

THE SPECTER OF A LESBIAN SUPREME COURT JUSTICE: PROBLEMS OF IDENTITY IN LESBIAN LEGAL THEORIZING

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INTRODUCTION

*"To start with, we need a lesbian on the Supreme Court."*¹

It was the summer of 1992, the last summer of the Reagan-Bush regime, although the demise of that era was far from certain. I was being interviewed by a gay and lesbian magazine for a feature article about the Supreme Court. I was staying in Provincetown, a place renowned for its lesbian/gay culture, surrounded by lesbians of every ilk. My opinion was solicited as a constitutional scholar and expert on lesbian legal issues and theories.² While lesbians appear in periodicals, on the streets, and in legal theories,³ not one lesbian has appeared as a United States Supreme Court Justice, ever. So, when the interviewer

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1. Andrew Patner, *Supreme Injustices*, *ADVOCATE*, Sept. 8, 1992, at 32, 38 (quoting Ruthann Robson).

2. RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992) [hereinafter *ROBSON, (OUT)LAW*]; Ruthann Robson, *Posner's Lesbians: Neither Sexy Nor Reasonable*, 25 *CONN. L. REV.* 491 (1993) [hereinafter *Robson, Posner's Lesbians*]; Ruthann Robson, *Incendiary Categories: Lesbian/Violence/Law*, 2 *TEX. J. WOMEN & L.* 1 (1992) [hereinafter *Robson, Incendiary Categories*]; Ruthann Robson, *Embodiment(s): The Possibilities of Lesbian Legal Theory in Bodies Problematized by Postmodernisms and Feminisms*, 2 *LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES* 37 (1992) [hereinafter *Robson, Embodiment(s)*]; Ruthann Robson, *Lesbianism in Anglo-European Legal History*, 5 *WIS. WOMEN'S L.J.* 1 (1990); Ruthann Robson, *Lesbian Jurisprudence?*, 8 *LAW & INEQ. J.* 443 (1990); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law & Lesbian Legal Theory*, 20 *GOLDEN GATE U. L. REV.* 567 (1990); Ruthann Robson, *Lifting Belly: Privacy, Sexuality & Lesbianism*, 12 *WOMEN'S RTS. L. REP.* 177 (1990); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMP. L. REV.* 511 (1990).

3. I do not mean to imply that there is even a minimal level of satisfactory lesbian visibility, in publishing, public life, or jurisprudence. Part of the lesbian project remains articulating our existence, to ourselves, to each other, and to non-lesbians.

asked me a general question about changing the United States Supreme Court, I replied that we should start with the appointment of a lesbian.

My proposal, glib as a Provincetown summer, implicitly asserts lesbianism would be a relevant quality of a United States Supreme Court Justice. More explicitly, I presupposed a lesbian United States Supreme Court Justice would, by virtue of her lesbianism, possess certain judicial philosophies and political positions. For example, she would not be a strict constructionist who relied upon the original framers of the Constitution as her touchstones.⁴ As a lesbian, she would be aware that none of the original framers were lesbians, or even women; she would not be bound by world views that excluded her and her lovers. Further, as a lesbian she would believe that *Bowers v. Hardwick*⁵ was wrongly decided, since she would believe her own sexuality deserved constitutional protection.⁶ Also as a lesbian, although perhaps more tenuously related to her lesbianism, I assumed she would uphold privacy doctrine generally, including abortion rights for all women;⁷ she would give an expansive reading to the equal protection clause of the Fourteenth Amendment, not only to include lesbians as lesbians, but to include all lesbians, even if the categories at issue were racial, religious, bodily, gender, sexual, or cultural;⁸ she would declare capital punishment unconstitutional under the Eighth Amendment;⁹ she would resurrect the rights of criminal defendants;¹⁰ she would under-

4. For a discussion of strict constructionism and original intent in constitutional interpretation, see generally Raoul Berger, "Original Intent": A Response to Hans Baade, 70 TEX. L. REV. 1535 (1992); Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

5. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

6. In *Hardwick*, the Court rejected a constitutional challenge to a Georgia statute criminalizing oral/anal sex, generically known as a sodomy statute. The extent to which such statutes actually encompass lesbian sexuality is problematic, although lesbians have been prosecuted under such statutes. See generally ROBSON, (OUT)LAW, *supra* note 2, at 47-71.

7. For the precarious state of constitutional protection for women's abortion rights, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); see also *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (holding that disfavor or opposition to abortion does not amount to discrimination against women as a class).

8. See *infra* notes 90-98 and accompanying text for a discussion of equal protection.

9. For the present state of the Supreme Court's capital punishment jurisprudence, see *Herrera v. Collins*, 113 S. Ct. 853 (1993) (holding that a claim of proof of innocence does not warrant a stay of execution).

10. For recent Supreme Court decisions adversely affecting criminal defendants' rights, see *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) (right to testify); *United States v. Nachtigal*, 113 S. Ct. 1072 (1993) (right to jury trial); *Wright v. West*, 112 S. Ct. 2482 (1992) (right to due process).

stand the importance of free speech, but it would not be her shibboleth in this nation of disparate access to speech.¹¹ Given the current composition of the United States Supreme Court, she would be writing an excessive number of dissenting opinions.

The specter of a lesbian Supreme Court Justice raises an issue that has troubled lesbian and political theory, the issue of identity politics. Any invocation of identity, political or otherwise, provokes post-modernist apprehension, an apprehension that has been particularly potent in sexual identities. Also as a sexual identity, lesbian identity evokes other postmodernist-influenced issues. Particularly problematic are lesbian identity's unintelligibility until claimed or avowed and lesbian identity's uncertain classification as an identity status or a sexual act. This Article will interrogate the predicaments posed by identity politics, including postmodernist questionings of identity and the identity/activity dichotomy, concluding with some opinions about the necessity for a lesbian Supreme Court Justice.

IDENTITY POLITICS

A suggestion that a lesbian should serve as a Justice on the United States Supreme Court rests on a foundation of identity politics. Identity politics posits a relationship between one's identity, in this case identity as a lesbian, and one's politics, in this case progressive politics. The underlying assumption of identity politics is that given a social structure that is cognizant of group identities (such as sexuality, gender, and race), one's identities will shape one's experiences, which in turn will influence one's thinking, including one's politics. This, in and of itself, seems hardly arguable, unless one wants to argue that experience and thought are totally disconnected. Much more arguable is the more insidious assumption that identities and politics are consistently related in a particular pattern; the conventional configuration is that one's experience of oppression produces an emancipatory politic. Applied to lesbianism as an identity, this would mean that every lesbian, because she has experienced oppression on the basis of her sexuality, holds political positions that oppose other forms of oppression against other disempowered identities which she may or may not possess based upon identity categories such as race, ethnicity, religion, class, age and disability. In a universe of perfected identity politics, there are no racist

11. Cf. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), a unanimous opinion holding a type of hate-crime statute unconstitutional. See generally Robson, *Incendiary Categories*, *supra* note 2, at 20-27.

lesbians, no ageist women, no anti-Semitic African-Americans, no homophobic people who are disabled. Identity politics has preoccupied much of recent progressive theory, but it occupies a privileged position in the development of contemporary lesbian theory. For example, as articulated in the early 1970s by The Furies, an influential lesbian-feminist collective, "Lesbians, as outcasts from every culture but their own have the most to gain by ending class, race, and national supremacy within their own ranks."¹² Lesbian poet and theorist Adrienne Rich similarly notes that as a "lesbian/feminist" any passive subservience to the order of men which has profited from slavery and imperialism, as well as enforced heterosexuality and misogyny, is against her own self-interest.¹³ As expressed by lesbian historian Lillian Faderman, the 1970s desire for "Lesbian Nation" produced communities with "various dogmas" regarding "class, race, food and ecology consciousness" and "political activity," which "were not unlike those of the hippie counter-culture and the New Left, but filtered always through a radical feminist awareness."¹⁴ Lesbian attention to political issues other than lesbianism persists: the "struggle to take each other's cultures and systems of oppression seriously" continues.¹⁵

Yet even among its most fervent lesbian adherents, identity politics prevails as a normative theory rather than a descriptive one. The statement of The Furies collective that lesbians have much to gain by resisting oppression and of Adrienne Rich that lesbians act against their own self-interest by accepting oppression are admonitions, not summaries of inherent or universal lesbian traits. Faderman's use of "dogma" to describe such political positions is used in the context of a discus-

12. Ginny Berson, *The Furies*, in *LESBIANISM AND THE WOMEN'S MOVEMENT* 15, 18 (Nancy Myron & Charlotte Bunch eds., 1975).

13. This obedience renders her "woman-identification [as] mere 'sexual preference,'" the "erotic self still distorted and constrained." ADRIENNE RICH, *Disloyal to Civilization: Feminism, Racism, Gynephobia*, in *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966 - 1978*, at 275, 310 (1979).

14. LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 230 (1991).

The notion of "Lesbian Nation" had its most public expression in Jill Johnston's *Lesbian Nation*, a journalistic argument for lesbianism as a "feminist solution." As Johnston contended:

Historically the lesbian had two choices: being criminal or going straight. The present revolutionary project is the creation of a legitimate state defined by women The totally woman committed woman, or lesbian, who shares this consciousness with other women, is the political nucleus of a woman's or lesbian state - a state that women cannot achieve by demand from the male bastion but only from within from exclusive woman strength building its own institutions of self support and identity.

JILL JOHNSTON, *LESBIAN NATION: THE FEMINIST SOLUTION* 277-78 (1973).

15. Bette S. Tallen, *How Inclusive Is Feminist Political Theory?: Questions for Lesbians*, in *LESBIAN PHILOSOPHIES AND CULTURES* 241, 254 (Jeffner Allen ed., 1990).

sion of "political correctness," a term that has received subsequent widespread usage outside of the lesbian communities of the 1970s.¹⁶ The possibility of being "politically incorrect" for "some infraction of the code,"¹⁷ recognizes that a correspondence between sexuality and politics is neither imperative nor absolute. Any conflation of sexual and political identities conflicts with a premise at least as powerful as identity politics; the premise that lesbian existence is a quasi-universal phenomenon.¹⁸ Slogans such as "A Lesbian Republican is an Oxymoron" compete with "We are Everywhere" on T-shirts and buttons, as well as in discourse.¹⁹ One can exist as a lesbian without possessing lesbian politics.

Thus, identity politics posits a series of expectations and aspirations rather than a claim to experiential reality; otherwise, a criticism of any lesbian as politically incorrect for failing to satisfy standards of lesbian politics would be meaningless.²⁰ The aspiration that is identity politics recognizes an ability to analogize between various identities.

When analogizing is not required, however, identity politics reveals its most powerful expectation, perhaps approaching a claim to reality. It would be "realistic" to assume that when one's own identity is implicated, one's politics will lean toward the emancipatory rather than the oppressive. Such a position, however, neglects both the struggles to define what is emancipatory and the effects of internalized oppression.

This most powerful aspect of identity politics, among others, was recently raised in the context of a nomination to the United States Supreme Court. Those of us who believed that an African-American should be nominated to the Supreme Court upon the retirement of the Court's first African-American, the civil rights champion Thurgood

16. See, e.g., Mark Tushnet, *Political Correctness, the Law and the Legal Academy*, 4 YALE J.L. & HUMAN. 127 (1992).

17. FADERMAN, *supra* note 14, at 230.

18. See, e.g., SUSAN CAVIN, *LESBIAN ORIGINS* (1985).

19. For a discussion of this competition, see Ann Ferguson, *Is There A Lesbian Culture?*, in *LESBIAN PHILOSOPHIES AND CULTURES*, *supra* note 15, at 63.

20. The aspirational aspects of lesbian identity politics and political correctness are addressed in a recent essay by lesbian-feminist theorist Marilyn Frye:

I persist in being able to hear the phrase 'politically correct' non-ironically and as a positive term. It sounds like a phrase I might have coined to name something I want to be - I want to "be political" and to get things right and not get them wrong. This seems to be the route both to my own narrow happiness and to my fullest possible engagement in the welfare and happiness of many others both near and distant.

MARILYN FRYE, *Getting it Right*, in *WILLFUL VIRGIN: ESSAYS IN FEMINISM 1976-1992*, at 13, 14 (1992).

Marshall, did so because of a belief that based upon Marshall's example, a Justice with knowledge of racism would work to eradicate it.²¹ Clarence Thomas, an African-American, nominated and confirmed as Justice, described his own racially-shaped experiences but did not demonstrate any commitment to the eradication of racism.²² Instead, his racial identity insulated him from investigation into his lack of commitment to eradicate racism.²³ His deployment of racist stereotypes, notably in his portrayal of his sister as a "welfare queen," was obscured.²⁴ Clarence Thomas demonstrates that race as identity and race as politics are distinct.²⁵

The disjuncture between identity and politics is also evident in the

21. See generally CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* (1993); William J. Brennan, Jr., *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390 (1981); Maria L. Marcus, *Learning Together: Justice Marshall's Desegregation Opinions*, 61 FORDHAM L. REV. 69 (1992); Cass R. Sunstein, *On Marshall's Conception of Equality*, 44 STAN. L. REV. 1267 (1992).

22. See generally A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

23. As Margaret Burnham notes:

Thomas was more vulnerable than any previous nominee - at least since Rehnquist - on civil rights matters, because, unlike the previous nominees, he had made his career as a civil rights basher . . . [H]is record on civil rights was ample and unambiguous.

But, apparently intimidated by the Pin Point [Georgia, where Thomas spent his childhood] story, the senators barely asked Thomas about the policies he followed at the [Equal Employment Opportunity Commission], where he had been Reagan's hatchet man Thomas had led the ideological charge against affirmative action. But when he was questioned by senators about his views and his record, he silenced them by reminding them that "it should be clear from my biography that I understand that racism exists."

Margaret A. Burnham, *The Supreme Court Appointment Process and the Politics of Race and Sex*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 290, 302 (Toni Morrison ed., 1992) [hereinafter RACE-ING JUSTICE].

24. See, e.g., Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, *supra* note 23, at 323; Christine Stansell, *White Feminists and Black Realities: The Politics of Authenticity*, in RACE-ING JUSTICE, *supra* note 23, at 251, 260-63.

25. As African-American theorist Cornel West expresses it:

All people with black skin and African phenotype are subject to potential white-supremacist abuse. Hence, all black Americans have some interest in resisting racism - even if their interest is confined solely to themselves as individuals rather than to larger black communities. Yet how this "interest" is defined and how individuals and communities are understood vary. So any claim to black authenticity - beyond being the potential object of racist abuse and heir to a grand tradition of black struggle - is contingent on one's political definition of black interest and one's ethical understanding of how this interest relates to individuals and communities in and outside black America. In short, blackness is a political and ethical construct.

Cornel West, *Black Leadership and the Pitfalls of Racial Reasoning*, in RACE-ING JUSTICE, *supra* note 23, at 390, 393-94.

lesbian context. "There are a lot of people who believe that Anne [Imelda] Radice is the lesbian Clarence Thomas."²⁶ President Bush appointed Radice to serve as chair of the National Endowment for the Arts (NEA). Under its former chair, John Frohnmayer, the NEA had been mired in controversies surrounding the funding of lesbian and gay artistic and literary projects. Conservative Senator Jesse Helms successfully orchestrated a law forbidding arts grants to be used to "promote, disseminate, or produce" art which included depictions of "homoeroticism" or was "obscene."²⁷ Congress subsequently amended this provision to provide that artistic excellence and merit are to be judged "taking into consideration general standards of decency" and that "obscenity is without artistic merit, is not protected speech, and shall not be funded."²⁸ Radice, aptly described as "a lesbian even Bush and Helms could love,"²⁹ explicitly stated that under her leadership the NEA would continue to examine the sexual content of arts projects, and that she would veto funding for any projects with "difficult subject matter" or "sexually explicit" matter,³⁰ terms which are generally understood as pertaining to lesbian and gay art and literature.³¹ In the realm of political appointments, Radice's sexuality is atypical³² al-

26. Quoted in Maer Roshan, *Anne Radice and the Politics of Appeasement*, QW, June 7, 1992, at 23, 24.

27. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 304(a), 103 Stat. 741, (codified as amended at 20 U.S.C. § 954(d) (1990)).

28. Pub. L. No. 101-512, § 103(b), 104 Stat. 1963 (codified at 20 U.S.C. § 954(d) (1990)).

For discussions of the controversy, including its First Amendment ramifications, see Donald W. Hawthorne, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 KAN. L. REV. 437 (1992); Robert M. O'Neil, *Artists, Grants and Rights: The NEA Controversy Revisited*, 9 N.Y.L. SCH. J. HUM. RTS. 85 (1991); Symposium, *Art, the First Amendment and the NEA Controversy*, 14 NOVA L. REV. 317 (1990); Nancy Ravitz, Note, *A Proposal to Curb Congressional Interference with the National Endowment for the Arts*, 9 CARDOZO ARTS & ENT. L.J. 475 (1991).

See also *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991) (holding that the NEA's requirement that grant recipients certify compliance with the policy against obscenity was unconstitutionally vague and chilling of protected speech); cf. *Fordyce v. Frohnmayer*, 763 F. Supp. 654 (D.D.C. 1991) (denying standing to a taxpayer protesting NEA's partial funding of the "anti-Christian" production "Tongues of Flame" on grounds that such funding violated the First Amendment's establishment clause).

29. Tommi A. Mecca, *A Lesbian Even Bush and Helms Could Love*, S.F. BAY TIMES, June 4, 1992, at 4.

30. *Id.*

31. "In NEA terms, sexually explicit has often been a code word for gay [and lesbian] The battles that have raised the most opposition in the past few years have always been related to sex, and with few exceptions they've been overwhelmingly related to lesbian and gay sex." Randall Bourscheidt, quoted in Roshan, *supra* note 26, at 24.

32. See *infra* notes 70-78 and accompanying text.

though perhaps not arbitrary.³³ In the realm of identity politics, Radice is anomalous; a lesbian who not only does not share the progressive politics but also is hostile to lesbian sexuality.

A "lesbian even Bush and Helms could love" effectively falsifies any claim to universal truth that identity politics might assert. "Lesbian" cannot unfailingly operate as shorthand for a certain set of political positions. Identity politics, recognized as normative rather than descriptive, allows for the possibility of a lesbian Supreme Court Justice being anti-lesbian. This is the specter that any proposal for a lesbian Supreme Court Justice must contemplate.

POSTMODERNISM AS POST-LESBIANISM

Not only is identity politics subject to dispute on the grounds that there is no necessary connection between one's identity and one's politics, it is also subject to a more devastating critique of the notion of identity itself. The critique of identity is largely derived from postmodernist³⁴ critiques of subjectivity, positing the "death of the subject." As articulated by Fredric Jameson, one of the most respected American proponents and scholars of postmodernism, this position sub-

33. See Roshan, *supra* note 26, at 24:

To some observers, the fact that a widely known lesbian was appointed to a position so mired in sexual politics seems to be much more than an accident. In fact, an interesting line of speculation gaining ground in more cynical corners of the art world is that Radice was appointed to her NEA post *because of* - *not despite* - her lesbianism.

The article quotes a "well-connected gay source at the NEA" as opining that "the administration realized that, as a lesbian, she'd be less susceptible to all the slak [sic] she would be getting about homophobia." *Id.*

34. I am using the terms "postmodernist" and "postmodernism" throughout this Article to connote a philosophical perspective, as summarized for example by Jane Flax:

[P]ostmodern philosophy is not a unified and homogenous field. The persons and discourses associated with postmodernism include Nietzsche, Foucault, Derrida, Deleuze and Guattari, Lyotard, Rorty, Cavell, Barthes, semiotics, deconstruction, psychoanalysis, archaeology, genealogy, and nihilism. Postmodernists share at least one common object of attack--the Enlightenment--but they approach this object from many different points of view and attack it with various methods and for diverse purposes.

Despite their many differences, these discourses are all "deconstructive;" they seek to distance us from and make us skeptical about the ideas concerning truth, knowledge, power, history, self, and language that are often taken for granted within and serve as legitimations for contemporary Western culture.

JANE FLAX, THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM, & POSTMODERNISM IN THE CONTEMPORARY WEST 29 (1990). Thus, although I agree that postmodernism is "the cultural era in which we live" and "the set of cultural products created" during this era, J.M. Balkin, *What is Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1967, 1969 (1992), I intend to stress the theoretical aspects. Post-structuralism, a term more specifically associated with philosophy rather than culture, is a narrower term preferred by some. However, I decline to use post-structuralism because it is not the term generally employed by contemporary American theorists; that term is postmodernism.

scribes to the notion that "individualism and personal identity is a thing of the past; that the old individual or individualist subject is 'dead'; and that one might even describe the concept of the unique individual and the theoretical basis of individualism as ideological."³⁵ Any appeal to individual authenticity or even freedom is suspect from a postmodernist perspective. This allows a postmodernist heterosexual male law professor to criticize a postmodernist lesbian law professor for not being sufficiently postmodern because she "wants to validate the lived reality of lesbians through resort to the 'authentic self.'"³⁶

Postmodernist critiques of identity also argue that even assuming there is an individual subject, any identities that inhere in individual subjects are the result of historically specific and contingent discourses of power. The work of the influential French philosopher and intellectual Michel Foucault is an extended argument of this position.³⁷ In his last works, devoted to sexuality, Foucault argued that the "homosexual" was an invention of nineteenth century medico-juridical discourses,³⁸

35. Fredric Jameson, *Postmodernism and Consumer Society*, in POSTMODERNISM AND ITS DISCONTENTS: THEORIES, PRACTICES 13, 17 (E. Ann Kaplan ed., 1988).

36. Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1194 (1992). Hutchinson, who identifies himself as a postmodernist and as a "white, male, heterosexual, forty-year old academic of working class background," *id.* at 1177, is critiquing Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989), in which Cain argues that postmodernism holds the most promise for feminist theory. Hutchinson argues that Cain's use of the "authentic self" is a "subtheme that runs strongly through the essay that compromises her commitment to postmodernism," 26 NEW ENG. L. REV. at 1194, rendering her sketch of freedom "not postmodern in character or ambition," *id.* at 1195.

Hutchinson illustrates what he refers to as the failing of Cain's "modernist mentality:"

[S]he goes so far as to say that "male homosexuality is a practice that contradicts the assumption of universal heterosexuality, but affirms male-centered reality." Yet this surely denies the lived experience of many gay men. In a world of almost compulsory heterosexuality, their reality is equally marginal and invisible.

Id. at 1196 (citing 4 BERKELEY WOMEN'S L.J. at 192 n.1). Thus, postmodernism perfected renders the experiences of gay men and lesbians "equally marginal and invisible." *Id.* I would suggest that only the most arrogant gay men would affirm that their own reality of marginality and invisibility is equal to the reality of lesbians in our world of gendered power. For further discussion, see ROBSON, (OUT)LAW, *supra* note 2.

37. Foucault's primary works in English translation include: 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., 1978); 2 THE HISTORY OF SEXUALITY: THE USE OF PLEASURE (Robert Hurley trans., 1985); 3 THE HISTORY OF SEXUALITY: THE CARE OF THE SELF (Robert Hurley trans., 1986); DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977); THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION (A.M. Sheridan Smith trans., 1973); THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., 1972); THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Alan Sheridan trans., 1970); MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Richard Howard trans., 1965).

38. Foucault argues that:

There is no question that the appearance in nineteenth-century psychiatry, jurisprudence, and literature of a whole series of discourses on the species and subspecies of

an argument that has gained ascendancy and is presently the legitimate version.³⁹ Foucault, himself a gay man, rejected the notion of sexual identity,⁴⁰ despite his involvement with gay liberation in America as well as in France during the last years of his life.⁴¹

Sexuality has been fertile ground for the postmodernist contestation of the coherence of identity categories, in part because lesbian and gay theorizing has been profoundly influenced by all aspects of postmodernism.⁴² Such contestations can be rather grandiose. For ex-

homosexuality, inversion, pederasty, and "psychic hermaphroditism" made possible a strong advance of social controls into this area of "perversity"; but it also made possible the formation of a "reverse" discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or "naturalness" be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.

1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 37, at 101.

39. The recitation of this "fact" in legal scholarship includes Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1087 (1988) ("No attitude toward 'homosexuals' or 'homosexuality' can really be identified before the mid-nineteenth century because the concept did not exist until then."); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 537 (1992) (citing JEFFREY WEEKS, *COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN* 23-32 (1977)) ("The word 'homosexual' and the idea that the homosexual was a different kind of person were developed by late nineteenth-century sexologists proposing medicalized causation theories for sexual behavior."); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 148 (1992) (citing JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 42 (1980), WEEKS, *supra*, and WAYNE DYNES, *Gay*, in 1 *ENCYCLOPEDIA OF HOMOSEXUALITY* (1990)) ("The term 'homosexual' did not originate until the late nineteenth century.").

40. For example, discussing homosexuality in an interview, Foucault referred to a recent biography of Proust in which the author demonstrated:

[H]ow difficult it is to give meaning to the proposition 'Proust was a homosexual.' It seems to me that it is finally an inadequate category. Inadequate, that is, in that we can't really classify behavior on the one hand, and the term can't restore a type of experience on the other.

Interview, *Sexual Choice, Sexual Act: Foucault and Homosexuality*, in *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS OF MICHEL FOUCAULT 1977-1984*, at 286, 292 (Lawrence D. Kritzman ed., 1988). Similarly, in a recent biography of Foucault, an interchange in 1975 between "a young gay militant" and Foucault is described, in which the younger man asks Foucault his opinion about "gay liberation" and Foucault reportedly responded, "I believe the term 'gay' has become obsolete," and that people "are neither this nor that, gay nor straight." JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* 254 (1993).

41. MILLER, *supra* note 40, at 254-57.

42. The embracing of postmodernist discourse by the lesbian/gay/bisexual academic community is evident from the Fourth Annual Gay and Lesbian Studies Conference, which included presentations such as "AIDS and Post-Modernism," "Postmodern Lesbianism," "When Jack Blinks: (si)ghting gay desire in Ann Bannon's *Beebo Brinker*," "'Who are 'we'?' 'Gay' 'Identity' as political (e)motion," "Homosexuality and the Uncanny: What's Fishy in Lacan," "'I don't want to discourage invention': Foucault's interviews and queer theory/practice," and "Anonymous Sex with Foucault."

As I have argued elsewhere, Robson, *Embodiments*, *supra* note 2, I believe it is no accident that lesbian/gay/bisexual studies has enthusiastically adopted postmodernism. No matter how queer we are, if we (re)present our queerness on our bodies in a trendy enough style, if

ample, lesbian theorist Judith Butler argues that the incoherency of sexual categories like lesbian are precisely their appeal. She states that she is "skeptical about how the 'I' is determined as it operates under the title of the lesbian sign," and argues that identity categories such as lesbianism are "sites of necessary trouble:"

In fact, if the category were to offer no trouble, it would cease to be interesting to me: it is precisely the *pleasure* produced by the instability of those categories which sustains the various erotic practices that make me a candidate for the category to begin with. To install myself within the terms of an identity category would be to turn against the sexuality that the category purports to describe⁴³

This is a rejection not only of any (pre)determined connections between lesbian identity and politics, but also of any determinable connections between lesbian identity and anything else, except instability. Any sexuality that might be named lesbian is precisely too unstable to be named anything at all.⁴⁴

Postmodernism relegates lesbianism to a precarious position: postmodernism entails post-lesbianism. The postmodernist instability of lesbian identity (as well as the instability of gendered identity) makes possible a lesbian who has sexual relationships exclusively with men, or even a "lesbian man." Such postmodernist possibilities "make lesbianism, at least as we have known it, impossible."⁴⁵ A definition of lesbian as a woman who gives her erotic and affectional attention to other women rests on a gendered axis, an axis that postmodernists also dispute.⁴⁶ Yet, lesbians also dispute the gendered axis, albeit with a result different from the dissolution of lesbianism.⁴⁷ Apart from

we wear the right footnotes like accessories, if we express the body's desires in a manner complicated and oblique enough, then maybe we will be tolerated. This is not to say that there are no other reasons that postmodernist discourse might be useful. Nevertheless, I believe the intellectual sophistication of postmodernism is an important factor resulting in its widespread adoption within the gay/lesbian/bisexual academic community.

43. Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13, 14 (Diana Fuss ed., 1991).

44. Butler does not limit her argument to lesbian sexuality and identity: "[T]his might be true for any identity category which seeks to control the very eroticism that it claims to describe and authorize, much less 'liberate'." *Id.* at 14.

45. Jacquelyn N. Zita, *Male Lesbians and the Postmodernist Body*, 7 *HYPATIA* 106, 124 (1992).

46. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (a postmodernist critique of gender identity).

47. Perhaps the most famous among these is Monique Wittig, one of the first theorists who devastatingly deconstructed and anti-essentialized gender. For Wittig, "woman" exists only

postmodernism, lesbians have also interrogated the meaning of erotic, affectional, and sex as relational categories that apply to lesbian interaction, albeit again resisting the conclusion that such relations are unstable and impossible.⁴⁸ As I, among others, have argued elsewhere, the cessation of the category "lesbian" is a grave potential danger.⁴⁹ Yet the impossibility of lesbianism is precisely the goal of postmodernist philosophers; a goal that reverberates in common conversations in this postmodern era in which people eschew "labels" that might be applicable to their sexuality. Lesbianism, of course, is not uniquely impossible. All sexual identities, as well as gender and racial ones, are ultimately impossible. Within postmodernism's ambit, even the identity of "postmodernist" is objectionable.⁵⁰

Within legal theory, repudiation of identity categories has generally been more circumspect.⁵¹ In a pertinent if obverse example, postmodernist theorist Jennifer Wicke argues that [lesbian and] gay advocates should be supported in any quest to extend marital rights to intimate relationships:

Marriage can be subjected to a withering critique as a transparently ideological institution, but in this case too the importance of reserving a vocabulary of 'rights' as a legal subject transcends those objections since the political objectives of securing [lesbian and] gay marriage rights outweigh any hesitance about the identities pre-

in terms of men, only in terms of "heterosexual systems of thought and heterosexual economic systems" which leads Wittig to her famous pronouncement that "Lesbians are not women." MONIQUE WITTIG, *The Straight Mind*, FEMINIST ISSUES, Summer 1980, at 1, reprinted in THE STRAIGHT MIND AND OTHER ESSAYS 21, 32 (1992). However, Wittig has been accused of being a "lesbian modernist," because she posits homosexuality (specifically lesbianism) as outside the "heterosexual matrix," and as a "purification," and thus as a unification of lesbianism. BUTLER, *supra* note 46, at 121; DIANE FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE 43 (1989).

Similarly, lesbian ethicist Sarah Lucia Hoagland, who has probably never been labelled a postmodernist, contends that "woman" is a normative category to regulate female behavior and the "category 'woman' is not a reflection of fact but instead tells us how to determine fact." SARAH L. HOAGLAND, LESBIAN ETHICS 15 (1988).

48. See, e.g., JULIA PENELOPE, *Does It Take One to Know One?*, in CALL ME LESBIAN: LESBIAN LIVES, LESBIAN THEORY 17-38 (1992).

49. Robson, *Embodiments*, *supra* note 2.

50. See David C. Hoy, *Foucault: Modern or Postmodern?*, in AFTER FOUCAULT 12, 38 (Jonathan Arac ed., 1988) (concluding that "Foucault was a consistent postmodern in that he would never have called himself [one]").

51. See, e.g., Betsy B. Baker, *Constructing Justice: Theories of the Subject in Law and Literature*, 75 MINN. L. REV. 581 (1991); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991).

supposed by the marriage.⁵²

In reply, Mary Joe Frug, the late postmodernist feminist legal theorist,⁵³ argued that it is precisely the law's preoccupation with enforcing identity that produces the injustice:

Law requires all legal claimants to assume a particular posture - a partial identity - in seeking judicial assistance; we must leave aside much of the multiplicity and complexity of our lives in order to engage in legal discourse. Injustice occurs, as in the . . . [lesbian and] gay marriage campaign, when legal rules structure these particular postures in such a way that subordinate groups cannot squeeze into them at all. In these situations, legal rules need to expand the narrow and rigid character of the subject position they impose as a condition of admission to the legal arena.⁵⁴

Thus, although disagreeing, neither Wicke nor Frug promote the abandonment of identity categories, apparently judging such categories necessary for social change. Interestingly, however, both conclude that conditions of the subordinate identity category - lesbians and gay men - would be improved by participation in an arrangement definitive of the dominant category - the heterosexual right to marry - a debatable assumption with which I disagree.⁵⁵

52. Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 *COLO. L. REV.* 455, 467 (1991).

53. Mary Joe Frug, a feminist law professor teaching at New England School of Law, was murdered in March 1991. Tributes to her life and work include: David Kennedy et al., *In Memoriam: Mary Joe Frug*, 62 *COLO. L. REV.* 433 (1991); *In Memoriam, Mary Joe Frug, 1941-1991*, *YALE J.L. & FEMINISM* at i (No. 2, 1991); Frances Olsen, *In Memoriam: Mary Joe Frug*, 14 *HARV. WOMEN'S L.J.* at i (1991); Carl Tobias, *Tribute to Mary Joe Frug*, 24 *CONN. L. REV.* at ix (1991); *Memorial Service for Mary Joe Frug*, 26 *NEW ENG. L. REV.* 639 (1992). Her posthumously published work includes *MARY J. FRUG, POSTMODERN LEGAL FEMINISM* (1992).

For an excellent engagement with Frug's work from a lesbian perspective, see Ruth Colker, *The Example of Lesbians: A Posthumous Reply to Mary Joe Frug*, 105 *HARV. L. REV.* 1084 (1992).

54. Mary J. Frug, *Law and Postmodernism: The Politics of a Marriage*, 62 *COLO. L. REV.* 483, 487 (1991).

55. My own position is that the availability of lesbian marriage would promote a division between the "good" lesbians (married, and therefore monogamous, familial, and conservative) and the "other" lesbians (unmarried and therefore promiscuous, independent and radical). See Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMP. L. REV.* 511 (1990).

Both the availability and desirability of marriage, and other coupling mechanisms, for lesbians and gay men has received attention in the legal literature. See, e.g., Vada Berger, *Domestic Partnership Initiatives*, 40 *DEPAUL L. REV.* 417 (1991); G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 *U. DAYTON L. REV.* 541 (1985); Harlon L. Dalton,

CLAIMING & DISCLAIMING LESBIAN IDENTITY

Much of the postmodernist impulse to transcend identity categories is certainly an understandable one, even as it arguably re-establishes the unique individual (a person beyond all labels) that postmodernism also rejects.⁵⁶ This impulse approaches irresistibility in the context of sexual identity categories because these categories must be explicitly claimed.⁵⁷ Lesbian identity is generally not transmitted through cues from one's parents, as are cultural, religious, and gender identities, but is instead claimed in the "coming out" process, often in direct contradiction to normative expectations.⁵⁸

Coming out is a cornerstone of lesbian experience and theory.⁵⁹ Its structure is a collective and individual narrative of identity. Although, arguably, identities are accessible only as narrative,⁶⁰ the coming-out narrative is endemic to lesbian narratives.⁶¹ Despite individual

Reflections on the Lesbian and Gay Marriage Debate, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 1 (1991); Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 31 (1991); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 63 (1991); Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134 (1987-88); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9 (1991); Hannah Schwarzschild, *Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly*, 4 BERKELEY WOMEN'S L.J. 94 (1988-89); Gina M. Torielli, Recent Development, *Protecting the Nontraditional Couple in Times of Medical Crises*, 12 HARV. WOMEN'S L.J. 220 (1989); Amy L. Brown, Note, *Broadening Anachronistic Notions of "Family" in Proxy Decisionmaking for Unmarried Adults*, 41 HASTINGS L.J. 1029 (1990).

56. See *supra* notes 34-54 and accompanying text.

57. Sexuality categories are not unique in this regard. For an especially provocative account of this phenomenon in a racial/ethnic context, see MICHELLE CLIFF, CLAIMING AN IDENTITY THEY TAUGHT ME TO DESPISE (1980), in which a lesbian writer interrogates her own identity as a light-skinned Jamaican descendant of slaves from Africa. See also Judy Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 2 YALE J.L. & FEMINISM 305 (1990).

58. The extent to which normative expectations are changed by a lesbian/gay/bisexual parent are uncertain. A lesbian daughter of a lesbian mother can be a politically dangerous research topic given the judicial climate preferring studies that prove that a child of a lesbian mother is no more likely to be lesbian/gay than a child of heterosexual parents; thus, it is within the "best interests of the child" to allow custody to a lesbian mother.

59. A sampling of syllabi from courses on lesbianism reveals that "coming out" is often the first unit in the course; a unit may include students' writings and discussions of their own coming out experiences. See *Sample Syllabi from Courses on Lesbianism*, in LESBIAN STUDIES: PRESENT AND FUTURE 217-35 app. (Margaret Cruikshank ed., 1982).

60. See CELIA KITZINGER, THE SOCIAL CONSTRUCTIONISM OF LESBIANISM 90 (1987) (noting that the subject of her study was not any "real" or "underlying" lesbian identity, but the identity account itself, in recognition that a social scientist only has access to the account).

61. As lesbian literary critic Bonnie Zimmerman writes:

variations, coming out is generally considered as a process through the stages of self-labelling, a communication of feelings or identity to others, a location and participation in a community, an integration of sexuality into the self, and possibly the proclamation of identity to friends, parents, children, employers, and the world at large.⁶² This narrative is constructed as an emancipatory (and implicitly irreversible) trajectory involving the recognition and claiming of one's authentic identity. Within the confines of such a narrative, not coming out - remaining "in the closet" - is an inauthentic, negative and generally disparaged state.⁶³ Not surprisingly, in our postmodern era, this narrative has been rightly criticized as simplistic.⁶⁴

Yet the rhetoric of coming out and closets has remained vital in lesbian/gay theory, even as it has proliferated beyond references to

Coming out is the rite of passage through which a lesbian establishes and affirms herself. It is the tale we tell ourselves to state who we are and why we exist, a gift shared between lovers . . . and among friends. It is the currency, the means of exchange, within Lesbian Nation The coming out story explains how we came to be lesbians, how our consciousness formed and our identity developed. It repeats a few basic patterns and defines a collective identity. The coming out story is one of the fundamental lesbian myths of origin, the first basic tale of all lesbian communities [T]he first movement is always a personal and interior one, the claiming or discovering of the lesbian within one's self. In lesbian novels, this movement is consistently imagined as a journey.

BONNIE ZIMMERMAN, *THE SAFE SEA OF WOMEN: LESBIAN FICTION 1969-1989*, at 34 (1990).

62. MARGARET CRUIKSHANK, *THE GAY AND LESBIAN LIBERATION MOVEMENT* 46-48 (1992).

63. Remaining closeted is also considered inimical to collective identity and survival. To quote one of many recent examples, this one occurring in a discussion of the boycott of Colorado in response to Amendment 2, *see* note 86, coming out is integral to civil rights:

The only protection we have now is ourselves. As important as anti-discrimination laws are . . . it is even more important to put a face on our movement, and achieving that goal requires coming out to the world. Those who have come out already have laid the groundwork. Even more will be accomplished when the rest of you muster your courage and come out - even when it's not fun, even when it's inconvenient, and even when it places you in harm's way.

Niles Merton, *Pride and Prejudice*, *ADVOCATE*, Feb. 9, 1993, at 6.

64. Resistance to the "grand narrative" that legitimates and totalizes that which it purports to explain is a central idea of postmodernism. *See* JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* at xxiv *passim* (Geoff Bennington & Brian Massumi trans., 1984) ("Simplifying to the extreme, I define *postmodern* as incredulity toward metanarratives."). This resistance can be established through deconstructive techniques, as demonstrated by the following passage by Judith Butler:

If I claim to be a lesbian, I "come out" only to produce a new and different "closet." The "you" to whom I come out now has access to a different region of opacity. Indeed, the locus of opacity has simply shifted . . . so we are out of the closet, but into what? what new unbounded spatiality? the room, the den, the attic, the basement, the house, the bar, the university, some new enclosure For being "out" always depends to some extent upon being "in"; it gains its meaning only within that polarity. Hence, being "out" must produce the closet again and again in order to maintain itself as "out."

Butler, *supra* note 43, at 15-16.

lesbian and gay identity.⁶⁵ One reason for the authority of the notion of claiming lesbian identity is the often dramatic consequences attendant to such a claiming. The claim can sunder previous relationships between the claimant and her family, friends, employer, and others in her social and professional circles. For example, a claim that one is a lesbian can mean a loss of employment, a loss that the law rarely deems actionable employment discrimination.⁶⁶ Another reason for the continued vitality of claiming is the imperceptibility of lesbianism given the presumption of universal heterosexuality.

Claiming lesbian identity (or coming out) implies a volitional act, an implication that is not universal. Lesbian literature is replete with positive journeys toward lesbian identity, but also contains instances in which lesbianism is initially exposed rather than confessed.⁶⁷ There are centuries of accusations of lesbianism, accusations which often merit legal sanctions including death, banishment, or prison, as well as contemporary cases in which lesbianism is an issue.⁶⁸ The current "outing" controversies, prompted by the revelation of one's lesbian or gay status often by members of lesbian/gay communities for political purposes,⁶⁹ is but the latest complicated development in the history of involuntary disclosures of one's sexuality caused by the necessities of claiming lesbian/gay identities.

The complications surrounding claiming and disclaiming lesbian identity have gained national prominence, foreshadowing the specter of a lesbian Supreme Court Justice. Although President Bill Clinton promised to appoint a diverse cabinet,⁷⁰ any possibility that lesbian

65. Eve Sedgwick has influentially argued that the closet is the "defining structure" for lesbian/gay oppression in this century. EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 71 (1990). Sedgwick also notes that "[t]he closet' and 'coming out,' now verging on all-purpose phrases for the potent crossing and recrossing of almost any politically charged lines of representation," are magnetic figures by which "homosexuality" is indicative of "wider mappings of secrecy and disclosure, and of the private and the public." *Id.*

66. See ROBSON, (OUT)LAW, *supra* note 2, at 81.

67. See, e.g., JACQUELYN H. PARK, *A STONE GONE MAD* (1991) (16 year old girl found with female schoolmate and sent to boarding school and psychiatrists).

68. See generally ROBSON, (OUT)LAW, *supra* note 2.

69. For discussions of "outing" in legal literature, emphasizing the privacy aspects, see John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747 (1992); Jon E. Grant, Note, *"Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 CORNELL L. REV. 103 (1991); see also RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 11-48 (1992).

70. As reported by the *New York Times*, then-candidate Clinton first articulated this promise in the third televised election debate:

The National Women's Political Caucus gave me an award, one of their good guy awards for my involvement of women in high levels of government. And I've appointed more minorities to positions of high level in government than all the gover-

identity might figure among the diversities remains unrealized. On the contrary, it became important that any woman who might potentially be claimed within a lesbian identity category disclaim any lesbian identity.⁷¹

For example, intimations of lesbianism attached to both Donna Shalala, Clinton's successful nominee for Secretary of the Department of Health and Human Services, and Janet Reno, Clinton's third (and successful) nominee for Attorney General. Donna Shalala's disclaimer of lesbianism occurred in an article in a local newspaper and was thereafter widely reported.⁷² The particular quote attributed to Shalala is: "Have I ever lived an alternative lifestyle? The answer is no." The article portrays the rumors of lesbianism as being generated by "gay groups" who have subjected others "to this sort of attack." The article also concludes that "[f]eeding the rumor was the fact that Shalala, at 51, is one of the few high-profile, single women her age in town."⁷³ Being unmarried as a condition that necessitates a disclaimer of lesbianism also occurred in Janet Reno's case, although Reno handled it a bit differently by explicitly stating that she is "attracted to strong, brave, rational, and intelligent men."⁷⁴ Shalala's singlehood as rumor nourishing and Reno's use of heterosexual interest to disclaim lesbian identity occurs in a legal context which equates an absence of heterosexual activity with lesbian identity.⁷⁵

nors in the history of my state combined before me.

So that's what I'll do as President. I don't think we've got a person to waste, and I think I owe the American people a White House staff, a Cabinet and appointments that look like America but that meet high standards of excellence, and that's what I'll do.

The 1992 Campaign: Transcript of the 3d TV Debate Between Bush, Clinton and Perot, N.Y. TIMES, Oct. 20, 1992, at A20. After Clinton's election, the *New York Times* emphasized the diversity issue in its coverage of Clinton's appointments, see, e.g., Adam Clymer, *Push for Diversity May Cause Reversal on Interior Secretary*, N.Y. TIMES, Dec. 23, 1992, at A1; Gwen Ifill, *Clinton Completes Cabinet and Points to Its Diversity*, N.Y. TIMES, Dec. 25, 1992, at A1.

71. As Nina Totenberg of National Public Radio reported, "the White House satisfied itself that Reno is not gay [lesbian] before going ahead with the nomination." Doug Ireland, *Press Clips: Flying to Reno*, VILLAGE VOICE, Feb. 23, 1993, at 8.

72. At the time of her nomination, Shalala was the President of the University of Wisconsin at Madison, and the original piece was printed in the Madison, Wisconsin newspaper. *Gay Group Dogs Shalala with Phone Campaign*, CAPITAL TIMES, Dec. 30, 1992, at 10A. One example of the story's dissemination is *Shalala: Not Lesbian*, N.Y. NEWSDAY, Dec. 31, 1992, at 16.

73. CAPITAL TIMES, *supra* note 72.

74. VILLAGE VOICE, *supra* note 71.

75. For example, a District of Columbia trial judge recently interrogated a woman about her sexual partners in an action seeking to remove her children for abuse and neglect:

THE COURT: Is there some reason that the two of you slept in one bed? You are grown women. Is there some reason why?

WITNESS: Yes, there was a reason . . . A room factor . . . The limitation of space.

THE COURT: You know, we could probably get a clearer understanding of exactly

Importantly, however, neither candidate relied upon any postmodernist incoherency of the category of lesbianism; one cannot imagine Shalala or Reno stating that "to install myself within the terms of an identity category would be to turn against the sexuality that the category purports to describe."⁷⁶ Even more importantly, neither candidate proffered a statement that her sexual orientation might be irrelevant to the task at hand. As one commentator expressed it, supporters of Reno wanted to be "reassured that there aren't any culturally unacceptable hair-raisers of the Dykes-on-Bikes variety in her background."⁷⁷ Another issue is a more delicate one that implicates the disclaimer itself: "Sources close to the investigation [of Shalala] insist the FBI check isn't a 'lesbian witch hunt,' but instead the FBI is trying to determine whether or not the HHS secretary-designate has lied about her sexual orientation."⁷⁸ This is the classic catch-22 that contaminates the claiming and disclaiming of lesbian identity: a claim of lesbian identity causes one to be discriminated against as a lesbian; a disclaimer of lesbian identity causes one to be discredited as a liar.

PROBLEMS OF ESSENTIALIZING & ANALOGIZING IDENTITIES

The necessity for claiming lesbian identity implicates the problems of essentializing and analogizing lesbian identities. Within identity theories, essentialism and (social) constructionism compete for explanatory primacy. Essentialism generally theorizes from the place of "biological

what is the big mystery in this case if you could give me a very truthful straight answer to one question.

WITNESS: Yes.

THE COURT: Do you have a sexual relationship with Gail Jones?

WITNESS: I have never.

THE COURT: Well, then, let me approach it from another way . . . Since Ms. Gail Jones moved in your home five years ago . . . and the two of you have slept in the same bed for five years . . . have you had sexual relations with any males?

WITNESS: No.

THE COURT: No women?

WITNESS: No.

THE COURT: So, you have made a monastery of your home since that time?

In re J.A. & L.A., 601 A.2d 69, 77 n.7 (D.C. 1991).

Although the trial judge found there was not enough evidence to justify a finding of lesbianism and was ultimately reversed by an appellate court for evidencing bias, the trial judge was comfortable with assuming that the lack of heterosexual activity implicates lesbianism.

76. See *supra* note 43 and accompanying text.

77. VILLAGE VOICE, *supra* note 71.

78. Tracy Baim, *Clinton Top Picks Include No Open Gays/Lesbians*, OUTLINES, Jan. 1993, at 15. The article predicted that Shalala's honesty on the issue of her sexual orientation would be considered during her Senate confirmation hearings. However, the sexual orientation issue is absent from the public records of the confirmation hearings. See 139 CONG. REC. S93-01 (daily ed. Jan. 21, 1993).

force" while the oppositional theory of constructionism (or social constructionism) generally theorizes from the place of culturally defined constructs and labels.⁷⁹ Reductively expressed, the conflict is one between nature and nurture. Despite accurate observations that the essentialism/constructionism dichotomy has outlived its usefulness,⁸⁰ the dichotomy refuses retirement. Within lesbian and gay theorizing, however, social constructionism has assumed preeminency.⁸¹ Previous theories, such as lesbian-feminist theories of the 1970s, are often disparaged as essentialist, essentialism having become more of an insult than a viable competing theory.⁸²

This competition between essentialism and social constructionism is not limited to lesbian theoretical texts. In scientific discourse, the preoccupation with an etiology for lesbianism is expressed as a contest between biological explanations and psychological ones. While lesbianism was once generally believed to be less biological and more psycho-

79. In sexual theory, essentialism can be defined as the treatment of sexuality as a "biological force" and thus sexual identities are "cognitive realizations of genuine, underlying differences," while (social) constructionism can be defined as the position that sexuality and sexual identities are constructed by society and thus sexuality and identity "belong to the world of culture and meaning" as "labels, created by cultures and applied to the self." Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, SOCIALIST REV., May-Aug. 1987, at 9, reprinted in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 239, 241-42 (Edward Stein ed., Garland Pub. 1992) (1990).

80. See *id.* at 241.

81. As Richard Mohr notes,

Within the emerging academic discipline of lesbian and gay studies, there is nearly universal agreement among scholars that social factors are in some sense determinant in homosexuality, that homosexuality is culturally constituted or produced. Indeed, especially as espoused by Michel Foucault, this variant of cultural determinism - the social construction of homosexuality - has achieved hagiographical status within lesbian and gay studies, where it is almost always an object for witness rather than of analysis.

MOHR, *supra* note 69, at 221-22. Mohr considers himself one of the few "dissenters" from this uncritical acceptance of social constructionism, and proceeds to compellingly dissect the varieties of social constructionism.

82. An examination of those texts, however, does not support such a blanket disparagement, because the texts themselves reveal an essentialism tempered with a dedication to constructionism. For example, in the classic *The Woman Identified Woman* by Radicalesbians, there is an inner core of essential lesbian identity: a lesbian "acts in accordance with her inner compulsion to be a more complete and freer human being" and struggles to "expel the heavy socialization that goes with being female" so that she can "find peace with herself." In this same relatively short statement, however, there is also a constructionist interpretation of lesbian identity: "Lesbian is a label invented by the Man to throw at any woman who dares to be his equal" and "'Lesbian' is one of the sexual categories by which men have divided up humanity." Even the first notorious statement of the Radicalesbian's text - "A lesbian is the rage of all women condensed to the point of explosion" - leans toward a constructionist stance; lesbianism is a political option rather than an inherent certainty. Radicalesbians, *The Woman Identified Woman*, in RADICAL FEMINISM 240-42 (Anne Koedt et al. eds., 1973).

logical,⁸³ the most widely reported recent empirical study posits the likelihood of a lesbian "gene."⁸⁴ This well-publicized scientific debate⁸⁵ informs and is informed by the political/legal debate, in which the contest usually devolves into a distinction between status and conduct. For example, recent controversies concerning President Clinton's goal to halt the military's exclusion of "homosexuals" usually devolved to a distinction between whether "homosexuality" is a status or an activity; a debate that often occurred in the context of an explicit comparison with the military's former practice of racial segregation.⁸⁶ Legal scholarship considering the military's exclusion of lesbians and gay men has analyzed the status/conduct dichotomy,⁸⁷ at least in part because of a judicial privileging of this dichotomous distinction. Perhaps the most famous judicial example is the Seventh Circuit's reasoning in *Ben-Shalom v. Marsh*,⁸⁸ in which the court upheld the constitutionality

83. For example, Richard Posner argues that lesbians, possibly in distinction to gay men, do not possess any innate sexual preference. Posner explains this lack with sociobiological theories of evolution (fewer lesbians survived because the women who did survive had male protectors), one empirical study of sexual preference concordance in twins (lesbianism is not a concordant quality based upon four sets of female twins), and a gendered congenital disparity ("Maybe the wires accidentally get crossed at birth in some more or less stable percentage of newborns, especially boys because of the greater complexity of the male reproductive system."). RICHARD A. POSNER, *SEX AND REASON* 99, 101-02 (1992). For further elaboration of Posner's conclusions, see Robson, *Posner's Lesbians*, *supra* note 2, at 499.

84. See J. Michael Bailey et al., *Heritable Factors Influence Sexual Orientation in Women*, *ARCHIVES GEN. PSYCHIATRY*, Mar. 1993, at 217; see also Natalie Angier, *Study Suggests Genes Sway Lesbians' Sexual Orientation*, *N.Y. TIMES*, Mar. 12, 1993, at A11.

85. See, e.g., Chandler Burr, *Homosexuality and Biology*, *ATLANTIC*, Mar. 1993, at 47 (cover story); *Is This Child Gay? Born or Bred: The Origins of Homosexuality*, *NEWSWEEK*, Feb. 24, 1992, at 46 (cover story).

86. See, e.g., Lynne Duke, *Drawing Parallels - Gays and Blacks; Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, *WASH. POST*, Feb. 13, 1993, at A1.

Similarly, recent political initiatives in Colorado and Oregon to amend their respective state constitutions to forbid lesbian and gay rights often employed rhetoric disputing sexuality as an identity category commensurable to other minorities, even while simultaneously exploiting rhetoric that undermined racial and other minorities' claims to "special treatment."

87. See, e.g., Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 *MIL. L. REV.* 55 (1991); Janine M. Dascenzo & Neal A. May, Comment, *Cleaning Out The Pentagon's Closet: An Overview of the Defense Department's Anti-Gay Policy*, 23 *U. TOL. L. REV.* 433 (1992); Douglas A. Dribben, Note, *Homosexuals and the Military: Strange Bedfellows*, 57 *UMKC L. REV.* 123 (1988); Denise Dunnigan, Note, *A New Suspect Class: A Final Reprieve for Homosexuals in the Military?*, 42 *OKLA. L. REV.* 273 (1989); Troy R. Holroyd, Commentary, *Homosexuals and the Military: Integration or Discrimination*, 8 *J. CONTEMP. HEALTH L. & POL'Y* 429 (1992); Craig W. Stedman, Comment, *The Constitution, the Military, and Homosexuals: Should the Military's Policies Concerning Homosexuals be Modified?* 95 *DICK. L. REV.* 321 (1991).

88. 881 F.2d 454 (7th Cir. 1989). Other important cases include *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991); *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989); *Falk v. Secretary of the Army*, 870 F.2d 941 (2d Cir. 1989); *Woodward v. United States*, 871 F.2d

of a military regulation excluding "homosexuals," defined as including persons "as to whom there is no evidence they have engaged in homosexual acts either before or during military service."⁸⁹

As is apparent in the military context, the importance of lesbianism as a status, preferably with biological roots, is derived from the primacy of analogizing identities. Racial and ethnic identities are arguably protected identities, based in part upon constitutional theories of equal protection.⁹⁰ The "promise" of the (in)famous footnote four of *Carolene Products* is that discrimination against "discrete and insular minorities" such as "religious, or national, or racial minorities" will warrant a "more searching judicial inquiry."⁹¹ To be within this promise, a discrete and insular minority must be a social minority that has been historically discriminated against and continues to be relatively politically powerless, the members of which possess immutable and identifiable characteristics.⁹² Thus, efforts at theorizing equal protection for lesbian and other sexual identities often focus on analyzing the *Carolene*-derived criteria, often attempting to argue lesbian identity within the criteria and often problematizing the immutability requirement.⁹³ Essentializing lesbian identity as immutable, fixed and biologi-

1068 (Fed. Cir. 1989).

89. The court reasoned:

It is true that actual lesbian conduct has not been admitted by plaintiff on any particular occasion, and the Army has offered no evidence of any such conduct. [United States District] Judge Gordon found no reason to believe that the lesbian admission meant that plaintiff was likely to commit homosexual acts. We see it differently. Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future. The Army need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here. Plaintiff does not deny that she has engaged or will engage in homosexual conduct. Plaintiff has admitted that she has a homosexual desire, but not necessarily that she intends to commit homosexual acts. The Army need not try to fine tune a regulation to fit a particular lesbian's subjective thoughts and propensities.

881 F.2d at 464. For a thoughtful analysis of this case, see Gisela Caldwell, Note, *The Seventh Circuit in Ben-Shalom v. Marsh: Equating Speech with Conduct*, 24 LOY. L.A. L. REV. 421 (1991).

90. U.S. CONST. amend. XIV, § 1.

91. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

92. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16, at 1436-1672 (2d ed. 1988); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937 (1991).

93. Compare Eliva R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as*

cally determined results in the most traditional compliance with the *Carolene*-derived criteria, yet such an essentialism is inconsistent with current lesbian theorizing.⁹⁴

Analogizing is also problematic for lesbian identity within the context of the *Carolene*-derived criteria. Within equal protection discourse, the history of equal protection as intentionally and paradigmatically directed at racial identity results in lesbian identity being most often analogized to racial (or ethnic) identities. Arguments that lesbian identity is socially constructed (rather than essential), attributable to psychology (rather than biology), and is an activity (rather than a status), supposedly taint the analogy. Such a distinction obscures the extent to which all identities combine elements of essentialism, including primordial ascription (what one "is") and social constructionism, including optional affiliation (what one "chooses").⁹⁵ As critical race theorists have noted, race itself is a societal construct.⁹⁶

Yet analogizing is not merely faulty because racial identity is likewise constructed. The positing of African-American racial identity as the paradigm with which lesbianism must comport is rather unhelpful because of the persistent political, legal and societal discrimination against African-Americans and other racial minorities.⁹⁷ The *Carolene*-derived equal protection criteria has not guaranteed an anti-racist ethic or reality and thus does not operate adequately even in the paradigm case. Therefore, even a perfectly fitting analogy would be imperfect because race is not a perfect paradigm given an emancipatory goal. Further, the act of analogizing racial and sexual identities obscures the

a Discrete and Insular Minority, 10 WOMEN'S RTS. L. REP. 143 (1988) (arguing lesbian identity conforms to the traditional discrete and insular minority criteria) with Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (arguing a reconceptualization of the criteria to accommodate social constructionist theory).

94. Although not absolutely inconsistent. Even ardent advocates of postmodernist theories of social constructionism can advocate a "strategic essentialism." For example, the respected postmodernist theorist Gayatri Chakravorty Spivak analyzes the work of a group to retrieve a specific minority consciousness as "a strategic use of positivist essentialism in a scrupulously visible political interest" and posits the requirements for this strategy to be successful. GAYATRI C. SPIVAK, *Subaltern Studies: Deconstructing Historiography*, in *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 197, 205 (1988). As appraised by Diana Fuss, Spivak's wisdom is that "the permissibility, if you will, of engaging in essentialism is therefore framed and determined by the subject-position from which one speaks." FUSS, *supra* note 47, at 32.

95. See Epstein, *supra* note 79.

96. For example, as Cornel West argues, "blackness has no meaning outside a system of race-conscious people and practices," and that ultimately "blackness is a political and ethical construct." West, *supra* note 25, at 393-94.

97. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992).

extent to which the identities are not distinct. All persons have racial identities as well as sexual ones, or more specifically, there are many African-American lesbians.

Moreover, paradigms of protectable identities are not limited to racial and ethnic identities. Religious identities are dissimilar to any racial/ethnic paradigm in many of the same ways in which sexual identities are dissimilar, especially in cases in which the religious identity is adopted in an adult conversion process. Thus lesbian identity might be more impeccably analogized to a born-again-Christian identity, a protected identity.⁹⁸

Ultimately, however, the vitality of lesbian identity cannot rest upon its assimilability to another protected identity, whether based upon essentialism or constructionism. As previously argued, the analogues are hardly aspirational and the analogies are always analogies rather than duplicates. Further, what is essentialized is susceptible to alteration;⁹⁹ what is constructed can be deconstructed.¹⁰⁰

98. I thank Marianne Wesson, Professor of Law, University of Colorado, for originally bringing this point to my attention. Although religious identities have the implicit additional guarantee of the First Amendment, *Carolene Product's* footnote four specifically mentions religious minorities. 304 U.S. at 152 n.4. Further, contemporary discrimination jurisprudence, which includes religious minorities, is not founded on the First Amendment, but is founded on notions of equal protection as well as statutory protections such as the 1964 Civil Rights Act, especially 42 U.S.C. § 2000e (Title VII) (1988).

99. As Richard Posner, who believes that (male) homosexuality is essential and biologically innate, argues:

Maybe we should just be patient; science, which has worked so many wonders, may someday, perhaps someday soon, discover a "cure" for homosexuality. I suspect, however, that most persons who are already homosexual will not want to be cured, not because they are oblivious to the advantages of being heterosexual but because being homosexual is part of their identity But if the hypothetical cure for homosexuality were something that could be administered - costlessly, risklessly, without side effects - before a child had become aware of his homosexual propensity, you can be sure that the child's parents would administer it to him, believing, probably correctly, that he would be better off, not yet having assumed a homosexual identity.

POSNER, *supra* note 83, at 308.

100. As Eve Sedgwick writes,

To the degree - and it is significantly large - that the gay essentialist/constructivist debate takes its form and premises from, and insistently refers to, a whole history of other nature/nurture or nature/culture debates, it partakes of a tradition of viewing culture as malleable relative to nature: that is, culture, unlike nature, is assumed to be the thing that can be changed [Likewise, the feminist formulation has implied] that the more fully gender inequality can be shown to inhere in human culture rather than in biological nature, the more amenable it must be to alteration and reform I have often wondered what the basis was for our optimism about the malleability of culture by any one group or program.

SEDGWICK, *supra* note 65, at 41.

WEIGHT/LESSNESS & FUTURISTIC FANTASIES

There is a weight and weightlessness to lesbian identities.

One type of weight is based in history. As Jacquelyn Zita argues, there is a "lacuna in postmodernist ontology and a failure to recognize the individual's real powerlessness" against "the historical gravity of a culturally constructed" body that "stubbornly returns with a weight that defies the promises of postmodernist fantasy and its idealistic denial."¹⁰¹ The "weight" of lesbianism is as an historically disparaged and prosecuted identity, an identity that can serve as a punitive legal referent even when the individual denies its applicability. Even among those who argue that lesbian identity must be negotiable, the history of prosecution and violence against lesbians requires that we live our lives "under a cloud of prior interpretation."¹⁰² Another type of weight is based in perception and process, more phenomenological than a claim to foundational reality. Lesbian identity is something I have known, have felt, have recognized across a room and across years. It is the river lesbian theorist and poet Gloria Anzaldúa utilizes to describe identities: changing, yet perceptible, flowing.¹⁰³

Yet another type of weight is based in community. Although I do not posit lesbian identity as primarily forged in community, I do think there has been an intellectual confluence of discovery and creation of lesbian identities.¹⁰⁴ This weight of our contemporary identities is subject to continuing scrutinizing: "At this point in the history of lesbian studies, it may be useful to step back from our 'cumulative discoveries' and examine them as our 'collective constructions.'"¹⁰⁵

And finally, there is the weight of lesbian bodies, bodies in relation, in desire and sex.¹⁰⁶ As French lesbian theorist Michèle Causse

101. Zita, *supra* note 45, at 126.

102. SHANE PHELAN, *IDENTITY POLITICS: LESBIAN FEMINISM AND THE LIMITS OF COMMUNITY* 157, 170 (1989). Phelan argues that lesbian-feminism was too rigid and that if we are to be "free, we must learn to embrace paradox and confusion." *Id.*

103. Anzaldúa writes, "Identity is a river - a process. Contained within the river is its identity, and it needs to flow, to change to stay a river - if it stopped it would be a contained body of water such as a lake or a pond." Gloria Anzaldúa, *To(o) Queer the Writer - Loca, Escritora y Chicana*, in *INVERSIONS: WRITINGS BY DYKES, QUEERS AND LESBIANS* 249, 253 (Betsy Warland ed., 1991).

104. *Cf.* HOAGLAND, *supra* note 47, at 290 (lesbian community as a ground of lesbian being).

105. Valerie Jenness, *Coming Out: Lesbian Identities and the Categorization Problem*, in *MODERN HOMOSEXUALITIES* 65, 73 (Ken Plummer ed., 1992).

106. For an elaboration of this weight, see Robson, *Embodiments*, *supra* note 2, at 39.

describes it, "a *face à face* between two lesbians . . . between two subjects who are constantly inventing themselves outside of any reference," lesbianism is a relation, a praxis.¹⁰⁷

Paradoxically, perhaps, there is also a type of weightlessness to lesbian identities. Lesbianism is most present as an absence. The term "lesbian" itself is what one lesbian theorist describes as a "quadri-fold evasion," a term both weighty and weightless.¹⁰⁸ As an intersection between sexuality and gender, lesbian identity is often invisible.¹⁰⁹ Much lesbian work has been an effort to instill gravity into the term "lesbian."

It is against this weight/lessness that a lesbian Supreme Court Justice becomes a worthwhile suggestion. A lesbian Supreme Court Justice remains rather unimaginable. A Justice weighted with the history of lesbianism, with lesbian perception and process, with lesbian community, with lesbian desire - it is barely imaginable. A Justice existing in contradiction to the weightlessness of lesbianism, its imperceptibility - its unimaginability is precisely its attraction.

Yet the desire for a lesbian Supreme Court Justice also exhibits a

107. Lise Weil, *Conversation with Michèle Causse*, 20 TRIVIA: A JOURNAL OF IDEAS 90, 91 (1992).

108. Marilyn Frye explains:

The use of the word 'lesbian' to name us is a quadri-fold evasion, a laminated euphemism. To name us, one goes by way of a reference to the island of Lesbos, which in turn is an indirect reference to the poet Sappho (who used to live there, they say), which in turn is an indirect reference to what fragments of her poetry have survived a few millennia of patriarchy, and this in turn (if we have not lost you by now) is a prophylactic avoidance of direct mention of the sort of creature who would write such poems or to whom such poems would be written . . . assuming you happen to know what is in those poems written in a dialect of Greek over two thousand five hundred years ago on some small island somewhere in the wine dark Aegean Sea.

MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 160 (1983) (ellipsis in original).

109. The current trendiness of lesbians in the popular media might belie the continued visibility of notions of lesbian invisibility. For example, as *Newsweek* recently proclaimed, "Lesbians have always been the invisible homosexuals," but the cover story was not intended as concealment. *The Power and The Pride*, NEWSWEEK, June 21, 1993, at 54 (cover story). However, as lesbian theorist Victoria Brownworth compellingly argues:

Many lesbians have been struggling for lesbian visibility for decades. But visibility cannot be reduced to the Warholian 15 minutes under klieg lights. Visibility comes over time, and it means permanent inclusivity, not a fad of the moment. The *Newsweek* story treats lesbians as if they were fleeting: It diminishes our numbers to less than 1% of the population and then fosters appalling misconceptions about who we are and how we live. Beginning with a glossary of necessary lesbian terms (butch, femme, lipstick lesbian, sex-positive, and vanilla), the story is sexist reductionism at its worst The *Newsweek* story is the mainstream media version of a lesbian photoplay in *Playboy*: momentary titillation, nothing more.

Victoria A. Brownworth, *More Than Just a Trend*, ADVOCATE, July 27, 1993, at 80.

startling lack of imagination. This lack inheres in the problem of identity and identity politics, embodied by a Radice-like Supreme Court Justice who might not only be conservative, but also be strategically used. But this lack of imagination also inheres in the identities - socially constructed - of those of us who are imagining. It is this construction that makes it difficult for us to imagine the most radical changes, changes that are not merely inserting lesbian interests into the existing structure. Imaginings that do not take for granted a Supreme Court, or even a constitutional system, or even the "rule of law". It is risk of such imaginings that are the challenge of lesbian legal theory beyond the 1990s.