's view, judicial invalidation of the statute challenged in *Hardwick* on substantive due process grounds would threaten the delicate balance of power between the state and federal governments in general, and the Supreme Court in particular. Unlike the 1930s Court, Justice White and his colleagues are not "inclined to take [an] . . . expansive view of [their] authority to discover new fundamental rights imbedded in the Due Process Clause."[56] To do so, in Justice White's view, would be to render a constitutional judgment that would represent no more than the "imposition of the Justices' own choice of values on the States."[57]

In an essay on *Hardwick*, Frank Michelman has suggested that this language, and indeed, the *Hardwick* opinion as a whole, embodies an "*excessively detached and passive judicial stance toward constitutional law*."[58] At one level, this characterization of Justice White's stated constitutional stance toward the perceived majoritarian sentiment

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[53] See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 543-44 (1976) (White, J., dissenting). Using almost the same language he would later employ in his opinion for the Court in *Hardwick*, Justice White condemned the *Moore* Court for overturning the criminal conviction (under a city housing ordinance) of a woman who had refused to obey an order to remove a grandson for whom she was caring from her home. Id. (White, J., dissenting); see id. at 505-06 (majority opinion).

[54] *Hardwick*, 478 U.S. at 191.

[55] 198 U.S. 45 (1905). In *Lochner*, the Supreme Court struck down a New York law limiting the number of working hours of bakery employees in that state. Id. at 64-65. The *Lochner* Court held that the New York law unconstitutionally infringed upon the "right of free contract," id. at 64, although the Constitution, by its terms, does not expressly confer such a right.

[56] *Hardwick*, 478 U.S. at 194.

[57] Id. at 191.

[58] Frank Michelman, Law's Republic, 97 Yale L.J. 1493, 1496 (1988).

behind the Georgia statute is certainly correct. The passive voice to which Justice White reverts in explaining the institutional grounds for Court's unwillingness to expand the reach of "substantive due process" to embrace Hardwick's claim indicates an exceedingly deferential attitude toward the expressed will of Georgia's democratic majority.[59]

Despite all this, the Court's posture is neither wholly passive nor detached. Consider the terms in which Justice White describes the Court's institutional obligation to avoid interpretations of constitutional law which might lead to a repetition of the political crisis spawned by *Lochner*. In Justice White's words, the Court's independent interest in its institutional integrity calls for "great resistance" to the constitutional claim "pressed" on it in *Hardwick*.[60]

Given the place that the story of *Lochner* and its decisional descendants have come to occupy in American constitutional folklore, the Court's resolute "resistance" is understandable. The appeal to *Lochner* and its progeny does not tell the whole story, however. Although the memory of the *Lochner* era may arguably account for the Court's stated fear of the potentially catastrophic consequences that a ruling in Hardwick's favor might hold for the institution of judicial review, it does not explain the precise and peculiar linguistic means by which that fear is expressed. In this regard, Justice White's judicial *style* is most revealing.

The brutal forcefulness of the figural strategies Justice White deploys to develop his argument against the claim "pressed" on the Court by Michael Hardwick is remarkable. Two observations are especially relevant here. The first is the striking dissonance between the text's position of principled judicial self-restraint, and the passionately unrestrained terms in which that defense is conducted. The radical discontinuity between Justice White's prudential narrative about the dangers of substantive due process doctrine, and the overheated style in which that narrative and its supposed lessons are cast seems odd—especially in an opinion which begins with a promise to confine its analytic scope to the narrow issue at hand, namely, "whether the

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[59] Indeed, the grammatical "passivity" of this passage provides a textual clue that the political problem with which the Court wrestles in *Hardwick* cannot be fully captured by the conceptual vocabulary of conventional constitutional analysis. See infra text accompanying notes 85-111.

[60] *Hardwick*, 478 U.S. at 195.

Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[61] Justice White's rhetorical excesses are all the more remarkable in light of his argument that *Hardwick* "calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate."[62]

A second and equally striking feature of the passage is its curiously apocalyptic tone. Justice White's language is an exemplary instance of the "paranoid style" in American constitutional law.[63] White paints an ominous picture of the "vulnerable" position in which the Court places itself: reliance on substantive due process doctrine to find rights which cannot be directly traced to the language of the Constitution would bring the Court to the brink of institutional "illegitimacy."[64] Justice White speaks insistently of the need for vigilant "resistance" to claims of a constitutional right [65] that might lead the Supreme Court to another "face-off" of the kind it found itself in as a result of *Lochner*, a fight the Justices would almost certainly lose. Hardwick's claim of right "falls far short" in its effort to overcome the Court's prudent unwillingness to set in motion a process which might well end in judicial invalidation of statutes against "adultery, incest, and other sexual crimes."[66] In short, to extend the right of privacy to "homosexual sodomy" would be to start down a primrose path of constitutional principle which could lead only to institutional

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[61] Id. at 190. Specifically, Justice White declared:

> This case does *not* require a judgment on . . . laws against sodomy between consenting adults in general . . . . It raises *no* question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds.

Id. (emphasis added).

[62] Id.

[63] Richard Hofstadter, The Paranoid Style in American Politics (1965). In his classic essay, Hofstadter argues that "[c]atastrophe or the fear of catastrophe is most likely to elicit the syndrome of paranoid rhetoric." Id. at 39. Hofstadter further contends that the "central image" of the paranoid style "is that of a vast and sinister conspiracy, a gigantic and yet subtle machinery of influence set in motion to undermine and destroy a way of life." Id. at 29. My use of the term "paranoid style" differs from Hofstadter's in one key respect. Although some governmental officials have raised the specter of a "homosexual conspiracy" to destroy the foundations of the heterosexual "way of life" I do not find enough evidence of conspiratorial language or logic in *Hardwick* for an interpretation along those lines. As I demonstrate in the text, however, it is difficult to deny the constitutional apocalypticism at the heart of this part of the Court's opinion; in this respect, I find Hofstadter's concept very useful.

[64] *Hardwick*, 478 U.S. at 194.

[65] Id. at 195.

[66] Id. at 195-96.

perdition. The Court leaves little doubt that it is "unwilling to start down that road."[67]

The *Hardwick* decision marks the textual site of an important institutional "representation" in the sense in which Stuart Hall has elaborated that term.[68] For all its apparent passivity, Justice White's stylistic strategy entails an "active work of selecting and presenting, of structuring and shaping," a productive practice of "*making things mean*."[69] What emerges from the figural field of the Court's opinion in *Hardwick* are distinct images of heterosexuality, of homosexuality, and of the affective ties that bind them together. The neutered, impersonal "it" Justice White uses to describe pronominally the position in which he and his colleagues find themselves fails to mask the libidinally resonant character of the Court's rhetorical representations of "its" institutional identity. By attending carefully to White's language in this passage,[70] we begin to see the operations and effects of the psycho-sexual fantasy that provides the legal result in *Hardwick* with its social ground.

The rhetorical register of Justice White's argument can be taken as a sign that the claimed right in *Hardwick* (and by extension, the individual in whose name that right has been asserted) provokes fear in the Supreme Court that goes far beyond the perceived threat to its judicial authority. The "paranoid style" of *Hardwick* is symptomatic of a deeper and different anxiety. For the writer of this opinion, a decision in Hardwick's favor would somehow not only undermine the authority of the Court, but unman (to use Judge Schreber's word) the patriarchal (hetero)sexual ideologies and identities on which that authority ultimately rests. In *Hardwick*, the claimed right to commit "homosexual sodomy" is thought (or not so much thought as phantasmagorically represented) to be a threatening attack on patriarchal power.

As White's reference to the shameful "face-off" during the 1930s between Franklin Roosevelt and the Supreme Court suggests, the *Hardwick* case carries a traumatic force. It engenders a sense of panic

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[67] Id. at 196.

[68] Stuart Hall, The Rediscovery of "Ideology": Return of the Repressed in Media Studies, *in* Culture, Society and the Media 64 (Michael Gurevitch, Tony Bennett, James Curran & Janet Woollacott eds., photo. reprint 1990) (1982).

[69] Id.

[70] For the text of this passage, see supra text accompanying note 52.

among the members of the Court which can be described as the judicial equivalent of castration-anxiety. The psychic pressures this trauma induces find displaced expression in the figural logic by which the *Hardwick* Court gives voice to (homo)phobic premises that the reigning protocols of constitutional doctrine do not permit the Court explicitly to acknowledge, but which emerge nonetheless from the discursive grounds of the decision.

Although the opinion moves rapidly through a whole series of sexually loaded images, the chief mode by which the text of *Hardwick* gives voice to a fear that dare not (literally) speak its name may be seen in the terms of Justice White's argument regarding the "limits of the Court's role in carrying out its constitutional mandate."[71] In perhaps the most interesting aspect of the *Hardwick* decision, the Court positions itself in relation to Michael Hardwick and his constitutional claim in a series of imaginary identifications whose representative force eventually spins out of control. The images of sexual and gender identity that underwrite Justice White's representation of the Court's institutional identity perversely twist the thesis of the great constitutionalist Alexander Bickel that judicial review "is at least potentially a deviant institution in a democratic society."[72]

An examination of the images underlying White's text first requires an understanding of the legitimating role that rhetorical appeals to the ideology of fatherhood have historically played in American constitutional discourse. In America, the law of the Constitution is the "Law-of-the-(Founding)-Father(s)."[73] Discussions of the judiciary's place in the American constitutional scheme reveal a similar reliance on "paternal metaphor": the "name" of the judge is the "Name-of-the-Father."[74] Sixty years ago, in one of the first efforts to apply psychoanalytic categories to the analysis of legal consciousness in America, Jerome Frank argued that the "basic . . . myth" of American law was the myth of the "Judge-as-Infallible-Father."[75] Frank argued that this myth represents a reinscription of the childhood image of the "Father-as-Infallible-Judge":[76]

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[71] See *Hardwick*, 478 U.S. at 190.

[72] Alexander M. Bickel, The Least Dangerous Branch 128 (1962).

[73] Jerome Frank, Law and the Modern Mind 18 (1930).

[74] See id.

[75] See id. at 18-19.

[76] Id.

> [M]ost men [sic] are at times the victims of the childish desire for complete serenity and the childish fear of irreducible chance. . . . [They seek to fulfill that desire through] "the rediscovery of the father," through father-substitutes. . . .
>
> . . . The Law can easily be made to play an important part in the attempted rediscovery of the father.[77]

Frank maintains that because the law, like the father, claims for itself the power to "infallibly determin[e] what is right and what is wrong and [to] decid[e] who should be punished for misdeeds," it functionally "resembles the [childhood fantasy of the] Father-as-Judge."[78]

This image of the judge as patriarchal power informs the doctrine of "originalism" that has been so fiercely debated in American constitutional law throughout its history.[79] According to this doctrine, the Supreme Court should conform its interpretations of the text of the Constitution either to the original intentions or understandings of the Founding Fathers.[80] If the Supreme Court is the contemporary voice of the Constitution, its legitimacy can remain secure only if the Justices remain faithful to the call across the centuries of the men who wrote and ratified the document.[81]

The existence of this powerful mythic backdrop would seem to suggest that the conceptual organization of the Court's constitutional analysis in *Hardwick* would be bound to a narrative system whose chief figure would be identified as a stolid patriarch. Remarkably, however, in *Hardwick* this predominant, traditional image of the Supreme Court as a collective Father undergoes a discursive sea-change, or should I say sex-change. That is, the institutional subject-position figured in the text of Justice White's opinion begins to evoke, alongside the image of the "Judge-as-Father," a vision of the "Judge-as-Mother," in language whose logical entailments would lead the collective mind of the Court to uncomfortable conclusions. The figural reversal by which the Justices assume the name of Justitia bears a

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[77] Id. at 19.

[78] Id. at 18-19.

[79] See Robert H. Bork, The Tempting of America 153-55 (1989); H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 886 (1985).

[80] See Powell, supra note 79, at 948 (criticizing that view).

[81] See, e.g., Raoul Berger, Government by Judiciary 3 (1977); Henry C. Black, Handbook on the Construction and Interpretation of the Laws 20 (2d ed. 1911); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 124 (Walter Carrington ed., 8th ed. 1927).

startling resemblance to the "transformation into a woman" recounted by Judge Schreber in his *Memoirs*.[82] Recall that an "essential feature" of the judge's paranoid fantasy was that God had called him to redeem the world by being "transformed into a woman" and "[impregnated] by divine rays to the end that a new race of men might be created."[83] Drawing on that image, we might argue against Jerome Frank that the dominant figural self-representation of the Court in *Hardwick* is not that of a patriarchal voice, but rather that of a maternal vessel of the Constitution. To convey the dangers that Michael Hardwick's case poses to the Court's integrity, the Court stages a "reversal into its opposite" as described in Freud's *Instincts and their Vicissitudes*.[84]

Justice White mobilizes the "maternal metaphor" to generate a constellation of ideas and images that allow him to avoid the work of reasoned constitutional analysis and argument. Situating itself in the place and position of a woman (or more precisely, within the cultural codes of femininity), the *Hardwick* Court seeks to persuade readers of its institutional chastity. Fidelity to the "language [and] design" of the "Law-of-the-(Founding)-Father(s)" demands "great resistance" to Hardwick's attempted seduction of the Court, and the "illegitimacy" to which a betrayal of that law would lead.[85] Because homosexual activity bears "[n]o connection"[86] to family, marriage, or procreation, it cannot "qualify for recognition"[87] as a species of constitutional privacy. Because Michael Hardwick's asserted "right" to engage in homosexual sodomy is "not readily identifiable in the Constitution's text,"[88] judicial invalidation of Georgia's "anti-sodomy" law would represent an act of interpretive adultery, whose shameful outcome can only be the birth of a "bastard" right with no legitimate textual "roots" or claim to the "Name-of-the-(Founding)-Father(s)."

What is the meaning of this discursive transformation of the institutional image of the Supreme Court in *Hardwick* from a subject-posi-

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[82] See Schreber, supra note 11, at 300; supra notes 11-31 and accompanying text.

[83] See Freud, supra note 12, at 20.

[84] Sigmund Freud, Instincts and their Vicissitudes (1915), *reprinted in* 14 Standard Edition of the Complete Psychological Works of Sigmund Freud 126-27 (James Strachey trans. & ed., 1957).

[85] See *Hardwick*, 478 U.S. at 194-95; Frank, supra note 73, at 18.

[86] *Hardwick*, 478 U.S. at 191.

[87] Id. at 195.

[88] Id. at 191.

tion of "masculine" activity to "feminine" (aggressive) passivity? The beginnings of an answer to this question are suggested by Leo Bersani's essay, *Is the Rectum a Grave?*[89] Bersani argues that in the homophobic American mind, the regnant representation of the gay male homosexual is that of "a grown man, legs high in the air, unable to refuse the suicidal ecstasy of being a woman."[90] Drawing on the work of John Boswell[91] and Michel Foucault,[92] Bersani contends that this image is so terrifying to the masculinist imagination because it conjures up the sodomitical spectacle of a man in a passive (i.e., female) position, a position which, at least for the patriarchal psyche of the male heterosexual, entails a horrifying abdication of power.[93] For Bersani, the gay man's rectum is a "grave in which the masculine ideal . . . of proud subjectivity is buried."[94] Anal eroticism among men must therefore be repudiated (in psychoanalytic terms "sublimated") because it poses a threat to the phallic law of masculine heterosexuality.[95] It is perhaps this image of male homosexuality that led Chief Justice E. Warren Burger in his concurring opinion to note with apparent approval that William Blackstone described sex between men "as an offense of 'deeper malignity' than rape."[96] The "deeper malignity" of "homosexual sodomy" lies in the fact that, unlike rape, sex between men represents an assault on the normative order of male heterosexuality—indeed, an abdication of masculine identity *as such*.

In fact, however, the process of identification inscribed in the rhetorical operations of Justice White's text suggests that matters are considerably more complex than a simple misogynist aversion to the dangers that male homosexuality embodies for the masculinist heterosexual ideal. *Hardwick* shows that the radical dis-identification with male homosexuality that Bersani takes to be basic to the fantasmatic

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89 See Leo Bersani, Is the Rectum a Grave?, 43 October, Winter 1987, at 197.

90 Id. at 212.

91 John Boswell, Christianity, Social Tolerance and Homosexuality (1980).

92 See Foucault, supra note 9.

93 Bersani, supra note 89, at 212.

94 Id. at 222.

95 We are talking here about the meaning of the anus in the male heterosexual imagination, for which "[male] [h]omosexuality is always connected with the anus, even though—as Kinsey's precious statistics demonstrate—anal intercourse is still the exception even among homosexuals." Guy Hocquenghem, Homosexual Desire 89 (Daniella Dangoor trans., 1978).

96 *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 William Blackstone, Commentaries *215).

structure of male heterosexuality is less fixed and more fluid than the terms of *Is the Rectum a Grave?* suggests. What makes *Hardwick* so fascinating a text in the juridical archive of discursive heterosexual identification, as well of the processes of homosexual differentiation by which heterosexual identity is secured, is its vertiginous instability: the opinion ricochets back and forth between masculine and feminine polarities. The Court's rhetorical contortions in *Hardwick* reveal the desperate lengths to which the paranoid judicial imagination is willing, at least figurally, to go in order to defend itself from a constitutional claim which "gnaws at the roots of [the] male heterosexual identity"[97] that subtends the Court's institutional self-image.

In order to deny Michael Hardwick's claim of constitutional privacy, the "Father-Judges" of the Supreme Court do not hesitate to abandon the paterual metaphor through which they have traditionally represented the Court's role in our constitutional scheme, or the patrilineal identification from which a good measure of its cultural authority has historically derived. At the doctrinal level, the Court flatly rejects any connection between Hardwick's asserted right to commit homosexual sodomy and the heterosexual practices at issue in the Supreme Court's previous elaborations of the right to privacy. And yet, standing alone, the doctrinal disavowal of Hardwick's appeal to the privacy principle is not enough. The *Hardwick* Court's doctrinal pronouncements about the political "limits" beyond which it refuses to go demand additional discursive reinforcement. The Court is not content simply to reject Hardwick's "facetious" claim of a constitutional right to commit what the Chief Justice (again quoting Blackstone) calls "a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.' "[98] The bonds between the "law" of normative male heterosexuality and American constitutional law are so close that the asserted right to commit "homosexual sodomy" "pressed" by Michael Hardwick on the Court provokes nothing less than a crisis of institutional representation. This panic finds displaced expression in the wild veering of subjective standpoint(s) from which the Court analyzes Hardwick's claim. It is as if Justice White *needs* to go "both ways": only a protean subject

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[97] See Jeffrey Weeks, Sexuality and Its Discontents: Meanings, Myths and Modern Sexualities 191 (1985).

[98] *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 William Blackstone, Commentaries *215).

position can enable the *Hardwick* Court to manage the contradictions posed by its unwillingness to extend constitutional privacy jurisprudence to a case whose facts in many ways make it "the most private of all [the] privacy cases."[99]

Over and above the rule of the case, the potentially destabilizing effects of the issue posed in *Hardwick* seem to require this presumptively heterosexual Court to perform a radical act of rhetorical disidentification with the very *figure* of the male homosexual. Faced with a constitutional question that assaults its members' institutional and individual identities, the Supreme Court can only imagine or fear itself in a "vulnerable," unmanly, and perforce, enfeminized position. If "homosexual sodomy" is "an offense of 'deeper malignity' than rape," the Supreme Court must meet its dangers with "utmost resistance."[100] This resistance is inscribed in the rhetorical politics of the *Hardwick* opinion itself.

This contention is not simply a negative claim. The language of the *Hardwick* Court permits it to resist Hardwick's attempt to win constitutional recognition of a right to engage in "homosexual sodomy," a refusal which flies in the face of the Court's earlier privacy decisions. But that is not all. In a sense, the Court's enfeminized posture of "weakness" also gives it a certain strength. The maternal metaphor to which Justice White resorts allows him to reject Hardwick's attack

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[99] Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1437 (1992).

[100] This phrase refers to the old legal doctrine that a woman who accused a man of rape must be able to show that she responded to the threat of sexual assault with "utmost resistance." A description of the arguably more "relaxed" contemporary standard may be found in the dissenting opinion of Judge Cole in State v. Rusk, 424 A.2d 720, 728-35 (Md. 1981) (Cole, J., dissenting). The *Rusk* Court upheld a rape conviction which a lower appellate court reversed on the grounds that the conviction had been secured on legally insufficient evidence. Id. at 728. Judge Cole protested, arguing:

> While courts no longer require a female to resist to the utmost or to resist where resistance would be foolhardy, they do require her acquiescence in the act of intercourse to stem from fear generated by something of substance. She may not simply say, "I was really scared," and thereby transform consent or mere unwillinguess into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. She must resist unless the defendant has objectively manifested his intent to use physical force to accomplish his purpose. The law regards rape as a crime of violence.

Id. at 733 (Cole, J., dissenting). For a critical discussion of the "resistance" standard in rape law, see Note, The Resistance Standard in Rape Legislation, 18 Stan. L. Rev. 680, 684 (1966).

on the Georgia "anti-sodomy" statute from a point of symbolic identification which figurally protects the Court from the dangers that simply *mentioning* sexual pleasure between men poses to the patriarchal law. If "homosexual sodomy" is a "crime not fit to be named," not even the "Father-Judges" of the Supreme Court can break that linguistic taboo without first submitting to a discursive "sex-change" or "unmanning" which removes them, like Judge Schreber, from "the category of men" on whom the male homosexual preys.

Nonetheless, the displaced sexual field in which the *Hardwick* Court rhetorically reinscribes the rule of privacy in order to justify this outcome entails its own unavoidable and uncontrollable risks. How is this claim to be understood? As I have noted, the Court achieves its defensive dis-identification from Michael Hardwick in the text by transversing the gender line. The Justices assume a kind of feminine position in relation to the Founding Fathers, or rather to the Constitution, that potent symbolic incubus that our national patriarchs left behind, and from which our contemporary constitutional order derives its legitimacy. Yet, the *Hardwick* Court's imaginary cross-identification across the gender divide unwittingly compounds the psycho-social difficulties raised by the case. The resistance to Hardwick that the Court's figural and phantasmagoric transsexualization into a woman makes possible cannot, by the nature of the case, fully secure its intended ratification of the masculinist heterosexual ideal. Like all acts of sexual identification, the Supreme Court's attempt to bind its institutional consciousness to the image and ideology of patriarchal male heterosexuality fails fully or finally to succeed.

The terms of Bersani's argument may help explain why the slippage of sexual identities staged in *Hardwick* is as perilous as it is productive. If Bersani is correct about the workings of the homophobic imagination, the *Hardwick* Court's attempted stabilization of male heterosexual identity is doomed from its inception by the form of the figural logic by which it is governed. The inaugural gesture of gender cross-identification always already incorporates the very (passive) position by which the male homosexual body is fantasmatically, and in this case, phobically, conceived. The *Hardwick* Court's homophobic dis-identification with the aggressive male homosexual body of Michael Hardwick forces a now enfeminized legal consciousness to identify with the regnant representation of the dangerous fig-

ure whose constitutional rights the decision's doctrinal contortions take such pains to deny. Homophobic dis-identification paradoxically results in homosexual "identification with the aggressor."

Moreover, the Court's construction of its identity in the text of the *Hardwick* decision provides an evidentiary instance of Freud's claim that "all human beings are capable of making a homosexual object-choice and have in fact made one in their unconscious."[101] If "the maintenance of heterosexual identity is dependent upon active avoidance of that psychic reality,"[102] the strategy of gendered identification pursued in the text of the *Hardwick* decision represents a massive failure. The *Hardwick* Court cannot escape the reality that the law of heterosexuality finds its normative foothold in the very figure it views with such contempt. In the gendered "switch" from paternal to maternal metaphor, the homophobic discourse of *Hardwick* provides a dysphoric point of (re)entry for its (homosexual) repressed.

Recall the earlier passage of the *Hardwick* decision in which Justice White ritually invokes the standard distinction between the "wisdom" and the "constitutionality" of the challenged statute.[103] He insists that in *Hardwick*, the Court is concerned only with the "validity" and not the "desirability" of laws such as the Georgia statute.[104] The Court's task in *Hardwick*, according to White, is dispassionately to render a decision according to law, not to intervene in the passionate polemics of politics.[105] Consider once more the discursive disclaimer with which the *Hardwick* opinion begins:

> This 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. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of

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[101] Sigmund Freud, Three Essays on the Theory of Sexuality (1905), *in* 7 Standard Edition of the Collected Works of Sigmund Freud 144 n.1 (James Strachey trans. & ed., 1958).

[102] Tim Dean, The Psychoanalysis of AIDS, 63 October, Winter 1993, at 83, 112.

[103] 478 U.S. at 190.

[104] Id.

[105] Id.

> the many States that still make such conduct illegal and have done so for a very long time.[106]

Behind Justice White's language stands a conception of constitutional adjudication whose resemblance to the position taken by the psychotic Judge Schreber should not go unremarked.

Freud notes that in the *Memoirs of My Nervous Illness*, Schreber insists that it is not the judge, but the "Order of Things" that demands his "emasculation":

> It is not to be supposed that he *wishes* to be transformed into a woman; it is rather a question of a "must" based upon the Order of Things, which there is no possibility of his evading, much as he would personally prefer to remain in his own honourable and masculine station in life.[107]

Similarly, Justice White implies that judicial allegiance to the principles of American constitutionalism demands a similar submission by the Supreme Court to the will of the state of Georgia. For Justice White, what is at stake here is the constitutional validity of the laws against "homosexual sodomy," not their desirability.[108] As to this latter question, the constitutional "Order of Things" requires the members of the Supreme Court to adopt an institutional posture of official indifference. Respect for the limited role of the Supreme Court in our constitutional system obliges the Justices to keep their personal preferences regarding the wisdom of the law challenged in *Hardwick* to themselves.

A careful reading of the text, however, demonstrates that the language of the *Hardwick* opinion in fact undermines, and ultimately overtakes, the Court's putatively detached and disinterested logic. The figural "unconscious" of the text demonstrates that because of political commitments that he either cannot or will not acknowledge, Justice White is finally unable to avoid the dark domain of desire whither a serious judicial inquiry into the legal imposition of compulsory heterosexuality would lead the Court.[109] In *Hardwick*, the voice

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[106] Id.

[107] Freud, supra note 12, at 17.

[108] *Hardwick*, 478 U.S. at 190.

[109] Obviously, I mean to evoke the expansive understanding of "desire" developed in the Freudian theory of the libido, for which the term refers to the full continuum of human emotions ranging from love to hatred. See Sigmund Freud, The Libido Theory, *reprinted in* 5 Collected Papers (Joan Riviere trans., 1959).

of desire is "imbedded" in the "very delirium of metonymy"[110] by which the "Court" (itself a metonymic figure) anxiously articulates its "vulnerability" and mobilizes its powers of "resistance" to the claim "pressed" by Michael Hardwick. By the end of the *Hardwick* opinion, the text has confessed with equal insistence the very interest in homosexuality that Justice White has so insistently disavowed: the rhetoric of *Hardwick* is shot through with the traces of the homophobic passion whose relevance the Court's decision has taken such great pain to deny. That passion eclipses the cool, constitutional reason by which the Supreme Court claims to be bound and belies Justice White's contention that the *Hardwick* decision has nothing to do with the "imposition of the Justices' own choice of values"[111] regarding the legal regulation of gay and lesbian sexuality.

I hope by now to have shown that the *Hardwick* Court is not simply adjudicating the constitutionality of a statutorily codified homophobia (the Georgia "anti-sodomy" law) which is anterior to, or independent of, its own analysis. To the contrary, in *Hardwick*, the Supreme Court does not calmly reason about homosexuality, but rather rages irrationally against it. The rhetoric of the *Hardwick* decision discursively makes and marks the sexual difference between heterosexuality and homosexuality that makes homophobia possible. As a textual representation and ratification of normative heterosexuality, the Court's decision in *Hardwick* does not merely reflect the constitutional legitimacy of the politics of homophobia but, more importantly, is itself an instance of the paranoid juridical forms that politics sometimes takes.

Hardwick's lawyers modestly argued that the private, consensual sexual practices for which he was arrested were not different in any relevant aspect from those to which the Supreme Court had accorded constitutional protection in its earlier privacy decisions.[112] The doctrinal step the Supreme Court was asked to take in *Hardwick* was thus quite conservative. Justice White responds to this assertion of legal identity between *Hardwick* and cases such as *Griswold v. Con-*

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[110] Fredric Jameson, Fables of Aggression: Wyndham Lewis, The Modernist as Fascist 27 (1979).

[111] *Hardwick*, 478 U.S. at 191.

[112] Id. at 188-89.

necticut [113] and *Roe v. Wade* [114] by erecting a rhetorical wall of sexual difference between "family, marriage, or procreation on the one hand and homosexual activity on the other":[115] "[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[116]

This discourse of sexual difference enables the *Hardwick* Court to sustain its doctrinal refusal to extend the protections of constitutional privacy to gay men and lesbians. A rhetorical reading of the text of *Hardwick* suggests that the sexual difference between heterosexuality and homosexuality stressed by Justice White is not a cause, but rather an effect of the decision. This metalepsis—which is reflected in the tropological switch from paternal to maternal metaphor—produces a destabilizing effect on the very notion of heterosexual identity, without which the idea of homosexual difference makes no sense. This destabilization (or should I say devaluation) of heterosexual identity is the cost of the sexuated (ex)change in subject positions by which the Supreme Court distances itself rhetorically from Michael Hardwick and his constitutional claim.

The reading presented here of textually constructed sexual difference in *Hardwick* has serious implications for contemporary critiques of identity politics in gay and lesbian theory. This rhetorical reading of the (hetero)sexuated figural logic of *Hardwick* illustrates the need for a more precise understanding of ideologies of sexual difference than the emerging critique of gay and lesbian identity politics in American legal scholarship has thus far offered. Writing from this critical perspective, one commentator on the case has argued that the assertion of homosexual identity in *Hardwick* was "simply the flip side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalizes sexual conduct, and vilifies 'faggots' "[117] and straightjackets "those who engage in homosexual sex into a fixed identity specified by their *difference* from 'heterosexuals.' "[118] This argument holds that *Hardwick* shows the

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[113] 381 U.S. 479 (1965).

[114] 410 U.S. 113 (1973).

[115] *Hardwick*, 478 U.S. at 191.

[116] Id. at 190-91.

[117] Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 781 (1989).

[118] Id. at 779 (emphasis added).

dangers of too insistent an emphasis on the "homosexuality" of the sexual practices that were prohibited by the Georgia "anti-sodomy" law upheld by the Supreme Court. According to this account, when Michael Hardwick's lawyers decided to describe their client as a "practicing homosexual" in the complaint filed on his behalf, they unwittingly undermined the force of Hardwick's essentially identity-based claim—that his interests in sexual privacy were constitutionally indistinguishable from those of heterosexuals.

This critique of a rights discourse based on the assertion of homosexual identity misses the mark. By identifying the *Hardwick* Court's "obsessive focus"[119] on homosexual difference—on the "particularly homosexual aspect of homosexual sex"[120]—as a critical feature of its decision, this view blames the idea of gay and lesbian identity itself for the case's outcome. Essentially, it proposes that the inclusionary claims of identity politics are ultimately indistinguishable from those made on behalf of an exclusionary politics—a proposition that can be sustained only if one fails to take into account the different power positions from which, as well as the purposes for which, these appeals to sexual identity have been made.

The emerging legal critique of the assertion of difference in gay and lesbian identity politics ignores a crucial distinction between two very different types of claims, a distinction we overlook at our peril. One could understand the assertion of homosexual difference to be an ontological claim that the physical difference between homosexual and heterosexual acts produces a difference in sexual identity. This categorical claim is untenable. As I have argued elsewhere,[121] however, one could rest the argument for homosexual difference and its assertion on a very different ground. This argument starts from the proposition that there is an undeniable historical difference between the societal treatment and consequences of homosexual acts, a particularity which has forged a distinct social place and position for those with whom same-sex practice is identified. As an historical matter, the proclamation of homosexual identity does not, and need not, appeal to "some common characterological essence that sets those who embrace that identity apart from those who do not; rather, this

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[119] See *Hardwick*, 478 U.S. at 200 (Blackmun, J., dissenting).

[120] Rubenfeld, supra note 117, at 778-79.

[121] Thomas, supra note 99, at 1501, 1502 n.249.

assertion of homosexual identity derives from a common historical experience of [domination]."[122] This position does not contend that the "homosexual" is a "personage," or "a type of life, a life form, and a morphology";[123] it does insist that the idea of a homosexual identity be understood as an historically "entrenched contingency."[124] This latter description of homosexual identity, and the pursuit of a politics based on that identity, does not revolve around an essentialist claim that homosexuals are *different* but around an historical claim that they have been treated *differently*. Viewed in this light, the politics of gay and lesbian identity might be considered as a practice whose best and most basic commitments emerge in historical moments of critical calculation regarding our collective *situation*, not from a timeless metaphysical faith in our collective sensibility. Gay and lesbian politics may thus be understood as a "politics of location."[125]

The phobic figural representations by which the Supreme Court produces a hierarchical differentiation or "scaling"[126] of homosexual and heterosexual acts and agency in the *Hardwick* decision provide an indispensable map of the ideological situation with which contemporary gay and lesbian politics must now contend. The rhetorical politics of the *Hardwick* opinion suggests that we are indeed in treacherous terrain. *Hardwick* offers textual proof from law of the social constructionist claim that the idea of a distinct "homosexual" identity (or for that matter of a distinct "heterosexual" one) is a discursively constructed ideological category, and thus *false*. The ideological character of the "homosexual" identity fabricated in *Hardwick* resides in its constitutive "confusion of linguistic with natural reality."[127] The Court uses this confusion to erect a thoroughly imaginary figure of the (male) "homosexual," in "willful blindness"[128] to the fact that both this figure and the act of "homosexual sodomy" of which Hardwick was accused rest on equally imaginary epistemological grounds.

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[122] Id.

[123] Foucault, supra note 9, at 43.

[124] William E. Connolly, Identity\Difference: Democratic Negotiations of Political Paradox 176 (1991).

[125] Adrienne Rich, Notes toward a Politics of Location (1984), *in* Blood, Bread and Poetry: Selected Prose 1979-1985, at 210 (1986).

[126] I take this term from Iris M. Young, Justice and the Politics of Difference 122 (1990).

[127] See Paul de Man, The Resistance to Theory 11 (1986).

[128] *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting).

This insight into the figural, and therefore fictive, foundations of "homosexual" and "heterosexual" identities is important because it allows us to expose and attack the "regime of truth" on which the *Hardwick* opinion stands. Because the *Hardwick* Court's rhetorical representations carry the force of law, however, the "homosexual" and "heterosexual" identities the Supreme Court constructed in its decision cannot be dismissed *false*—they are *real*. Stated bluntly, we ought not forget that conviction under the statute Michael Hardwick was charged with violating could be punished by imprisonment for up to twenty years.[129] Nor should we ignore the fact that the *Hardwick* case took place against a backdrop of a long history of violence against "homosexuals" whose bloody consequences have been all too real.[130] The lesson I take from my reading of *Hardwick* is this: in the law, the rhetorical politics of "homosexual" and "heterosexual" identities *matter*. To be sure, we must remain mindful of difficulties that attend the very notion of sexual identity. At the same time, however, we must recognize that the strategic negotiation of those difficulties is a challenge that we cannot simply refuse. In *Hardwick*, the Supreme Court taught us that the assertion of sexual difference, and an oppositional politics that engages that difference, are practices that gay and lesbian Americans finally cannot do without.

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[129] Id. at 188 n.1; Ga. Code Ann. § 16-6-2 (Michie 1984).

[130] For a discussion of the structures of homophobic violence to which *Hardwick* in particular, and "anti-sodomy" statutes in general lend ideological legitimacy, see Thomas, supra note 99, at 1467-92.