CLOSING MY EYES AND REMEMBERING MYSELF*: REFLECTIONS OF A LESBIAN LAW PROFESSOR**

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ON REASON AND OBJECTIVITY

I know that I am in the right place. The room is stuffy. The portraits of past deans line the wall reminding some of us that we are interlopers. The gaze of the dead mixes with that of the living—staring at a podium inhabited by the newest member of the law school faculty. I am here—ready to teach, to probe my students' minds, and to allow them to probe mine, as we attempt to make sense out of cases in which rights and wrongs are inscribed on our collective consciousness. I am going to do something today that these first year students could not have anticipated. As part of their orientation class, I am going to teach Bowers v. Hardwick to begin their law school careers, and

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*In Patricia William's book, *The Alchemy of Race and Rights*, (Harvard Univ. Press 1991), she recounts her own invisibility as an African American woman in a world that works quite hard at marginalizing on the basis of gender and race. Professor Williams, in an eloquent and powerful voice, reminds us that the annihilation of the self often forces the "other" to have to "close (my) eyes and remember (my) self." It is from this passage that I not only found the title for this work but the courage and inspiration to write of my experience as a law teacher.

**I am grateful to Professors' Martha Fineman, Patricia Williams, and Mari Matsuda for their work with narrative. As always, these women are trailblazers—enabling the second generation of feminist lawyer/academics to benefit from their work and inspiration. Finally, I owe much to Sandra Badin, for her encouragement and support as I wrote this piece.

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my first day, with an inquiry into the construction of the legal/political Other.[1] And today, these students will be asked to begin this inquiry by submerging themselves into the identity of Michael Hardwick, a gay man arrested in his bedroom by two Georgia police officers. Today, these students and their teacher will attempt to make sense out of state power aimed at those who love members of their own sex.

We start with a careful rendition of the facts. I ask one student, a young man, to tell us how Michael Hardwick came to the attention of the court. As he speaks, I am struck by the catalog of facts: arrested, bedroom, two men, caught, sodomitical embrace, jail term, 20 years. His words hang in the air as he completes this brief assignment. Once again, I am reminded of how tenuous the existence of the sexual outlaw is: how it is constructed by the imposition of the will of those who would relegate us to a legal wasteland, where liberty, privacy, and bodily integrity are illusory and reserved only for those who know how to love Right.

I ask the students "to get into Hardwick's head and heart, and to identify what he is thinking and feeling." One student raises his hand. I recognize him. He states, "I can't do that because what Hardwick is doing is wrong. It's morally repugnant." I am struck by this student's certitude. Yet, it is not merely his certitude, his unselfconscious righteousness that is striking but the authority that underscores his words, an authority to define what is and is not moral, a power that cultural privilege bestows.[2] And he is not alone. The nodding of his colleagues' heads makes this eminently clear as do the words of the Justices who spoke for the majority of the Court.

And yet, I inquire further. I want to expose the reasoning implicit in the assignment of "moral repugnance" to Hardwick's act of intimate association[3]. I raise the issue of miscegenation laws. I ask if the "moral repugnance" of racial mixing through the intimate association of marriage can or should be

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[1]Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 (1986).

[2]*See generally*, Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law (Cornell Univ. Press, 1990).

[3]I am rejecting the confluence of sex and sexuality that the majority makes in its opinion. Rather, I am dissaggregating sex from sexuality since this is not the sole defining characteristic of ***being*** homosexual. Indeed, it is a characteristic, albeit important, that constructs homosexual identity; others include companionship and emotional intimacies with members of the same sex. *See generally*, Blackmun's dissent in Bowers as well as Morris Kaplan, Constructing Lesbian and Gay Rights Liberation 79 Va. L. Rev 1877.

recognized in law. I ask them to think of Loving[4]—of the biblical incantations used to support the jailing of those who love across the racial divide.

But this is different, they tell me. This is racism and it is clearly wrong. While the reasoning is circular, it is in fact reflective of the current lexicon about homophobia and racism. I raise this with the class using the military ban on homosexuals as a rhetorical device to examine the existence of parallels between homophobia, racism and misogyny.

We discuss the 1993 hearings where gays and lesbians[5], cast as cultural pariahs, are reduced to stereotypes fitting the dominant culture's dichotomization of sexual subjects as predators (homosexuals) and sexual objects as victim (heterosexuals). We reconstruct the predator/victim paradigm in retelling testimony from the hearings—testimony that catalogs the straight male recruits' fear of sexual subjugation. The nature of this fear is unveiled as students begin to see that what is feared is feminization—and that privacy rights and the right to bodily integrity are deeply gendered. We list the words used by witnesses—phrases such as "destroys unit cohesion," words like "dis-ease," "fear," "discomfort"—all applied to straight men, to their feelings about homosexuals. We contrast this fear with the fact of gay bashing in the military and raise the question how it is that the homosexual *qua* homosexual is the enemy—not homophobia.[6] We list the words used to justify racial segregation in the military—words like "destroys unit cohesion," "disease," "fear," and "discomfort"—and wonder how it is that the African American *qua* African American is the enemy—not racism.

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[4]In Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967), the Supreme Court found Virginia's miscegenation laws unconstitutional. What is striking about Loving is the Court's rejection of the Judeo-Christian ethic as a justification for miscegenation laws. Of additional noteworthiness is the Court's refusal to uphold such legislation because of the "long history and tradition" of such laws. Nineteen years later in its 1986 decision, the Bowers Court reverses itself by invoking the rational it rejected in Loving to uphold criminal sodomy statutes as applied to homosexuals.

[5]It must be noted that lesbian sexuality is barely visible in the hearings. Here the confluence of gender asymmetry and homophobia combine to relegate lesbian sexuality to a cultural gulag. Our absence in the debate is telling; it reveals a great deal about the position of women's sexuality in society in general.

[6]*See generally,* Allen Berube, Coming Out Under Fire: The History of Gay Men and Women In World War Two, (Free Press 1990).

The room has fallen silent. It is a productive[7] silence, one that allows for moments of reflection. I look around the room and see in my students' faces a myriad of emotions. Are they learning that "...much of what is spoken in so-called objective, unmediated voices is in fact mired in hidden subjectivities and unexamined claims that make property of others beyond the self, all the while denying such connections?" [8] Have they discovered that law is not objective Truth? [9]

ON IDENTITY, INTERSECTIONALITY, AND LAW

I have been involved in numerous debates that center on the question of whether gender and sexual orientation are constructed or if there is in fact an essential property that defines either.[10] The question, however, is misguided. Indeed, it is a truism among critical legal scholars that the question is not *whether* identities are constructed in law but *how* they are constructed and with what consequence. Nothing illustrates this better than the case of Valerie Malcom, a West Indian woman macheted by her former intimate partner and business associate.[11]

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[7]I do not mean to suggest that "productive" is synonymous with agreement. Here I am referring to the process that students engage in as they learn to analyze law, fact, and policy. Intrinsic to our analysis is how normative values shape law and public policy.

In this instance, the students' silence was appropriate. It allowed them to process the information through various layers of the self. And, as one student said to me ten months after the class, "I went through a metamorphosis in that first class. I walked out a bit different than when I walked in—I could feel the pain of my mind expanding." Perhaps, not every student experienced what this young man did—but from the tenor of the conversation ***and*** from the silence I am convinced that a majority of the students went through a similar process, an expansion of both mind and heart.

[8]Patricia Williams, The Alchemy of Race and Rights, (Harvard Univ. Press 1991) at 11.

[9]When asked to teach this class in succeeding years I used Sartre's Anti-Semite and Jew in addition to Bowers. Students read selections in which Sartre describes the topography of hate and how the victim is reconstructed into alien and predator. We discussed Sartre's thesis that dominant cultures construct the Other, and therefore, in the absence of the Jew, one would have to create him. In analyzing the constructed nature of the Other, students examined parallel constructions as a consequence of misogyny and homophobia.

[10]See generally, Martha Fineman, chapter three in The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies (Routledge 1995); Elizabeth Spelman, Woman: The One and the Many, in Inessential Woman: Problems of Exclusion in Feminist Thought, (Beacon Press 1988).

[11]Conversation with Valerie Malcom.

Malcom was a rare woman in the world of business, finance, and city contracts. At a time when the economy of New York City was precarious at best, she garnered millions in city contracts aimed at increasing minority hiring in the construction business.[12] Malcom combined business acumen with ethnic pride, and created a minority owned and run sub-contracting firm that linked minority construction teams with major building projects. Malcom could create matter out of nothing. And for this, she would pay dearly.

In 1990, Malcom formed a partnership with R, a Jamaican national. She discovered too late that their professional and personal relationship was a mistake. In the fall of 1991, because R was skimming off the top, Malcom dissolved the business partnership. [13] Within weeks of terminating their partnership, Malcom also ended their personal relationship because R was becoming threatening. Faced with losing social and political status within the Jamaican community, R left messages on Malcom's answering machine with not-so-veiled threats of bodily harm if she did not reinstate the partnership.[14] Malcom went to the local police precinct with the tape in an attempt to obtain assistance. Her efforts were fruitless. [15]

In late winter, Malcom was visited by R in her office. He was convinced that Malcom owed him money. Although R had contributed neither capital nor services to the start-up of the business, Malcom was willing to give him $150,000. The only caveat was that R would have to wait until some assets were liquidated. Enraged at hearing this, R drew a machete that he had hidden under his overcoat. He struck Malcom in the head and hand, causing a deep gash in the skull and amputation of the fingers.

Malcom's screams brought her co-worker into her office. In an attempt to deflect R's blows, the co-worker's heavy construction jacket was shredded wherever R's machete landed. The attack ended only when local firefighters came onto the scene called by Malcom's neighbors. Malcom was taken to the hospital. She had lost five pints of blood and had sustained a fractured skull and severed fingers. Since R's voice-activated tape recorder was in his coat pocket at the time of the attack, the entire event was recorded—Malcom's screams and R's frenzied rampage. The tape was introduced at trial along with pictures of Malcom's injuries, medical reports, the machete, the shredded

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See generally,* Twice Abused: Battered Women and the Criminal Justice System in New York City (Report of the Coalition of Battered Women's Advocates 1993).

jackets of both the victim and the eye witness, and Malcom's torn and blood drenched clothing.[16]

R was subsequently acquitted of all charges; the jury returned a not guilty verdict because they believed that Malcom had "lured" R and "provoked" the attack.

I decide to use the Malcom case in my class on violence against women by intimate partners,[17] in spite of the risks inherent in using such a graphic example of individual and systemic misogyny and racism.[18] I use this case because it teaches about the power of the law to construct identities. During the trial, Valerie Malcom's persona is reconstructed—her very being suspended and reconstituted to conform to the dominant cultural definition of the "masculine woman": the annihilator of men. The defense casts her as the black widow spider,[19] an ironic designation, given that R was never in danger of being maimed or killed, but quite the contrary. Ultimately, Malcom is left indelibly transformed, forever changed, unrecognizable even to herself.

I remember that as a woman and a lesbian, my reality is altered by what others perceive me to be, intimidating, aloof, masculine, a male basher, "dyke," "lezzie." I am lost in their interpretation of what I am not. I, like Valerie Malcom, have a self apart from what is perceived—and like Valerie, I must carry a cultural passport in this land. For Valerie, for women, for gays and lesbians, for Sister Souljah—justice is illusory and the property of others. And knowing this—I will teach this class.

I assign articles that report on the trial and on the jury's reaction to Malcom. I assign critical portions of the transcript that record both direct and cross of Malcom and the closing arguments of the prosecutor and of the defense counsel. In addition to these documents, students pour over

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[16]Malcom lost two thirds of her body's blood volume. She was unconscious for three days and remained in the intensive care unit for two weeks. Although her fingers were reattached, she can no longer use her hand without experiencing searing pain.

[17]Since 1989, I have re-cast the term "domestic violence" because it fails to adequately describe the nature of the violence or the relationship between survivor and assailant. Use of the term "violence against women by intimate partners" is my attempt to contextualize both the conduct and the status—it distinguishes intimate violence from acts initiated against women by strangers or by the state.

[18]*See generally*, Lenore Walker, The Battered Woman, (Harper and Row 1979); Evan Stark, Re-presenting Woman Batterring: From Batterred Woman Syndrome to Coercive Control, 58 Alb. L. Rev. 973 (1995); and G. Kristian. Miccio, Deconstructing the Myth of the Passive Battered Woman and the "Protected Child" In Neglect Proceedings, 58 Alb. L. Rev 1087 (1995).

[19]*Supra* note14.

transcripts of the audio tape. Finally, I ask them to read accounts of the Rodney King Simi Valley trial.

As a class we attempt to draw out the similarities between the cases: black victims, differently gendered/raced defendants, eyewitnesses, severe injuries, events memorialized on tape, and not guilty verdicts. Although students are troubled by the outcomes in both cases they understand how the King verdict evolved. As, E, a young African American male reminds us, "If the verdict had come back for King, now that would have been shocking."

To be black in America is to be an outsider. E knows this, he has lived it every day of his young life in a way that I can only imagine—like a bad dream. My skin has shielded me from what he has experienced. Yet, I am not grateful, I am angry—it is merely a reprieve.

Many of my students have grown up with the realization that there are two forms of justice, one for whites and one for blacks. For the former, the police serve to protect. The latter too often experience the police as an occupying army. To many blacks, "police have come to symbolize white power, white racism and white repression." [20] These students know we are not all equal. E, Rodney King, and at least two thirds of my class fear what I have been raised to respect. Yet today we meet on common ground, brought together by two cases—by what Valerie Malcom and Rodney King can teach us.

None of the students can understand the jury's verdict in the Malcom case. It is a case which, on the surface, appears to be a sure conviction. The victim is a prosecutor's dream[21]—articulate, well educated, a business woman, and self possessed. Surely, her testimony alone will convict the defendant. And as C, a Latina student observes, "This isn't about race since both the victim and the defendant were people of color."

So the outcome is difficult to comprehend, especially once the composition of the jury is revealed—seven women, five men, two African-Americans, five Latinos, and five people of European descent. Unlike the King case, in Malcom, the complainant, the defendant, and a majority of the jury share an aspect of their identity—but not a common set of experiences. The defense creates an insuperable chasm between Malcom and the jury—particularly the female jurors. Malcom is what they are not: She is the enemy—unfeminine, anti-male, and anti-black. In the words of the defense, she is a woman who "brings Kings down."[22]

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[20]Report of the United States National Advisory Commission on Civil Disorders 206 (E.P. Dutton 1968) (commonly known as the Kerner Report).

[21]*Supra* note 14.

[22]*Supra* note 13.

Students learn that in dispensing justice, who you are perceived to be is as important as what you have done. They come to understand that race and gender intersect in the construction of Malcom as the "black widow spider".

This is also a case involving intimate violence—where male privilege is manifested in its most base form. And, in the lexicon of defense tactics, the very being of the woman—her self—is attacked and contorted—she is *too* strong, *too* articulate, *too* self possessed, *too* independent. And in a world of gendered polar opposites, she is a threat to "the Man"—a "castrating bitch."

Once this image is projected, the jury members can, as in the King case, discount what they heard and what they saw: Her story is rewritten—now, her screams are manufactured, his rampage justifiable. The shredded coat, her injuries, his fully intact clothing and body are invisible, so as to prepare the way for a verdict understandable only through lenses clouded by prejudice and misogyny.

While preparing to teach this class, I can not help but remember the first time I met Valerie Malcom. She came to me for help, tormented by how the defense characterized her. She wanted Justice. She wanted to reclaim her self—uncompromised and unconcealed.

Malcom could live with the physical pain, the reattached fingers, and the physical disfigurement. She could also live with the fact that R walked the city streets and often stood—just stood—in front of her house and stared at the brick and glass that separated her and her teenage daughter from him. She could live with all of this. What she could not live with was the image crafted by counsel that she ensnared innocent men—used and then disposed of them. Valerie Malcom could not accept that she was the sum of the defenses' parts—laid out before this jury of seven women and five men—dismembered and reassembled with the glue of cultural Other. And it was this memory that made her pain palpable.

And I knew that there was nothing I could do to help. In communication with the Justice Department, it became clear early on that they were not interested in pursuing a federal civil rights claim.[23] In their eyes, there was no

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[23]Federal civil rights claims are usually brought under 43 USC 1983. It was this tool that held the murderers of Schwerner, Goodman and Chaney accountable in the 1960s when the state acquitted the white defendants. In the 1990s, a federal civil rights action was brought by the federal government against Lemrick Nelson, an African American, for the murder of Yankel Rosenberg, a scholar killed in Crown Heights, Brooklyn because he was Jewish. And, it was a 1983 action in federal court that held the white police officers criminally liable for violating Rodney King's civil rights after the Simi Vally jury acquitted them in state court. Under 1983, if an individual's civil rights are violated by a group of persons or by the state (failure of the state to protect or prosecute when such failure is based on the victim's race, creed, sex, or national origin) the federal government is empowered to prosecute, even when the defendants

state action, even when they accepted the fact that the police failed to adequately investigate the case and preserve evidence. Malcom's claim that police inaction was predicated on her race and gender was rejected out of hand, even when the Department was presented with letters that documented statements by the police that supported Malcom's contention. This was not the type of case for which the Department would risk either resources or reputation—Malcom as Black woman survivor of intimate violence remained invisible.

As I teach Malcom, I am flooded by the memories and the anger that had been tucked away for a year. I struggle with presenting the material in a way that acknowledges balance. Balance between emotion and logic, between fact and law, between self and others, between the individual and the collective "we." But I also recognize that cases such as Malcom trigger emotions and memories that do not know artificial boundaries. And yet, if I am to teach this case, an internal balance must be struck so that I can hear the voices of my students as they struggle to find themselves.

Malcom's voice, like the voices of so many battered women, is real: violent acts against women by intimate partners are not mere abstractions. They are everyday occurrences that mirror an anti-woman culture which annihilates the self.[24] Whether physical or psychological, such violence forever changes the survivor's self conception, and her view of the world.[25] The violence is gendered—an explosion of misogynistic rage. And it is personal.

I see myself in Valerie Malcom and in the words inscribed in the decisions—and it is this recognition that shapes how I teach my students empathy as well as legal discourse. And in doing this our souls are laid bare.[26]

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have been acquitted in state court.

[24]*See generally*, Elizabeth Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse 67 N.Y.U. L. Rev.520 (1992).

[25]*See generally*, Stark, *supra* note 19.

[26]It is no coincidence that this class produces individual disclosure concerning victimization and being victimizer. I have learned that my students can work through their pain—and if properly directed can use their personal experience to inform their work as law students and lawyers.

ON BECOMING MYSELF

Am I to be cursed forever with becoming
somebody else on the way to myself?

-Audre Lorde[27]

I am sitting in my car in the law school parking lot. It is a humid August afternoon and the only cool place is in my car with the air on. I have a tape playing—the words of the Indigo Girls are background to my thoughts. I am replaying the interview, the words of which mix with lyrics about Georgia nights. I am ambivalent. I do not like having my closet door opened when I am unprepared for the reaction. This process of coming out—it is constant. It is not the fear of profound pronouncements; rather, it is the mundane that triggers the decision to continue to pass—such as when the letter carrier assumes that she is my sister or when the doctor presumes that I am, or should be, using birth control. It is a daily decision—when and if I will reveal a part of my self that is, to some, reviled. I do not have the luxury of choosing either the time, the place, or the manner—it just happens in the course of a day, everyday.

And today is no exception. And it is not anyone's fault. I am asked why I want to move out of New York City to teach at a law school in upstate New York. I give my standard answer. I love the country. I love the trees, the cows, the mountains, and my partner hates the city. It is the "partner" that Professor X focuses on. "Your partner (pause)...I didn't realize that your law partner was moving with you." I sigh, inside. It is time to decide—in or out. I come out in an ambiguous manner. "No, Professor, she's not my law partner." At that moment, I am met by a vacant stare. Professor X's wife, a member of the faculty, smiles and states, "It's OK, I'll explain it to him later."

Now I am left wondering if I handled it correctly. I always wonder about this. And it is this expenditure of human energy that constitutes the cost of coming out.

My self is constantly in motion—moving in and out of situations that require an assessment of physical and psychic safety. No place is safe—from judgment, from injury, from innuendo—based entirely on who I am, or rather,

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[27]Audre Lorde, "Changing of Season," in Chosen Poems, Old and New 40 (1982).

on who I am perceived to be. I am constantly constructed and reconstructed by others.[28] And, since the yardstick is constituted by a hegemonic heterosexual identity, I always come up lacking or, worse, threatening.

Yet, I am the sum of my parts—Italian-Hispanic-Sephardic Jew-Woman-Lesbian. And I move through these identities, never really knowing which one has salience at any given moment. Yet, "coming-out" as a lesbian is inherently reductionist. My identity is cast as singular—one defined exclusively in terms of sexuality. I am partialized, [29] separated from my self, and transformed into a mere sexual being. I am devoid of any other characteristics—I am not whole.

This is exactly the outcome of the Bowers decision. As I read and reread the majority and concurring opinions, I am struck by the way Hardwick is reduced to an act—that of homosexual sodomy.[30] His humanity, his very being, is defined in clinical anatomical terms—there is no recognition of Hardwick's need or right to have companionship or intimacy. The majority does not see Hardwick as a person—a human being—worthy of equal concern and respect.[31]

And, choosing between coming out or remaining in the closet and passing for straight does not remedy the situation. Cultural beliefs form both yardstick and lexicon—and it is this cultural prism that shapes the "I" into a one-dimensional being.

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[28]Franz Fanon is one of the many writers who discusses the effect of external [racial] identification on the interior self. *See generally*, Franz Fanon, Black Skin, White Masks (Charles Lam Markmann trans., Grove Press 1968).

[29]A term coined by Patricia Williams *supra* note 9.

[30]In Bowers, the Court initially frames the issue as "whether there is a fundamental right to privacy for homosexuals to engage in sodomy" (at 189). By the end of the majority opinion, the court has conflated the issue into a right to "homosexual sodomy" (at 196). The initial characterization was narrow enough—the resulting restatement, however, further reduces Hardwick, and homosexuals as a class, to purely sexual beings. The act of sex is not contextualized—therefore it is seen as the whole. Intimate association between members of the same sex is reduced to the mechanics of sex. The Court's decision does more than penalize sodomy—it creates a second-class citizenship based on sexual orientation. *See generally, supra* note 4.

[31]*See generally*, Janet E. Halley, "Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick," 79 Va. L. Rev. 1721.

And so Professor X's stare does more than presume heterosexuality[32]—it collapses my self and flattens the variations that constitute who I am. I am more than the sum of my parts.[33] The vacant stare presumes none of this.

ON THE INCORPORATION OF VOICE

The law school environment has been slow to accept the concept of diversity as a pedagogical imperative.[34] Rather, some of my colleagues see it as caving into the knaves who call for political correctness.[35] They are missing the point.

Difference, in thought and perspective, challenges existing paradigms. The difficult issue is how to accomplish a diversity of thought in faculties. Does a commitment to perspectival difference *require* that attention be paid to differences along axes of domination, such as race, gender, and sexual orientation? I think it does.

At the risk of being accused of essentialism—a label that neither fits nor adequately describes the terrain of the debate—I believe that the placement of minorities, women, gays, and lesbians on faculties positively contributes to the reshaping of curriculum and of pedagogy.

We are all members of communities of culture. And for many of us, these communities intersect. We hold membership in communities of color, ethnicity, gender, sexuality, and class. These communities form us—our

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[32]If we are to achieve true diversity, the calculus must include people with different sexual orientations. It is incumbent upon recruitment committees not to assume that all candidates for faculty positions are heterosexual. This then requires some familiarity with differing discourses. In the lexicon of gay and lesbian culture, the word "partner" connotes life-partner akin to the social construct of spouse.

[33]The notion of an external and internal sense combines with how the self is constructed by one's identification with discrete groups and how those groups define "being" gay, or Jewish, or Italian. Moreover, the external sense is shaped by negative conceptions as well. This external sense is then restructured by an internal voice.

[34]In fact the academy has been grappling with this issue since the late 1960s. The initial critique centered on monolithic faculties and curricula that acknowledged neither the existence nor the contributions of communities of color, of women, and of gays and lesbians. During this period, the canon was scrutinized along with the composition of college and university faculties. It was at this time that women studies programs and ethnic studies departments developed—influencing the restructuring of the canon and diversification within the academy itself. *See generally,* Adrienne Rich, On Lies, Secrets and Silences: Selected Prose 1966-1978 (Norton 1979).

[35]For an overview of cultural pluralism and affirmative action, *see* Duncan Kennedy, A Cultural Pluralist Case For Affirmative Action in Legal Academia, in Crenshaw *et al.*, Critical Race Theory: The Key Writings That Formed the Movement (New Press 1995).

habits, our customs, and our traditions. These communities shape what we believe and what we value—they constitute our internal sense and shape the contours of what we know.[36] And it is from this construct—this knowledge base—that we posit questions and constantly reconfigure ourselves. Hegemony of race, ethnicity, gender, and sexuality is counterintuitive, then, to the very nature of the academy—the supposed situs of vigorous debate and the exchange of *different* ideas.

I am having this very discussion with a colleague at the upstate law school where I teach. To K, there is no moral currency to my position. He believes that one does have to come from a specific community to raise the issues of the "isms." I tell K that I am not a proponent of affirmative action because I want to "raise issues of racism, homophobia, or misogyny." That is not the function of an African-American, a woman, or a gay man. I want him to know that we—the members of the so-called protected classes—have more to contribute than the constant raising of "isms." He does not understand.

I look for common ground. I ask him to think of the defense of justification in criminal law. (We have found the bridge between us!) I ask him to think of what is now termed as classic self-defense and juxtapose it with the claim of a woman who kills her batterer after a lapse in the violence. I then pose the question I know he is dreading: "Under the classic theory of self-defense (deadly force to meet deadly force)—could a woman who kills her assailant during a lull in the violence raise this defense?". K smiles—he knows that the immediacy requirement of classic self defense negates her claim. [37] He also knows that the reconfiguration of self defense law is based on women's lives—and how violence destroys those lives. And he knows that the paradigm shift has been orchestrated by women—feminist legal scholars and advocates—who form new legal standards *out of* the torn cloth of battered women's experiences, forever changing the legal terrain. K appears shocked that a similar analysis can be applied to the gay and lesbian experience. But he sees that I have a point. Is this an ally in the making?

I am sitting in the faculty-trustee lounge. I have just gotten off the phone with M, a professor and chair of the new Diversity Committee. He is surprised by my concern that there is no representation from the gay and lesbian community on the Committee. He is surprised because he does not believe that there is a problem—or a constituency. I disabuse him of this

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[36] *Id.*

[37] *See* State v. Wanrow, 88 Wash. 2d 221, 239; 559 P2d 548 (1977); People v. Barrett, 189 A.D.2d 879, 592 NYS2d 766 (1993); The work of Elizabeth Schneider and Martha Mahoney was critical in reshaping the terrain, specifically as violence against women relates to self-defense.

notion. I tell him that I am a lesbian. There is a pregnant pause on the other end of the phone—and panic. I try to put him at ease. He is looking for absolution. Neither is productive.

M is concerned that raising the issue of a gay and lesbian presence could "cause problems." He has never heard any student complain of anti-gay incidents at the school—a school that does not have a gay and lesbian student group. I ask him if he really believes that lesbians or gay men would go to him, a heterosexual, to speak of their pain. I do not mean to offend—only to contextualize the feelings.

I tell him that two gay students came to my office to tell me of threats made, innuendo spoken, and property defaced. He is shocked. His reaction reminds me of the first time I realized that racism existed—seeing the "whites only" drinking fountain as my parents and I drove through Georgia. I was sickened and yet, even at that young age, I knew that what I had experienced would pass—that my skin privilege enabled me to control the experience. Now M is moving out of the world of sexual privilege—but only for a moment. I take advantage of this moment.

I ask M to bring up the lack of gay/lesbian representation at this afternoon's faculty meeting. M pauses—but agrees. He asks me to speak to the issue. I agree to *support* his report to the faculty.

I am waiting for the meeting to convene. Another colleague comes early to get a seat. I have always seen A as an ally—she is an advisor to the Women's Law Caucus. I tell her about my conversation with M. I am looking for support. I ask her if she will speak in favor of including sexual orientation as part of the school's self study. A thinks it is a "wonderful idea to broaden the Committee's mandate" but, "since this is your [my] issue, you [I] should address the topic." I am speechless. I cannot find my voice. I do not understand how the lines get drawn—who "owns" what issue and why. I thought, perhaps naively, that the issue of gay rights was, *de minimis*, a *feminist* concern. I am wrong—at least on this terrain.

The meeting is convened. M tells the faculty that there is an issue concerning the Diversity Committee membership and mandate. He adds a few perfunctory remarks and ends with, "Professor Miccio will explain." I speak through the noise that my heart is making as it pounds out a prayer in my chest. I have no idea what I have just said—except I remember using words like "inclusion," "voices," "diversity," "honesty," "institutional commitment," and "hostile-free environment." I look to K and A for support. They remain silent. In fact, they all remain silent—the eight white, [presumed] heterosexual women, the 24 white, [presumably] heterosexual males, the one African-American [presumably] straight male and the one Asian, [presumably] heterosexual male. The only voice in support comes from D, the sole African

American female faculty member—who is in contention for a full time tenure track position. D is willing to risk her chance at the brass ring, because, as she tells me, "we speak from shared perspectives." I am moved by her courage, inspired by her vision. Our identities intersect, and for a moment, our voices fill the room.

Gayness is tolerated at this school. It is not invited, it is not accommodated, and it is not celebrated.[38] But this is changing. Through the work of the Diversity Committee, the law school is rethinking its pedagogy.[39] In relation to sensitivity toward gay and lesbian issues, faculty are examining their methodology. For example, gay rights cases are not to be ghettoized, but instead infused into various areas of the curriculum. They are thinking about ways to relearn "old" material so as to accomplish this goal, specifically, to teach about sexual orientation in family law, contracts, property, and constitutional law. There is more to Queer legal theory than Bowers v. Hardwick.

The discussion of diversity neither starts nor ends with the inclusion of gays and lesbians. But it does force us to rethink how we define diversity and for what purpose. In this context we examine our methodologies in teaching all courses—to understand the synergistic relationship between identity and law. We are recognizing the need to "speak" the language of diversity and to structure ourselves so that diversity of thought is expected and nurtured. We are beginning to understand our complexity as members of distinct but overlapping communities of culture, and how we can incorporate the voices of our various selves into our classes, our institutions, and our law.

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[38]The school's affirmative action policy includes "sexual orientation" in its non-discrimination provision. Although the faculty voted to include sexual orientation in the "affirmative" requirement of the policy to recruit gay and lesbian students, the Board of Trustees specifically excised this proviso from the policy. The faculty subsequently voted to keep the "offending" portion of the policy. The prevailing feeling on the faculty was that if the Board wished to exclude gays and lesbians from recruitment policies it would have to do its own "dirty work"—words finally spoken by K.

[39]As part of the school's entrée into understanding issues particular to sexual orientation, two gay students and I formed the school's first Lambda Law Association. The following year Lambda sponsored a poetry reading and film series to commemorate National Coming Out Day and a panel "On Being Gay In the Work Place." Both programs generated attendance from the student body and surrounding area. They also generated unabashed homophobic comments over the e-mail and on Lambda announcements.

AND IN THE END

I am first and foremost a law teacher. My teaching is informed by the whole of me—and this includes my sexual orientation as well as my gender. Denying the effect that identity has on our teaching and law is at once disingenuous and dangerous. Disingenuous because it assumes that in "doing law" and in teaching about it, we are removed from the process—that in fact there is moral currency to the concept of detached objectivity. It is dangerous because it assumes that all of us come to the table as structural equals and that our gender, our race, our ethnicity, our creed, our class, and our sexual orientation have little to do with how we are perceived and constructed. Taken to its conclusion then, this position would hold that differences are irrelevant—in constructing knowledge, in constructing law and in constructing normative values.

But we know this to be false. Race and gender have insinuated themselves into the Constitution.[40] Sexual orientation is the dividing line between those who have privacy rights in the bedroom and those who do not. [41] And class, or economic status, is the difference between real and theoretical rights.[42] The existence of these **differential rights** is a consequence of **cultural** asymmetry—and power. To teach, to litigate, and to structure ourselves as if these differences are mere incidentals is dishonest—and it denies the power that differences have in shaping legal discourse.

Recognizing difference and incorporating it into our teaching and into how we constitute ourselves gives much needed access to the voices that have been silenced. Such recognition is intrinsic to the concept of equality—and to our conception of equal concern and respect[43].

Infusing the voices of the marginalized is the province of pedagogy. The academy is linked to the world that it theorizes about. It is our responsibility then—as architects of legal theory and as molders of thought and of thinkers—to incorporate and integrate difference into the terrain where our

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[40]*See* U.S. Const. Amend.14, 19.

[41] *See* Bowers *supra* note 4.

[42]*See* Harris v. McRae 448 US 297 (*rehearing denied*) 1005 S.Ct. 2671 (1980) [federal Medicaid funds for abortion are denied to subsidize poor women's procedures. Where states fail to pick up the cost, poor women are denied access to constitutional right]; *Cf.* Gideon v. Wainright 372 US 335, 83 S.Ct. 792 (1963) ; Betts v. Brady 316 US 455, 62 S.Ct. 1252 (1942)[federal funds to states to provide counsel to indigent defendants in criminal felony and misdemeanor cases allows access to 6th Amendment right to counsel].

[43] *See* John Rawls, A Theory of Justice, at 5 (1971), citing H.L.A. Hart, The Concept of Law, at 155-159 (1961).

students live, our academic selves reside, and our thoughts are birthed. Anything less constructs a world where some of us are consigned to dwell in the shadows.