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Incendiary Categories: Lesbian/Violence/Law

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Ruthann Robson*

I. Slashes

Violence mediates all relationships between lesbians and law. Yet when most legal scholars invite me to talk or write about violence and lesbians and law, they want ampersands and not slashes; they want sparks and not charred remains. I am invited as lesbian evidence toward the credentialing of a conference or collection as inclusive of all feminist perspectives. I am invited to provide the "new" perspective, to speak about violence among women and how the law can (better) address this problem.¹ Yet in the feminist context, this is problematic. Violence among lesbians is a violent divergence from the feminist jurisprudential attempt to reconceptualize the law and expose its gendered violence. For many feminists, the problem of violence is the problem of men's dominance over women, a dominance often enforced with overt violence and always enforced with subtle promises of violence.² For some of these

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¹ I do not mean to imply that I do not think this is an important issue. See Ruthann Robson, Lavender Bruises: Intra-Lesbian Violence, Law & Lesbian Legal Theory, 20 Golden Gate U. L. Rev. 567 (1990).

² The theorist most often associated with this point of view is Catharine MacKinnon, whose rhetoric
feminists, violence among lesbians is merely an instance of lesbians appropriating male values. Whatever the explanation, however, after this provocative lesbian interlude, the agenda can return to the "real" problem of men's violence against women.

Given this common occurrence, I am appreciative of the editors and staff at the Texas Journal of Women and the Law, especially the feminist women and men who engineered the March 1992 symposium, New Perspectives on Women and Violence, and encouraged work on the broader aspects of violence and women, including lesbians. To a great extent, my concerns about lesbian violence do overlap with even the most narrow feminist attention to male dominance and violence against women. Lesbians are not immune from the violence some men routinely exhibit toward women in intimate situations simply because we often inhabit a private realm without men. While our experience of male violence is often neither private nor intimate, we experience male violence in public places like streets or workplaces. My present concern, however, is less about legal responses to male violence against lesbians than about the legal regime's own expressions of violence towards lesbianism. That the law is violent towards lesbianism cannot be seriously disputed: the law criminalizes our sexual activities, excludes us from what it considers to be the ultimate sanction of citizenship, and denies us protections. Even when a particular law implicitly discourages private violence against lesbians, it exhibits the law's violence toward lesbians.

Nevertheless, I do not wish to posit lesbians as victims of the violence typically includes passages like the following:

All women live in sexual objectification the way fish live in water. Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse... Given the statistical realities, much of women's sexual lives will occur under post-traumatic stress.

3. According to Catharine MacKinnon, lesbians cannot do otherwise than appropriate male values. For MacKinnon, sexuality may be "so gender marked that it carries dominance and submission with it, whatever the gender of its participants." Id. at 142. Further, since "sexuality is violent, so perhaps violence is sexual." Id. at 179. Thus, "[w]henever women are victimized, regardless of the biology of the perpetrator," the gendered system of dominance and submission that is patriarchy is at work. Id.

4. Lesbians do not always inhabit a private realm without men. Lesbians may live with their parents, with other relatives, or with their children and can experience violence. There are reported instances of parents procuring men to rape their daughters in order to facilitate a "cure," as well as of children so disturbed by a mother's lesbianism to attempt murder. GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 201 n.63, 207-08 n.71 (1991).

5. For a discussion of the crimes of lesbian sex, see RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 47-59 (1992).

6. For a discussion of lesbians and military service, see id. at 91-99; infra notes 27-28 and accompanying text.

7. For a discussion of lesbians and discrimination doctrine, see ROBSON, supra note 5, at 81-90.

8. See infra notes 42-70 and accompanying text (discussing the federal Hate Crime Statistics Act).
of laws or men. I want to claim violence as an attribute of lesbianism. This claim is not based on incidences of violence between lesbians, but on the existence of lesbians as violent denials to the law’s system of heterosexual and male hegemony. Lesbians exist only as slashes, only as ashes, within the dominant legal discourse. In one sense, this Article is a kind of violence. There will be no paragraph outlining what this Article will explore/examine/analyze. The verbs I am more interested in are verbs like incinerate, burn, and blaze. The last section of this Article considers arson.

II. Li(v)es Between the Slashes

Arguably, all categories are a kind of violence. They operate to exclude and include, to totalize by repressing differences, and to insist on their own authority. Classical category theory is based on a perception that items within the category have shared properties, while cognitive category theory is based on a perception that prototypes within the category order categorization. Nevertheless, both classical and cognitive theories of categorization share an implicit understanding that categorization enforces reality. Similarly, the postmodernist critique of language, often known

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9. Like many trained in the law, I have enumerated those verbs on a yellow legal pad and kept them handy for articles and pieces of advocacy. I have used and re-used those verbs so often that I have internalized their violent strictures. However, what I desire is new verbs that are lesbian-generated and do not assimilate lesbianism to legal activities, but express legalities in terms of lesbian activities.

10. Classical categorization theory can be briefly summarized as follows:

- From the time of Aristotle to the later work of Wittgenstein, categories were thought to be well understood and unproblematic. They were assumed to be abstract containers, with things either inside or outside the category. Things were assumed to be in the same category if and only if they had certain properties in common. And the properties they had in common were taken as defining the category.

GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 6 (1987). On the other hand, cognitive prototype categorization theory suggests that human categorization is essentially a matter of both human experience and imagination—of perception, motor activity, and culture on the one hand, and of metaphor, metonymy, and mental imagery on the other. As a consequence, human reason crucially depends on the same factors, and therefore cannot be characterized merely in terms of the manipulation of abstract symbols.

id. at 8.

11. As Lakoff explains:

To change the very concept of a category is to change not only our concept of the mind, but also our understanding of the world. Categories are categories of things. Since we understand the world not only in terms of individual things but also in terms of categories of things, we tend to attribute a real existence to those categories. We have categories for biological species, physical substances, artifacts, colors, kinsmen, and emotions and even categories of sentences, words, and meanings. We have categories for everything we can think about. To change the concept of category itself is to change our understanding of the world. At stake is our understanding of everything from what a biological species... is to
as deconstruction, has revealed that every text exists in relation to that which it seeks to silence and is thus ultimately undermined by that very silence. For example, the feminist critique of feminist theorizing has revealed that many exhortations of “woman” have been falsely essentialist or partial in racist and classist manners. Therefore, violences are inherent in categorization, as well as in reason, conceptual thinking, and language. They are often conjoined with political violence: the power to determine what marks insanity, intelligence, or integrity becomes the power to punish or reward persons with institutionalization, education, or publication. In addition to these inherent violences, the categories of lesbian, violence, and law each perpetuate their own particular types of violence. These violences are made even more particular when considered in relation to each other.

A. The Category of LESBIAN

An important particularity within the category of lesbian is the violence of silence. There is no language for the category of lesbian, for the language of this category is that of nonlesbian colonizers. As lesbian theorist Marilyn Frye notes:

The use of the word ‘lesbian’ to name us is a quadrifold evasion, a laminated euphemism. To name us, one goes by 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...

what a word is...

Id. at 9.

12. See, e.g., JONATHAN CULLER, ON DECONSTRUCTION 86 (1982) (stating that “to deconstruct a discourse is to show how it undermines the philosophy it asserts”).

13. See, e.g., DENISE RILEY, “AM I THAT NAME?”: FEMINISM AND THE CATEGORY OF “WOMEN” IN HISTORY 4 (1988) (arguing that “woman” is invoked too often when more accurate and delimiting descriptions could be used); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 158 (1988) (suggesting that the concept of an essential “womanness” makes women inessential because the details of their individual experiences are irrelevant). Interestingly, neither of these works considers the heterosexist implications of the category “woman” in feminist theory.

14. I am using the metaphor of colonizers here in recognition of the colonizing practice of substituting the colonizers’ language for the native language. As Jacques Derrida notes, “[I]n many countries, in the past and in the present, one founding violence of the law or of the imposition of state law has consisted in imposing a language on national or ethnic minorities regrouped by the state.” Jacques Derrida, Force of Law: The "Mystical Foundation of Authority," 11 Cardozo L. Rev. 920, 937 (1990). Colonization is a metaphor rather than an accurate description, however, because lesbians exist within a dominant heterosexual culture and as a part of other shared cultural conditions. For a discussion of domestication as a preferred term, see infra notes 142-44 and accompanying text.
assuming you happen to know what is in those poems written in a dialect of Greek over two thousand five hundred years ago on a small island somewhere in the wine dark Aegean Sea.  

Present debates about the category "lesbian" in postmodernist influenced "queer theory" can also silence the assertion of the category in a violent manner, hypothesizing instability outside of quotation marks.

Another particularity is the violence of dominance, especially as exhibited in language as a political manifestation of race and class. "Lesbian" theorist Gloria Anzaldúa notes:

For me the term lesbian es un problema. As a working class Chicana, mestiza—a composite being, amalgama de culturas y de lenguas—a woman who loves women, "lesbian" is a cerebral word, white and middle class, representing an English-only dominant culture, derived from the Greek word lesbos. I think of lesbians as predominantly white and middle-class women and a segment of women of color who acquired the term through osmosis much the same as Chicanas and Latinas assimilated the word "Hispanic." When a "lesbian" names me the same as her she subsumes me under her category. I am of her group but not as an equal, not a whole person—my color erased, my class ignored.

The violence may be the violence of obscenity: the category "lesbian" in a bookstore is a category of obscenity and thus to be violently excluded from legal respect. Or the violence may be the violence of damages: a woman being categorized as a "lesbian" (or "dyke") is entitled to money damages to compensate her for this violence against her. Or the violence may be the violence of child custody: the category of "lesbian" and the category of "mother" may be violently adjudged as mutually exclusive. Such instances of particularized violences are necessary to any understanding of the category "lesbian" as well as to determining how this category exists in relation to the law. 

16. For further discussion, see Ruthann Robson, Embodiment(s): The Possibilities of Lesbian Legal Theory in Bodies Problematized by Postmodernisms and Feminisms, 1 Law & Sexuality: Rev. Lesbian & Gay Legal Issues (forthcoming 1992); see also infra notes 32, 64.
18. See Video News, Inc. v. State, 790 S.W.2d 340, 341 (Tex.App.—Houston [1st Dist.] 1990, no writ) (affirming the conviction for possession with intent to promote obscene materials of bookstore owner whose "magazine racks are broken down into sexual preference groups" including "lesbian"); see also infra note 33 (discussing other obscenity cases).
19. See Samuels v. Southern Baptist Hosp., 594 So. 2d 571, 575 (La. Ct. App. 1992) (upholding verdict and damages for patient who, after being raped by a male nursing assistant in the hospital, suffered damages, including being called a lesbian and a dyke "by her female peers").
20. See infra notes 146-56 and accompanying text (discussing cases in which a woman's competence as a mother is questioned because of her lesbianism).
categorization of lesbianism within history, language, and culture are rooted in violence, the law's categorization of lesbianism is itself a cipher of violence. Just as the figure of the witch has been an incarnation of violence, the figure of the lesbian is also violently relegated to the symbolization of violence.

Yet another particularity is the violence attending debates about lesbians' sexual partners. Lesbians who have engaged in sexual relationships with men bemoan the loss of the lesbian label and implicitly accuse lesbians of too violently patrolling the borders of lesbian identity. This violence coalesces with an often perceived violent superiority of lesbianism in feminist circles. For example, in a feminist jurisprudence class, students read Ruth Colker's essay on authenticity in which she reveals her previous lesbian state and her present involvement with a man. The heterosexual women in the class expressed a visceral response to Colker's piece, speaking about their own wish to be lesbians if only they "could" because "everything would be easier." Because I am the professor/facilitator, I do not react. But I want to speak of the violence endured in those lesbian lives where everything is easier. I want to speak of adolescent lesbians chained to radiators or sent to aversion therapy by their families, of lesbians assaulted and raped and knifed by gangs of men. Interestingly, as the heterosexual feminists experience the violence of exclusion, I ground their exclusion on experiences of violence.

The experience of violence that is the law also occurs in the legal process of categorizing a woman as a lesbian. For example, male heterosexual judges violently supplant a lesbian's own definition of lesbianism with their own. As constitutional jurisprudence only permits the criminalization of acts, not of status, this violent supplanting has direct legal consequences. For example, the Seventh Circuit could uphold the Army's regulation disqualifying "homosexuals" as including "an individual who is an admitted homosexual but as to whom there is no evidence that

Leonard Tennenhouse eds., 1989) (arguing for the necessity of "pluralizing violence, qualifying it, exploring the local and historical constitution" of levels of violence if we are ever to understand violence).

22. See id. For a discussion of the links between lesbians and witches in legal history, see Ruthann Robson, Lesbianism in Anglo-European Legal History, 5 WIS. WOMEN'S L.J. 1, 31-36 (1990).

23. For a discussion of this issue within the context of the lesbian, bisexual, and gay communities, see Jorjet Harper, Lesbians Who Sleep with Men: Only Her Hairdresser Knows for Sure, OUT/WEEK 46 (Feb. 11, 1990) (including opinions on the relativist qualities of the categories "lesbian" and "bisexual" in response to a statistic that 15 out of 20 lesbians have had sexual relations with men).


25. For sources documenting incidents of violence against lesbians, see infra notes 42-47.

they [sic] have engaged in homosexual acts either before or during military service" and find it applicable to a lesbian who did not admit to lesbian sexual acts.27 In Ben-Shalom v. Marsh, the court reasoned:

It is true that actual lesbian conduct has not been admitted by the 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.28

Legal violence is also apparent when the woman disputes any type of lesbian identity. A common violent strategy is to analyze a woman with reference to her conformity with gender identity stereotypes. For example, a Texas criminal appellate court upheld a murder conviction of a female defendant who denied she was the female victim's lesbian lover based on trial evidence that the defendant "dressed like a man; kept her hair cut like a man; wore men's clothing, including men's shoes."29 The appellate court was comfortable relying on heterosexual stereotypes to confirm the defendant's lesbianism, despite the defendant's denials. Another violent strategy is to analyze a woman according to her conformance to heterosexual activity. 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?

27. Ben-Shalom v. Marsh, 881 F.2d 454, 457 n.3 (7th Cir. 1989).
28. Id. at 464.
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 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?

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 making assumptions about relationships between heterosexual activity and lesbianism.

As a participant in the rule of law—a complicit attorney and law professor—I have also perpetrated the violence of the lesbian category. As I was doing initial research for the book that would become Lesbian (Out)Law, I did a word search on both LEXIS and WESTLAW in all fields of inquiry. I searched for the word "lesbian." My search retrieved more documents than I had anticipated, most of them less than five years old. As I read through the documents, I discarded two types of cases that occurred frequently. In one type, the word "lesbian" was highlighted as part of a book title or book description and the case was an obscenity prosecution. In the other type, the word "lesbian" was highlighted as

31. ROBISON, supra note 5.
32. This marks a change from what lesbian legal theorist Rhonda Rivera noted as methodological problems in conducting legal research on lesbian and gay legal issues in the 1970s. As Rivera stated, "[F]or years most indexes never had a single topic listing for homosexuality . . . . [J]udges in their opinions for a variety of reasons may choose never to use the word homosexuality . . . and cases involving homosexual issues are unpublished more often than are cases involving other issues." Rhonda R. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 HASTINGS L.J. 799, 804-05 (1979). Because of the pioneering efforts of Professor Rivera, among others, my own research has been considerably less methodologically complicated. Nevertheless, the violence of silence to which Rivera referred persist.
33. See, e.g., United States v. Osborne, 935 F.2d 32, 38 (4th Cir. 1991) (using defendant's admission that he had a preference for viewing videotapes of girls age 13-17 engaging in lesbian acts to rebut affirmative defense of entrapment in prosecution for receiving child pornography through the mails).
part of a man's words as he assaulted or murdered his "girlfriend," female lover, or wife,34 or as an accusation raised in incest situations.35 Months after I discarded them, I reconsidered these two types of cases that I previously had judged as not raising issues of "real" lesbians. The violence of the category "lesbian" is pertinent to prove obscenity. The violence of the category "lesbian" is pertinent to prove male physical violence toward women. Within the legal system, one violence proves another.

Yet my own exercise in violent categorization allowed me to claim ownership of the category of lesbian and decide what should count and what would not. Based on appellate court opinions—multifold distortions of facts—36 I was temporarily comfortable with deciding questions of identity and lesbianism, of making violent cleavages between those whom I would count and those whom I would not.

B. The Category of VIOLENCE

Violence as physical and individual is the prototypical instance of violence. The issue for the law in such instances becomes whether or not it will intervene in such private incidences.37 Of course, the mere

34. See, e.g., Commonwealth v. Williams, 571 N.E.2d 29, 31 (Mass. App. Ct. 1991) (invoking a defendant appealing his murder conviction on the basis of an irrational fixation on his wife's lesbian relationship); Ibn-Tamas v. United States, 407 A.2d 626, 629 (D.C. 1979) (invoking a wife's description of her violent husband's accusing her visiting friend of being a lesbian and ordering her to leave their apartment as part of testimony concerning the battered woman syndrome); see also State v. Strickland, 361 S.E.2d 882, 883 (D.C. 1987) (discussing a husband who murders his estranged wife's minister after saying that he had heard the minister was a lesbian and that he would "get" her).

35. See, e.g., People v. Votava, 584 N.E.2d 980, 986 (Mass. App. Ct. 1991) (invoking a defendant who accused his fifteen-year-old daughter of being a lesbian in the course of physically beating her and molesting her); Chamberlain v. State, 687 S.W.2d 631, 632 (Mo. Ct. App. 1985) (invoking a defendant convicted of sexual assault on his fifteen-year-old daughter attempting to vacate his conviction on the grounds that "his wife, and two other women alleged to be his wife's lesbian lovers conspired to file the sexual assault charge").


37. See, e.g., Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. REV. 973 (1991) (exploring the impact that traditional conceptions of privacy have had upon the criminal prosecution of men who batter women).
categorization of such violence as private and individual can be a manifestation of violence, including the violations of sexism and homophobia.38

The law has begun to recognize incidents of violence against lesbians *qua* lesbians, including judicial rejection of the "homosexual panic defense,"39 and passage of statutes that enhance penalties for crimes motivated by bias.40 Another recognition is manifested by the attempt to officially calculate incidents of bias related crimes through passage of laws generically known as hate crime statistics acts. Many states have recently mandated the collection of statistics, at times including sexual orientation, and at times deleting or omitting it.41 In 1990 the United States

38. One of the most startling examples of sexist violence I have encountered appears in a recent theoretical piece distinguishing between private violence and collective violence. While the author defines collective violence as "the kind of violence that is practiced by one group on another and that pertains to individuals, as agents or as victims, only by virtue of their (perceived) association with a particular group," and uses racism as exemplar, the author specifically excludes violence against women:

[Collective violence] is quite unlike private violence, for example, domestic violence or street violence, in which the victims are selected by the attacker because of some relationship the attacker has to the victim or because of something about the victim that makes him or her a desirable target, such as having money or being a woman (rape). Except in unusual or bizarre cases, and making the usual necessary allowances for borderline cases, group membership (e.g., in a racial or religious group) is not the sole or the crucial factor, as it is with collective violence.


39. For example, in the well-publicized murder of Rebecca Wight and attempted murder of Claudin Brenner while the two lesbians were hiking along the Appalachian Trail, both the trial and appellate courts disallowed evidence of the defendant's psychosexual history offered to prove provocation in order to reduce the offense from murder to manslaughter. The courts reasoned that the provocation must be apparent from the victims' actions alone, and not from the defendant's "history of misfortunes," including his rejection by women and his mother's sexual preference. The appellate court also unequivocally stated that:

The sight of naked women engaged in lesbian lovemaking is not adequate provocation to reduce an unlawful killing from murder to voluntary manslaughter. It is not an event which is sufficient to cause a reasonable person to become so impassioned as to be incapable of cool reflection. A reasonable person would simply have discontinued his observation and left the scene; he would not kill the lovers. Whatever a person's views about homosexuality, the law does not condone or excuse the killing of homosexuals any more than it condones the killing of heterosexuals.


40. See, e.g., *N.H. REV. STAT. ANN.* § 651.6 (1992) and *WISC. STAT. ANN.* § 939.645 (1989-90) (referring to race, religion, national origin, sex, and sexual orientation as possible sources of bias). The Wisconsin Supreme Court has recently held the Wisconsin statute unconstitutional pursuant to the first amendment. State v. Mitchell, 485 N.W. 2d 807, 817 (1992) (relying on R.A.V. v. St. Paul, 112 S.Ct. 2638 (1992)), the court concluded that the statute, which enhanced penalties based upon a finding that a defendant intentionally selected a victim because of a protected identity, including sexual orientation, improperly punished a "mental act" rather than criminal conduct). For further discussion of R.A.V., see *infra* notes 78-107 and accompanying text.

41. For statutes that include sexual orientation, see *CAL. PENAL CODE* § 13023 (West 1992) (including
Congress passed the federal Hate Crime Statistics Act. The Act provides for the compilation of statistics of hate or bias crimes, specifically defined as "crimes that manifest evidence of prejudice based upon race, religion, sexual orientation, or ethnicity," and marks the first time sexual orientation as a category has been codified into federal law.

The Act's inclusion of sexual orientation is a testament to the increasing recognition of violence against lesbians, gay men, and bisexuals,
as well as a linking of this violence with the violence perpetrated on the basis of other group identities such as race, ethnicity, religion, culture, and gender.\textsuperscript{44} Much of this awareness is due to the efforts of the Anti-Violence Project of the National Gay & Lesbian Task Force (NGLTF), which has been documenting incidences of anti-lesbian and anti-gay violence since 1984.\textsuperscript{45} The efforts of the NGLTF have been augmented by many local anti-violence projects, as well as by some independent researchers, who have been collecting information since the early 1980s.\textsuperscript{46} Most researchers agree that reports of anti-lesbian and anti-gay violence have been increasing in the past few years.\textsuperscript{47} Such reports appear with increasing regularity in the lesbian/gay press.\textsuperscript{48} Further, documentation by lesbian/gay anti-violence projects has garnered the attention of the mainstream press,\textsuperscript{49} which in turn influences the political

\textsuperscript{44} The increasing awareness of a link between crimes based on sexual orientation and crimes based on other group identities is reflected in Senator Cranston's introduction of the bill that would become the Hate Crime Statistics Act:

I am aware that other legislation is pending in the Senate which mandates the collection of data regarding crimes against racial, ethnic and religious groups. However, these bills do not require that data be collected on crimes against gay and lesbian individuals. I am introducing this bill today because I believe that crimes based on prejudice against gay and lesbian individuals are just as reprehensible as crimes based upon any other types of prejudice.


\textsuperscript{45} The National Gay & Lesbian Task Force Policy Institute has issued annual reports entitled \textit{Anti-Gay/Lesbian Violence, Victimization & Defamation}. Annual reports can be ordered from NGLTF at 1734 14th Street, NW, Washington D.C. 20009-4309, (202) 332-6483. The NGLTF also provides other information concerning proposed and enacted legislation.

\textsuperscript{46} The most prominent local organizations include Community United Against Violence (CUAV) of San Francisco at 973 Market Street, San Francisco, California, (415) 777-5500, and New York City Gay and Lesbian Anti-Violence Project, with offices at 208 W. 13th, New York, New York, 10011, (212) 687-6761. There are also many more anti-violence projects in cities and municipalities with sizeable lesbian and gay populations. One researcher has written a book based in part on his empirical studies of anti-lesbian/gay violence. \textit{See} COMSTOCK, supra note 4.

\textsuperscript{47} This does not mean, however, that actual incidents of violence have been increasing or decreasing. As Kevin Berrill of the NGLTF Anti-Violence Project notes, it is difficult to determine whether there are increased incidences or increased documentation. Kevin T. Berrill, \textit{Anti-Gay Violence and Victimization in the United States: An Overview}, 5 J. INTERPERSONAL VIOLENCE 274, 287 (1990). What is uncontroversial, however, is that the violence is widespread. Limiting its documentation to six cities (Boston, Chicago, Los Angeles, Minneapolis/St. Paul, New York, and San Francisco), the 1990 NGLTF report documented 1,588 incidents of anti-gay/lesbian violence in that year. NGLTF POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION & DEFA MATION IN 1990 5 (1991) [hereinafter ANTI-GAY/LESBIAN VIOLENCE 1990]. Previous reports collected nationwide figures of 7,031 and 7,248, for 1989 and 1988 respectively. NGLTF POLICY INSTITUTE, ANTI-GAY VIOLENCE, VICTIMIZATION & DEFAMATION IN 1989 1 (1990) [hereinafter ANTI-GAY VIOLENCE 1989] (comparing the 1989 and 1988 statistics on the number of hate crimes perpetrated against gays and lesbians).

\textsuperscript{48} In addition to news stories about specific instances of aggression, anti-lesbian/gay violence as an epidemic has been the subject of numerous featured reports. One of the most powerful is a cover story in \textit{The Advocate} briefly narrating 127 instances of anti-lesbian/gay violence across the United States that took place in one month. \textit{See} John Gallagher, \textit{August—A Month of Hate: An Epidemic of Violence}, ADVOCATE, Nov. 5, 1991, at 42.

\textsuperscript{49} The release of the NGLTF's \textit{Anti-Gay Violence, Victimization & Defamation in 1988 report}
process. Despite the recognition of violence against lesbians and gay men, the Hate Crime Statistics Act's inclusion of sexual orientation occurred amidst much controversy within Congress. The compromise necessary in Congress to preserve the sexual orientation category included a statement in the Act that since "the American family life is the foundation of American Society, . . . [t]he family should encourage the well-being, financial security, and health of the American family, and schools should not de-emphasize the critical value of American family life." Any doubts about the antidotal function of this paean to the American family are resolved by the statute's next section: "Nothing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality." The Act also includes an antidote to any possible judicial interpretation that a law requiring the collection of statistics about the violence against lesbians and gay men might mean that discrimination against them is disfavored:


50. For example, appearing in the Congressional Record is the text of a lengthy article that appeared on page three in the Los Angeles Times on April 10, 1986, entitled Gay Bashings—AIDS Fear Cited as Attacks on Male Homosexuals Grow [hereinafter Gay Bashings]. The article quoted Kevin Berrill, director of the NGLTF Anti-Violence Project, as saying that "[a]nti-gay violence has reached epidemic proportions" and narrating instances of anti-gay violence, including information from San Francisco's CAUW as well as from the Philadelphia and New York anti-violence projects. 134 CONG. REC. S2000 (daily ed. Jan. 25, 1988).


52. Hate Crime Statistics Act, supra note 42, § 2(a)(1)-(3). According to the NGLTF, this amendment was added as a means of preempting an amendment by Senator Jesse Helms. ANTI-GAY VIOLENCE 1989, supra note 47, at 21 (discussing the dilatory tactics of Sen. Helms and defeat of his proposed amendment by a vote of 77-19 in the Senate). The Helms amendment provided that the Senate declare that:

(1) the homosexual movement threatens the strength and survival of the American family as the basic unit of society;
(2) State sodomy laws should be enforced because they are in the best interest of public health;
(3) the Federal government should not provide discrimination on the basis of sexual orientation; and
(4) school curriculums should not condone homosexuality as an acceptable lifestyle in American society.


53. Hate Crime Statistics Act, supra note 42, § 2(b).
"Nothing in this section creates . . . a right to bring an action, including an action based on discrimination due to sexual orientation." 54

The very Act which seeks to collect statistics about the violence against us is itself a manifestation of that violence. Many legal reformers believe that the repeal of statutes criminalizing lesbian sex and the passage of statutes protecting lesbians from discrimination are necessary steps in the quest to end violence against lesbians, 55 but the Act specifically rejects these goals. The signing of the Hate Crime Statistics Act marked the first time openly gay men and lesbians were invited to the White House. 56 Yet under the very rule of law they were invited to celebrate, lesbians cannot be promoted or encouraged or have any remedies against discrimination. Such ironies do not negate the Act as an advancement, but they do indicate the violence that inheres even in rules of law that implicitly disapprove of the violence against us.

The Act also manifests violence against us through several strategies of categorizing our identities. First, the category "sexual orientation" is defined in the Act as "consensual homosexuality or heterosexuality." 57 Perhaps consensual is meant to modify both homosexuality and heterosexuality, but even assuming such a charitable interpretation, the very inclusion of heterosexuality is problematic. As in discrimination discourse, the category operates to obscure power differentials between heterosexuals and lesbians or gay men. 58 For example, if a heterosexual man enters a lesbian bar and makes explicit heterosexual advances to the lesbian customers, and the lesbians shove him into the bathroom and lock him inside because they find such flagrant heterosexuality inappropriate and offensive, the lesbians have committed a hate crime, manifesting "evidence of prejudice" 59 based on the sexual orientation of heterosexuality.

Second, the de-gendering of the category of sexual orientation is a violence against lesbians. Lesbians and gay men are not co-extensive. The de-gendering that occurs usually results in the de-emphasis, if not the obfuscation, of lesbians. 60 Although some documentation supports a conclusion that gay men are more likely to be victims of violence than are

54. Id. § 1(a)(3).
55. See, e.g., ANTI-GAY/LESBIAN VIOLENCE 1990, supra note 47, at 23 (recommending that government act at every level to prohibit "discrimination based on sexual orientation in employment, housing, and other areas" and that laws prohibiting consensual homosexual activity be abolished).
56. Herek & Berrill, supra note 51, at 7.
57. Hate Crime Statistics Act, supra note 42, § 1(b)(3).
58. See, e.g., ROBSON, supra note 5, at 85 (criticizing the current legal feminist reform position that collapses sexual orientation and gender, resulting in the subordination of lesbianism to feminism).
60. For example, an article that is included in the Congressional Record and appears, therefore, to have informed the debate about the Hate Crime Statistics Act, deals only with the issue of gay men. See Gay Bashings, supra note 50, at 3.
lesbians, more recent reports reflect that lesbians may be twice as likely to be victims of violence than gay men. More important than comparing incidences of violence between lesbians and gay men, however, is the effect that the imperceptibility of violence against lesbians has on lesbians. Lesbians are apparently much more accepting of the violence against us and thus less likely to report it or even believe it is anything other than part of daily life.

Related to the de-gendering of the category of sexual orientation is the omission of the category of gender from the Hate Crime Statistics Act. Such an omission violently and artificially isolates lesbianism. If a man rapes a lesbian and says "What you need is a good fuck, dyke," the word "dyke" may be evidence of a hate crime. However, if the man rapes the same lesbian and neglects to say the word "dyke," or says other words as well, or there are no other factors indicating his prejudice against lesbians, it might not be a hate crime. Not only is her lesbianism irrelevant, but rape itself is not a crime that "manifests evidence of prejudice" based on any category that the Act recognizes.

61. For example, Gary Comstock's empirical studies reveal that a "higher percentage of men than women reported experiences of violence in all subcategories, especially being punched, hit, kicked, or beaten, and having objects thrown at them." The size of such disparities, however, is "consistently not great." Comstock, supra note 4, at 38-40.

62. See Victoria A. Brownworth, An Unreported Crisis, ADVOCATE, Nov. 5, 1991, at 50, 50 (referring to a March 1991 study by the San Francisco based group Community United Against Violence (CUAV) that showed that violence against lesbians was occurring at twice the level as violence against gay men in San Francisco).

63. As early as 1984, activists were explaining that like other women, lesbians are conditioned by their gender to accept violence so that when we are assaulted it does not even occur to us to question the basis for the attack. Berrill, supra note 47, at 282. More recently, Jill Tregor, program coordinator at CUAV, explained that of 400 lesbians surveyed in the Bay Area in 1989, only 15% reported the crimes to anyone:

Some lesbians didn't see the incidents as important enough. And I have to emphasize here that these incidents ranged from verbal harassments to stabbings. I think as women, lesbians are conditioned to expect violence against them. Men are accustomed to believing that they have rights and that they deserve protection—and that's why they report antigay violence to authorities, while lesbians do not. Antigay violence is perceived as male by the media and by the community. Yet increasingly women are the victims.

Brownworth, supra note 62, at 51.

64. Apparently, gender was never considered as a category encompassed by the federal Hate Crime Statistics Act. See Fernandez, supra note 51, at 269-81 (discussing legislative history and lobbying efforts, but not mentioning gender).

65. For example, in one reported case containing a detailed description of a protracted rape of a Santa Cruz, California lesbian, the court's recitation of the facts includes the defendant repeatedly asking the victim whether she had a boyfriend, the victim telling the defendant that she was a lesbian, and the defendant then declaring that the victim "was a sick person and that God must have sent him there because [she] was a sick person." People v. Hicks, 7 Cal. Rptr. 166, 168 (1992). One wonders whether such a crime was included in California's hate crime statistics.

Fourth, and perhaps most insidiously, the insistence on categorization itself violently atomizes us into separate identities. A rape of a lesbian, to use this example again, is not necessarily separable into discrete identities. As quoted in a recent article:

As I was being raped, I was called a dyke and a cunt. The rapist used those terms as if they were interchangeable. And as I talk to other women who have been raped—straight and gay—I hear similar stories. Was my attack antilesbian? Or was it antinwoman? I think the facts are simple. I was raped because as a woman I'm considered rapeable and, as a lesbian I'm considered a threat. How can you separate those two things?  

Under the Act, to "count" as a hate crime, the lesbian must stress her identity as a lesbian over her identity as a woman and hope that the FBI statisticians agree with her. A similar situation occurs if the lesbian has other identities implicated in the crime but not included in the Act, such as those based on age, race, or disability. To be counted, the lesbian must discount these identities just as the relevant statute discounts them.

However, even when the lesbian has other identities implicated in the crime and such identities are included in the act, choices of categories occur. Thus, in state statutes that include gender, the gender/sexuality dichotomy is not dissolved, but has different consequences. These consequences are the same for all identities that are categories under a statistics act. For example, if the rapist also makes racial slurs, such "evidence of prejudice" should mandate the statistic as a hate crime based on race. Does the FBI statistician choose race or sexual orientation? Does the statistician ask the African-American lesbian if she thinks she was raped because she is African-American or because she is a lesbian? Does the statistician ask the rapist about his motivation? Any choice does violence to our experiences of the violence against us.

Paradoxically, however, the absence of categorization in a hate crime statistics act may be a fifth kind of violence. Just as the lack of sexual orientation in a state statute is a violent denial of the violence against us and the lack of gender in the federal Act is a violent denial of our experiences of the violence against us, the lack of any categories also constitutes violence. Many opponents of hate crime bills seek to delete references to specific groups, usually lesbians and gay men, or failing that, to seek to delete mention of any group identity.  

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68. For a discussion of various reporting systems, see Fernandez, supra note 51, at 281-91.

69. For a discussion of the "stripping" of hate crime bills, see NGLTF POLICY INSTITUTE, COUNTERING ANTI-GAY VIOLENCE THROUGH LEGISLATION 10 (1992) (referring to such incidents in
act that mandates the collection of statistics of any crime based on bias, bigotry, or hate may appear to be magnanimously broad, but it actually erases the realities of violence. It also gives government officials wide latitude to determine the contours of bias, bigotry, and hate—allowing for the possibility that violence against lesbians is not biased, bigoted, or hateful, but merely natural.

Violence is not only exhibited in its recognition of categories of bias, but also in its very categorization of violence. Lesbians need to challenge the limiting of violence against us to legal crimes. From its inception, the lesbian and gay anti-violence movement, like the women against violence movement, has recognized that a violent act may not necessarily fit the elements of a criminal rule of law. The annual NGLTF Anti-Violence reports are thus broadly entitled Anti-Gay/Lesbian Violence, Victimization & Defamation and include incidents of violence that may not be criminal, such as “harassment.”

Given this gap between violence and crime, proposals for the creation of new crimes seek to expand the rule of law’s recognition and punishment of the violence against us. Such proposals, including the influential

Minnesota, Oregon, Illinois, Michigan, Georgia, Washington, New Jersey, Texas, Pennsylvania, and New York). For a survey of state statutes that include sexual orientation, as well as of those that do not, see supra note 41.

70. See, e.g., CONN. GEN. STAT. § 29-7m (1991) (providing in full that “[o]n and after July 1, 1988, the division of state police within the department of public safety shall monitor, record and classify all crimes committed in the state which are motivated by bigotry and bias”).

71. This does not mean that I necessarily endorse the category of “crime” or the use of the criminal justice system. As I have argued elsewhere, the use of the rule of law, including and especially the criminal rules of law, is problematic at best for lesbians, given our continuing history of being criminalized. See generally ROBSON, supra note 5. Further, given the violence inherent in the law, as discussed infra notes 122-42 and accompanying text, the use of the law is tantamount to the use of violence. For a feminist/Marxist perspective on using criminal sanctions to implement feminist reforms, see Laureen Snider, The Potential of the Criminal Justice System to Promote Feminist Concerns, 10 STUD. L. POL. & SOC’Y 143 (1990).

72. For example, under the subtitle “Harrassment/Intimidation” the 1990 NGLTF report included this anti-lesbian attack:

Salt Lake City, UT: On November 6, a woman walking with her son was pelted with food by four men in a passing car. One of the men yelled, “I bet you’re proud of your dyke mom, little boy!” When the car returned a short while later, one of the men got out, unzipped his pants, made obscene gestures, and said to the woman, “What you need is a real man.”

ANTI-GAY/LESBIAN VIOLENCE 1990, supra note 47, at 17. The report also includes a section entitled “Defamation,” listing some of the “expressions of anti-gay bigotry by public figures [that] were shamefully commonplace in 1990,” and noting that “although the offensive remarks quoted are legally protected speech, they nevertheless foster an atmosphere of intolerance and rejection that facilitates violence.” Id. at 18.

73. Oregon’s statute, recognized as the first minority intimidation law, was originally passed in 1981. OR. REV. STAT. § 166.155 (West Supp. 1990). The law includes sexual orientation as a protected category. For a critique of the law on the grounds of constitutionality and enforceability, see Helen Mazur-Hart, Comment, Racial and Religious Intimidation: An Analysis of Oregon’s 1981 Law, 18 WILLAMETTE L. REV. 197 (1982). That such laws are relatively new does not mean they are totally without precedent.
Anti-Defamation League of B’nai B’rith’s model legislation, often include a section creating or increasing civil liability for such acts, so that the victim could sue the perpetrator for monetary damages.\textsuperscript{74} Another strategy to expand recognition and punishment of the violence against lesbians has occurred in university policies. Because all of these efforts, whether they create crimes, civil causes of action, or university policies, often involve speech acts, they implicate First Amendment concerns. A University of Michigan policy that subjected students to discipline for acts of bias was successfully challenged in a federal trial court on First Amendment grounds.\textsuperscript{75}

\textsuperscript{74} The Anti-Discrimination League Model Legislation provides in Section 1 for the crime of institutional vandalism. Section 2 provides for crimes of intimidation:

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates section ____ of the Penal Code (insert criminal code provision for criminal trespass, criminal mischief, harassment, menacing, assault, and/or any other statutorily prescribed criminal conduct).

B. Intimidation is a ______ misdemeanor/felony (the degree of criminal liability should be made contingent upon the severity of the injury incurred or property lost or damaged).

Section 3 provides for civil actions:

A. Irrespective of any criminal prosecution or the result thereof, any person incurring injury to his person or damage or loss to his property as a result of conduct in violation of Sections 1 or 2 of this Act shall have a civil action to secure an injunction, damages, or other appropriate relief in law or in equity against any and all persons who have violated Sections 1 or 2 of this Act.

B. In any such action, whether a violation of section 1 or 2 of this Act has occurred shall be determined according to the burden of proof used in other civil actions for similar relief.

C. Upon prevailing in such civil action, the plaintiff may recover:

i. Both special and general damages including damages for emotional distress;

ii. Punitive damages; and/or

iii. Reasonable attorneys fees and costs.

Section 4 provides for statistics collection, including training for police officers in identifying, responding to, and reporting all bias offenses. ADL MODEL HATE CRIMES LEGISLATION § 1-4 (1988).

\textsuperscript{75} Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989). The University of Michigan policy provided that students were subject to discipline for:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that

a. Involves an express or implied threat to an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with any individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational
The relationship between hate crimes and the First Amendment is a volatile one. It has caused rifts within the lesbian legal community in the same way that the pornography debates cause rifts within the lesbian and feminist communities. Similarly, scholars and legal commentators are divided on the issue of whether the prohibition of manifestations of some phenomena variously known as bias, hate, violence, or intimidation, could be constitutional.

pursuits, employment, or participation in University sponsored extra-curricular activities.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

[a. b. and c. as above]

Id. at 856. The district judge characterized the challenge to this policy by a psychology student, represented by the American Civil Liberties Union, as a conflict between "the ideals of freedom and equality." Id. at 853. Given its own binary opposition, the court chose "freedom" of speech, upholding the policy only to the extent that it regulates physical acts.

76. I first heard the observation that the hate crime acts may be the sex wars of the 1990s expressed by lesbian attorney and scholar Mary Dunlap.

77. See generally J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 GEO. L. J. 399, 400 (1991) (concluding that state universities may lawfully bar racially abusive speech); Mark Cemerek & Susan Davies, Should Hate Speech Be Prohibited in Law Schools?, 20 SW. U. L. REV. 145, 146 (1991) (contending that law students should be prohibited "from expressing themselves in the language of racist, sexist, and anti-ethnic insults"); Anthony D'Amato, Harmful Speech and the Culture of Indeterminacy, 32 WM. & MARY L. REV. 329, 330 (1991) (arguing that "[t]he Constitution should not . . . and cannot, allow punishment for speaking words that themselves allegedly 'cause hurt'"); Mary E. Gale, Reimagining the First Amendment: Racist Speech and Equal Liberty, 65 ST. JOHN'S L. REV. 119, 128 (1991) (maintaining that protected expression must be distinguished from discriminatory harassment); Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2330, 2321 (1989) (calling for legal sanctions for racist speech); R. George Wright, Racist Speech and the First Amendment, 9 MISS. C. L. REV. 1, 4 (1988) (observing that "legal suppression of racist epithets is generally consistent with the free speech clause"); see also Symposium, Campus Hate Speech and the Constitution in the Aftermath of Doe v. University of Michigan, 37 WAYNE L. REV. 1309 (1991) (analyzing several articles expressing different interpretations of the constitutionality of regulating hate speech on college campuses).

Students also participated in this debate. See generally Chad Baruch, Note, Dangerous Liaisons: Campus Racial Harassment Policies, the First Amendment, and the Efficacy of Suppression, 11 WHITIER L. REV. 697, 697 (1990) (asserting that "racial harassment policies are unconstitutional and ineffective"); David McGowan & Rageh K. Tangri, Comment, A Libertarian Critique of University Restrictions of Offensive Speech, 79 CAL. L. REV. 825, 825 (1991) (claiming that "only regulations designed to prevent violence are both permissible under the Constitution and good policy for universities to pursue"); Deborah R. Schwartz, Note, A First Amendment Justification for Regulating Racist Speech on Campus, 40 CASE W. RES. L. REV. 733, 733 (1990) (suggesting that "while discussions of racial issues further the underlying philosophies of the First Amendment, racist epithets thwart the philosophical objectives that free expression was designed to protect"); Sean M. SeLegue, Comment, Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment, 79 CAL. L. REV. 919, 919 (1991) (proposing that state universities "enforce a personal civility zone protecting people in public forums from personally directed, harassing speech"); John T. Shapiro, Note, The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limits on Speech, 75 MINN. L. REV. 201, 205 (1990) (advocating the use of "existing hostile environment jurisprudence . . . [as] a guide for determining when a university's interest in maintaining a non-hostile environment overcomes the First Amendment presumption against restriction of free expression"); Kim M. Waterson, Note, The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech,
The United States Supreme Court, however, has quite recently resolved the debates about the constitutionality of the speech components of hate crimes, implicating the various types of hate crimes and perhaps even the statistics acts. In *R.A.V. v. St. Paul*, 78 the Court considered a challenge to the St. Paul Bias-Motivated Crime ordinance, which criminalized the placing of symbols, objects, or graffiti known to arouse “anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.”79 The petitioner, R.A.V., was a white juvenile charged under the ordinance for assembling a “crudely made cross” and then burning it “inside the fenced yard of a black family that lived across the street.”80 While progressive organizations divided on the constitutional issue raised by the charge under the ordinance,81 the Court did not. In a unanimous judgment, the Court held the ordinance unconstitutional on First Amendment grounds, reversing the Minnesota Supreme Court.82

In holding the ordinance constitutional, the state court had interpreted its prohibitions as applying only to “fighting words,”83 a category of

52 U. PIT. L. REV. 955, 956 (1991) (acknowledging that “not only is hate speech wrong, but . . . it can, perhaps, be regulated or prohibited by law in a principled fashion”).


79. *Id.* (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990)).

80. *Id.* at 2541. The facts provided by the Court’s opinion are extremely truncated and the concurring opinions barely refer to the facts at all. As reported by the *National Law Journal*, however, the cross was ignited by R.A.V. and several other white males “on the lawn of the only black family in the immediate neighborhood. The family included five children ranging in age from 6 months to 9 years.” Marcia Coyne, *Hate Crimes Scrutinized by Justices: Are Social Goals and the Constitution At Odds?*, NAT’L L. J., Dec. 2, 1991, at 1, 50.

81. Amicus curiae briefs were filed on behalf of the Petitioner, R.A.V., by: American Civil Liberties Union, Minnesota Civil Liberties Union, American Jewish Congress, Association of American Publishers, Freedom to Read Foundation, Patriot’s Defense Foundation, Inc., and the Center for Individual Rights.


83. See *R.A.V. v. St. Paul*, 112 S.Ct. at 2542 (stating that the United States Supreme Court is bound by a state court’s interpretation of one of its own, or one of its own subdivisions’, legislative enactments and citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 (1986) (deferring to Puerto Rico courts’ interpretations of Puerto Rico law); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982) (stating that the Supreme Court is bound by state courts’ interpretations); Terminello v. Chicago, 337 U.S. 1, 4 (1949) (observing that the state court’s interpretation of the ordinance in question
speech long considered not to raise any constitutional problems.\textsuperscript{84} Despite the Court's unanimity in judgment that this decision be reversed, the Justices vigorously disagreed about the correct foundation for their judgment.\textsuperscript{85} This disagreement centered on categories—and on the concept of category itself—\textsuperscript{86} in First Amendment jurisprudence.\textsuperscript{87}

Justice Scalia, writing for the Court, reinterpreted the so-called categorical approach, which views certain categories of speech as unprotected under the First Amendment. For Scalia, precedential statements that certain categories of expression, such as "fighting words," as well as obscenity and defamation, are not protected speech are not "literally true" and "must be taken in context."\textsuperscript{88} What such precedential statements really mean, according to Scalia, is that certain "areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely visible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."\textsuperscript{89} The distinction upon which Scalia

\begin{itemize}
\item \textsuperscript{84} This principle is articulated in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942):
\item \textsuperscript{85} Id. at 571-72 (quoted in R.A.V. v. St. Paul, 112 S.Ct. at 2551-52 (White, J., concurring), 2651 (Stevens, J., concurring)).
\item \textsuperscript{86} The unanimous decision generated four opinions: The opinion of the Court, written by Justice Scalia and joined by Justices Rehnquist, Kennedy, Souter, and Thomas; the concurring opinion of Justice White, joined by Justices Blackmun and O'Connor, as well as by Justice Stevens except as to Part I-A; a brief concurring opinion of Justice Blackmun; and a concurring opinion written by Justice Stevens, Part I of which was joined by Justices White and Blackmun.
\item \textsuperscript{89} Id.
\end{itemize}
insisted is captured in his analogy: the government may proscribe libel, but it may not make the further content-based discrimination of restricting only libel that is critical of the government. 90 Therefore, the power to prohibit speech on the basis of a general content category does not include the ability to further proscribe speech within that category on the basis of narrower content categories. 91

Justice White, disputing the logic of Scalia's formulation, noted:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently [by proscribing it only and not the remainder of the category] without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection. 92

The significance of White's formal logic is embedded in the existence of categories of speech; without a category of speech excludable from First Amendment protection, White's deductive display is irrelevant. Thus, White explicitly asserted that the "categorical approach is firmly entrenched in First Amendment jurisprudence" and that precedential categorical exclusions of speech were not contextual, but precise doctrinal truths. 93

The vitality of the categorical approach was not shared by Justice Stevens in his concurrence. Stevens' conclusion was that the categorical approach is ultimately unsound because it "sacrifices subtlety for clarity. . . . [T]he concept of 'categories' fits poorly with the complex reality of expression." 94 Stevens also criticized Scalia's approach on similar grounds, finding it an intolerable absolutism that required a government to proscribe either all speech or no speech within a particular category. 95 Presumably, Scalia's approach also fits poorly with the complex realities of expression.

The categorical problems of First Amendment jurisprudence inhere in categories such as "content," especially as related to "idea" and "message," that the Justices use to analyze the complex realities raised by the St. Paul ordinance. First Amendment categorical problems are displayed in almost every example the Justices analyzed. For instance, Scalia invoked the federal statute making it a crime to threaten the President with violence. 96 According to Scalia, this statute is

90. Id.
91. Id.
92. Id. at 2553 (White, J., concurring) (citations omitted).
93. Id. at 2552.
94. Id. at 2566 (Stevens, J., concurring).
95. Id. at 2562.
96. Id. at 2546 (discussing 18 U.S.C. § 871(a) (1988)).
constitutional because the categorical content of the speech is neutral enough to allow a distinction within the category. Specifically, "the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." The separate concurring opinions of both White and Stevens, however, argued that it is exactly this categorical reasoning that would render the St. Paul ordinance constitutional, assuming that one believes that "fighting words" have "special force" when applied to persons who have historically been subjected to violence. Perhaps it is this very assumption that divides the Justices. Justice White recognized the nation's "long and painful experience with discrimination," although it may be relevant to him as the author of Bowers v. Hardwick that this ordinance does not include "sexual orientation" as a category. Justice Stevens concluded that it is "eminently reasonable and realistic" to conclude that "the harms caused by racial, religious, and gender-based invective are qualitatively different from those caused by other fighting words." Scalia, however, emphasized that such speech is part of a "debate," also ironically reasoning that the ordinance's failure to include categories of speech addressing "political affiliation, union membership, or homosexuality" render it an imposition of "special prohibitions" on "disfavored subjects."

What would render the presidential threat statute unconstitutional for Scalia would be the criminalization of only those threats to the President "that mention his policy on inner cities." For Scalia, this content ("inner cities") is presumably unrelated to the rationale for the categorization ("threats"), just as the content of bias is presumably unrelated to the rationale for the categorization of "fighting words." The violence of bias and "fighting words" is not sufficiently connective for Scalia. Yet Scalia also argues that it is the very relatedness of the content to the rationale for the categorization that is determinative: "What makes the anger, fear, sense of dishonor, etc. produced by a violation of this ordinance distinct from the anger, fear, sense of dishonor, etc.

97. Id. at 2546 (citing Watts v. United States, 394 U.S. 705 (1969) (upholding 18 U.S.C. § 871(a) based upon the interest in protecting the President from harm)).
98. See id. at 2556, 2565.
99. Id. at 2556.
101. In Hardwick, Justice White concluded that "majority sentiments" about the morality of homosexuality supported the criminalization of homosexual sodomy. Id. at 196. In one of his most notorious statements, White noted that against the backdrop of what Justice Rehnquist called the "ancient roots" of proscriptions against sodomy, any claim that such sexuality was a fundamental right to be afforded protection was "at best, facetious." Id. at 194, 196.
103. Id. at 2547-48.
104. Id. at 2546.
105. For a discussion of harm, see id. at 2561 (Blackmun, J., concurring).
produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.” According to Scalia, the distinctive idea is a “message of hostility” based upon characteristics such as race, religion, or gender. Yet this idea is neither more distinctive nor less a message of hostility than the criminal statute prohibiting only threats made against the President of the United States.  

The incoherence of categories, however distinctive, like message and idea, infects not only the type of hate crime prohibition at issue in R.A.V. v. St. Paul, but also those that seek to punish crimes more severely if the crime is bias-motivated. These penalty enhancement statutes, like the statistics acts, concern only incidents that are encompassed by previously codified crimes. However, like the ordinance in R.A.V., the penalty enhancement statutes implicate First Amendment concerns because the element of bias is often provable through speech, and bias itself is a category of expression or thought. The danger is that there is increased punishment for words or thought.

This danger, however, is ever present in all categories of crimes. An element of a crime is often provable through speech, especially the element of intent which is itself a “thought.” Further, all crimes have content, ideology, and message. At the very least, the ideological content of any crime is the actor’s disregard for the law. This ideology is diffuse at best, yet it is no more diffuse than a distinctive ideology like “hostility.” Even “hostility” based upon certain characteristics, such as gender, is analogous to hostility toward the law. Our recognition of ideology is itself constructed by the category “ideology.”

106. Id. at 2548.

107. Such a statute embodies not only the “distinctive message of hostility” contained in a threat, but also communicates the concept that the President’s life is more worthwhile than the lives of the rest of us. For further discussion of the presidential threat statute, see Watts v. United States, 394 U.S. 705, 706 (1969) (reversing lower court’s decision that petitioner “knowingly and willfully” made a “threat to take the life of or to inflict bodily harm upon the President of the United States” in violation of 18 U.S.C. § 871 (a)).

108. See, e.g., supra note 74.

109. See generally KENT GREENAWALT, SPEECH, CRIME AND THE USE OF LANGUAGE (1989) (discussing crimes that have communication as an element and their various relationships to the First Amendment).

110. Categories of distinction such as motive, purpose, and intent lack a certain coherence, especially given arguments that motive is an impermissible consideration in assessing criminal responsibility, while purpose and intent are not. See James Morsch, The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation, 82 J. CRIM. L. & CRIMINOLOGY 659 (1991) (attempting to make rational distinctions, although admitting that courts and commentators often confuse motive with the distinct concepts of intent, specific intent, purpose, and reason).

111. Given the speech components of many elements of crimes, discussed in GREENAWALT, supra note 109, attempts to distinguish the speech components of hate crimes from other crimes are common. For example, one commentator criticizes the ADL Model Statute, supra note 74, because the “distinction between the use of the actor’s words as the sole—and perhaps only possible—element of an offense and
For lesbians, theorizing violence should not be grounded on First Amendment categories of speech, or even upon the category of speech itself. The First Amendment is rooted in European notions of liberalism, including individualism and private property. Its value to lesbianism must be decided by us, not assumed by us. Our thinking in this area is domesticated by the powerful propaganda that enshrines free speech as one of the most cherished liberties. Yet "lesbian" is a category their use as [merely an] element of an offense is virtually nonexistent:

This is not the case in other contexts in which speech is used as evidence of an element of an offense. For example, introduction of evidence that a defendant used a note in a bank robbery or divulged information in an antitrust violation would not infringe First Amendment rights. In those cases, there is no likelihood of confusing the speech itself with the elements of the offenses evidenced thereby. There is no risk of chilling protected thought, speech, or association. The illegal conduct consists of a verbal act, but the actor's beliefs, opinions, and ideas are not at issue. By contrast, the ADL model statute is directed specifically toward the harboring and expression of bigoted sentiments; without them, there is no violation of that statute.


Yet a distinction between a note or statement that says "Give me the money or I'll kill you" and one that says "Death to dykes" is not necessarily obvious. Neither statement is an expression of an idea, yet both are expressions of underlying ideological positions. The statement, "Give me the money or I'll kill you," is not an idea; it is a command. Nevertheless, it expresses underlying ideas: Violence is an appropriate way to obtain money, people (like the bankteller) should generally capitulate to threats of death, and it is justifiable to rob a bank. Similarly, the statement, "Death to dykes," is not an idea; it is a declaration. It does, however, express underlying ideas: Lesbians do not deserve to live; lesbians are less valuable members of society than nonlesbians. In the penalty enhancement statutes, neither of these underlying ideas alone is sufficient to invoke criminal sanctions; they must be accompanied by some act that manifests the ideology and otherwise violates a criminal statute. The difference is that we generally recognize the ideological content of expressions like "Death to dykes," but not of expressions such as "Give me the money or I'll kill you."

112. This is best expressed in John Stuart Mill, On Liberty (Elizabeth Rapaport ed., Hackett Publ. Co. 1978). After the introductory chapter, Mill's first chapter is entitled "Of the Liberty of Thought and Discussion," while the next is "Of Individuality, As One of the Elements of Well-Being." There are many explicit and implicit links between these two themes of freedom of speech and individualism. For example Mill writes, "[I]f all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind." Id. at 16.

113. See William H. Riker, Civil Rights and Property Rights, in Liberty, Property and the Future of Constitutional Development 49, 53-55 (Ellen F. Paul & Howard Dickman eds., 1990) (linking the origin of the right of free speech to the right of property); see generally Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism (1990) (arguing that our political framework and understanding of politics are manifested in the Constitution in its focus on private property and on its goal of protecting unequal property). The property base upon which free speech rests is also evident in Justice Holmes' famous statement that freedom of speech is justified by the necessity for free trade in the marketplace of ideas. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See also Paul Chevigny, Philosophy of Language and Free Expression, 55 N.Y.U. L. Rev. 157, 160 n.27 (1980) ("The marketplace metaphor as a rationale for the protection of speech is not original with Holmes but long antedates the framing of the First Amendment.").

that is often excluded from free speech, not only in the unprotected category of obscenity,\footnote{115. See supra note 33.} but also when it is used to modify another component of speech that is a piece of private property,\footnote{116. For example, the United States Supreme Court has upheld an injunction against the use of the word “Olympics” in conjunction with the “Gay Olympics,” holding that the United States Olympic Committee (USOC) “owned” the word “Olympic” pursuant to 36 U.S.C. § 380. San Francisco Arts and Athletics v. United States Olympic Comm., 483 U.S. 522 (1987). Despite the Court’s ruling that the federal statute invested the USOC with more rights of ownership in the word than an ordinary trademark, the Court found that the USOC was not even a quasi-government agency. Thus, neither the First Amendment nor any other constitutional provision applied. The USOC’s decision to selectively enforce its ownership of the word “Olympics” was, therefore, insulated from review. The USOC may seek an injunction against the use of “olympics” when joined with “gay,” despite its affirmative grant of permission to other groups such as the “Special Olympics” or the “Explorer Olympics,” and its nonaction to prohibit other sorts of Olympics such as the “Crab-racing Olympics.” Coincidentally, as I am writing, I am listening to the “Modern Rock Olympics” on a New York radio station, wondering whether groups such as Nirvana, U-2, or Erasure will win the gold medal, but not wondering whether the USOC will seek an injunction. For further discussion of the “Gay Olympics” case, see Kelley Brownie, Note, A Sad Time for the Gay Olympics: SFAA v. USOC, 56 U. Cin. L. Rev. 1487 (1988).} or when it is unilaterally politicized.\footnote{117. Lesbians are quintessentially “politically correct,” a phrase current in lesbian communities of the early 1980s and now used to disparage all lesbians as “thought police” who are intolerant of free speech whenever they speak in protest. See generally Marilyn Frye, Getting It Right, 17 SIGNS 781 (1992) (remembering when the term “politically correct” could be used as a term of sincere aspiration and seeking to revitalize that aspiration). For an excellent article dissecting the charges of “political correctness” made notorious by Dinesh D’Souza in his book Illiberal Education, as applied to the legal academy, see Mark Tushnet, Political Correctness, the Law, and the Legal Academy, 4 YALE J. & HUMAN. 127 (1992).} Certainly, lesbians and others fighting against the repression of lesbian speech often rely upon the First Amendment, as in the recent National Endowment for the Arts (NEA) funding controversies.\footnote{118. In the recent NEA controversy, Congress passed a law forbidding arts grants to be used to “promote, disseminate or produce” art that included depictions of “home-eroticism” or that was deemed “obscene.” Act of Oct. 23, 1989, Pub. L. No. 101-121, tit. III art. 304(a)-(c), 103 Stat. 744. This provision, known as the Helms Amendment, after its sponsor Senator Jesse Helms, was subsequently replaced by an amendment that provided that “artistic excellence and artistic merit are the criteria by which applications are judged taking into consideration general standards of decency” and that “obscenity is without artistic merit, is not protected speech, and shall not be funded.” Pub. L. No. 101-512, § 103(b), 104 Stat. 1915, 1963-66 (codified at 20 USC § 954(d)(1), (2) (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’Neill, Artists, Grants and Rights: The NEA Controversy Revisited, 9 N.Y.L. SCH. J. HUM. RTS. 85 (1991); Senator Jesse Helms, 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 Foundation v. Frohnmayer, 754 F. Supp. 774 (C.D. Ca. 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 the NEA’s partial funding of the “anti-Christian” production Tongues of Flame on grounds that such funding violated the First Amendment’s establishment clause). Despite compromises and the resignation of John Frohnmayer as the NEA’s director, the NEA controversy continues. The new director of the NEA, Anne-Imelda Radice, has stated that the NEA will continue to examine the sexual content of art projects, and that she will veto funding for any projects with “difficult subject matter” or “sexually explicit matter.” Although a lesbian herself, Radice nevertheless}
determinative of our theories.119

An act of violence—"burning a cross in someone’s front yard"—is
within the category of the reprehensible according to Justice Scalia.120
Nevertheless, Scalia, joined by a majority of the Justices of the Supreme
Court, concluded that this reprehensible burning cross should be addressed
"without adding the First Amendment to the fire."121 The First
Amendment, however, may be as incendiary a fuel for lesbian theory as
lesbian bodies once were for the fires of legal executions.

C. The Category of LAW

The law’s arbitration of violent interactions between individuals
exhibits the law’s own violence.122 The late legal scholar Robert Cover
phrased the law’s inherent violence most graphically, reminding us that we
do not read court opinions because they are aesthetically pleasing or
intellectually stimulating, but because they are backed by soldiers.123 In
Cover’s uncompromising perception, the law occurs "in a field of pain and
death."124 Our “legal world” is “built only to the extent that there are
commitments that place bodies on the line.”125 The political world of
nation-states also places bodies on the line, although philosophers differ
concerning the primary violence of political organization.126 The law,

disapproves of homo-erotic art and is supported by Senator Jesse Helms. See Tommi A. Mecca, A Lesbian
Even Bush and Helms Could Love, S.F. BAY TIMES, June 4, 1992, at 4; Maer Roshan, Anne Radice and
the Politics of Appeasement, QW, June 7, 1992, at 23.
119. Cf. GAYATRI C. SPIVAK, Subaltern Studies: Deconstructing Historiography, in IN OTHER
WORLDS: ESSAYS IN CULTURAL POLITICS 197 (1988) (discussing essentialist strategies and historiography
in theories of India and colonialism).
reference “African-American,” serves to obliterate history and places the speech in a noncontextual
category.
121. Id.
122. A distinct but related concept to the law’s violence is the law’s authoritarianism. For an
123. As Robert Post recalls:

I vividly remember Robert Cover at a conference remarking on the question of why legal
scholars pondered so carefully the words of then-Chief Justice Burger. It was not, said
Cover, because the Chief Justice was so deep a thinker or so talented a writer, but because
his judgments were enforced by the United States Army. His words were written, so to
speak, in blood.

Robert Post, Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel, 77 CAL.
L. REV. 553, 559-60 (1989).
125. Id. at 1605.
126. This is expressed in political theories variously denominated as “consent,” “contract,” or
"obligation" theory. Such theories address the possibility of a foundation—other than violence or
force—for the state’s power. Classical theorists such as Hume, Locke, and Rousseau considered whether
nation-states exercised legitimate authority based upon the consent of those against whom such authority
was exercised. See generally DAVID HUME, POLITICAL ESSAYS (Charles W. Hendel ed., 1948); JOHN
however, is generally considered to be the instrument of the state that (violently) maintains state power. Relying on Cover, other scholars conclude that “law is a world of violence, death, pain, and suffering” which cannot be “understood apart from the violence it deals,” or, more optimistically, define law as “two parts violence and three parts hope.” Distinct from this rapidly developing Coverian tradition, however, scholars as different as Jacques Derrida, the paragon of deconstruction, and Richard Posner, the philosopher of law and economics, agree that the law is based on force and coercion.

The law manifests its violence in concrete terms: “A judge articulates her understanding of a text, and as a result somebody loses his freedom, his property, his children.” Lesbians experience these concrete manifestations of violence daily—we are more likely to be imprisoned than heterosexual women, we lose property in courts that do not recognize our relationships, and we have our children taken away. It is not only that the law fails to objectively justify such concrete manifestations of violence; it is that the law actively supports such concrete violations.


130. Jacques Derrida stated that “there is no such thing as law (droit) that doesn’t imply in itself, a priori, in the analytic structure of its concept, the possibility of being ‘enforced,’ applied by force,” Derrida, supra note 14, at 925, while Posner observed, “Law is coercion rather than persuasion,” RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 249 (1988).

131. Cover, supra note 124, at 1601. Cover’s use of gendered pronouns in this instance obscures the political and legal reality that male judges’ understanding of texts operates to deprive lesbians and other women of freedom, property, and children.

132. See Robert Leger, Lesbianism Among Women Prisoners: Participants and Nonparticipants, 14 CRIM. JUST. AND BEHAV. 448, 463 (1987) (concluding in a sociological study that compared with heterosexual women, lesbians “had longer sentences, were arrested at an earlier age, were more likely to have been previously confined and had served more time”).

133. See, e.g., Jeffrey Sherman, Undue Influence and the Homosexual Testator, 42 U. PITT. L. REV. 225 (1981) (concluding that some evidence suggests that courts are more willing to nullify wills in which a testator bequeaths his estate to a homosexual lover than wills made by a heterosexual testator, leaving an estate to a heterosexual lover).

134. See infra notes 146-156 and accompanying text.

135. The law tries to justify its violence with words, and yet because words cannot adequately capture the pain of the law’s violence, law is bound to fail at verbal justification. The more the law is pushed in the direction of objectification, the more removed it becomes from the reality of pain.
through the symbolic violence of its discourse. As feminist legal theorist Rosemary Coombe notes: "Legal interpretation is not something joined with the practice of violent domination, but an example of that practice; in other words, the process of legal interpretation can itself be seen as a practice of political violence, not simply a practice which has political violence as a likely consequence."136  

Such violence is not only exemplified by the violent expressions contained in the Hate Crime Statistics Act, but in the law's insistence that it control all categories, not only the category "lesbian," but all categories of relation among lesbians. For example, the law has uniformly denied lesbians—and gay men—the right to marry based upon its interpretation of the legal category of marriage.137 That the category of marriage may itself be an expression of legal violence138 does not cancel out the violence of its denial to lesbians.139 Further, the remaining categories of relation available to lesbians are also violent. Contract, for example, has been posited as an acceptable legal category and many lesbian advisors counsel lesbians to adopt relationship contracts, yet contracts are also rooted in patriarchal violence.140 As Derrida succinctly states, "there is no contract that does not have violence as both an origin and an outcome."141 Even relatively benign legal categories without a history of violence, such as "attorney in fact" or "beneficiary," do violence to

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136. Rosemary Coombe, "Same As It Ever Was": Rethinking the Politics of Legal Interpretation, 34 MCGILL L.J. 603, 649 (1989). Coombe relies upon the work of Pierre Bourdieu, whose theoretical framework enables one to "analy[s]e the ways in which symbolic practices exercise their own type of violence, a ['gentle[,] invisible form of violence'] which is never recognized as such, or which is recognized only by concealing the mechanisms upon which it depends." Id. at 650 (quoting John B. Thomson, Symbolic Violence: Language and Power in the Writings of Pierre Bourdieu, in STUDIES IN THE THEORY OF IDEOLOGY 43 (1984)).  
137. See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (denying a marriage license to two women because what they proposed was not a legal marriage); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (explaining that appellants were not denied a marriage license because of their sex, but because of the nature of the marriage itself).  
138. For an argument that marriage is a category of violence against women "interwoven with both the development and the perpetuation of patriarchy and women's status within patriarchy," see Ruthann Robson & S.E. Valentine, Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory, 63 TEMPLE L. REV. 511, 536-38 (1990).  
139. Further, some argue that by entering the institution of marriage, lesbians and gay men can transform the institution for the better. See, e.g., 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, 87 (1991) (hypothesizing that liberalizing the boundaries of legal marriage would lead to legal recognition of nontraditional family arrangements); Nan D. Hunter, Marriage, Law, and Gender: A Feminist Inquiry, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 9 (1991) (arguing that same-sex marriages would recast social constructs of male and female difference theory).  
140. For sources advising lesbians to enter into relationship contracts, see Robson & Valentine, supra note 138, at 521 n.65. For an argument that contract ideology can be destructive of lesbian relationships, see id. at 521-28.  
141. Derrida, supra note 14, at 1015.
lesbians because they compress lesbian relationships into legal categories rather than lesbian ones.

The law's control of categories produces an insidious violence I call the domestication of lesbian existence. Domestication is similar to other political processes that have been named colonization and imperialism. Yet both imperialism and colonization describe concrete historical processes that have resulted in slavery, death, and destruction, and I have come to prefer the term domestication to connote the law's hegemony over lesbian survival. Domestication is connotatively gendered. It implies the relegation of women to the domestic sphere, a private place that can facilitate domination and inhibit collective action. It also implies the circumscribing of one's potential to the service of another, as when animals are domesticated for human use.

Domestication also describes a process of substituting one way of thinking for another. Domestication has occurred when the views of the dominant culture, in this case the legal culture, are so internalized that they are considered to be common sense. The barbed wire enclosures seem to exist for our protection rather than our restriction. We attempt to argue ourselves into legal categories so that we can be protected, not noticing how such categories restrict our lesbianism.142

Domestication operates powerfully not only against the lesbians who are directly at risk of losing their freedom, property, or children because they have become actors on law's field of "pain and death,"143 but also when legal categories limit nonlegal choices.144 However, the most powerful violence of domestication inheres in its mundane frequency.

There are many days that even lesbians working within law's "field of pain and death" can forget about the law's violence, or believe it is abstract, or believe it does not apply to the particularized lesbian each of us is, or believe it is being relegated to history. I am busy making preparations to board a plane from New York, where I teach at a

142. Yet domestication also has within it the idea of its opposite. To have been domesticated, one must have once existed wild, and there is the possibility of a feral future. To be feral is to have survived domestication and to have been transformed into an untamed state. Post-domestication lesbian existence is one goal of a lesbian legal theory: if we can confront the ways in which we are domesticated, we can begin to challenge our domestication. Despite the domestication metaphor, I am not conceptualizing lesbians as women who have been trapped in little houses on the prairie by mean men or as wild animals who have been harnessed to plow the soybean fields. While these are tempting images that foster an idealized version of our innocence and victimization, such images conflict with my experience. To use the postmodern phrase, we are "always already" domesticated. We are born and socialized with reference to the dominant culture. However, I do not believe that we are necessarily so constricted. See generally, ROBSON, supra note 5.

143. Cover, supra note 124, at 1601.
144. The most compelling example of this that I have witnessed is a lesbian's articulation of the choice to have her child call her "mother" because of the law's imposition of legal responsibility upon her as a "mother." For a discussion of this incident, see ROBSON, supra note 5, at 140.
progressive law school as a lesbian whose scholarship is devoted to lesbian subjects. I am going to a conference at the University of Texas to speak on lesbians and violence. I am making the final edits to an piece on lesbian legal theory. Two of my research assistants, both lesbian law students, give me some legal research on lesbian issues from their weekly computerized search. One case in particular, one of them says to me, is worth reading. "What does it say?" I ask. She laughs, but her eyes glint somewhere between hard and hurt. "You'll have to read it yourself," she says and walks out of my office without saying goodbye. The other one follows.\footnote{145}

The case is \textit{Chicoine v. Chicoine}.\footnote{146} The court is the supreme court of South Dakota. The year is 1992. The case is domestic, an appeal of an award of restricted visitation rights to a lesbian mother. There is a dissenting and concurring opinion which quotes \textit{Leviticus}\footnote{147} and the \textit{Egyptian Book of the Dead}: an opinion reeking with violence.\footnote{148} There is a majority opinion which stuns the reader with its violent reversal of the trial court: the overnight unsupervised visitation of the children with the mother is so liberal that it is held to be an abuse of discretion, despite the condition that "no unrelated female or homosexual male could be present during the children's visit."\footnote{149}

The South Dakota Supreme Court enumerates the basis of its opinion that unsupervised overnight restricted visitation every other weekend was too liberal for Lisa Chicoine and her two children, James, age six, and Tyler, age five, with revelations from the record.\footnote{150} These chosen
\begin{quote}
145. Without the specific work of my research assistants, my own research would never be current. More importantly, however, my work benefits from their insights, determination, and imagination.
147. For an enlightening discussion of the legacy of \textit{Leviticus}, including parallels between the biblical passages and empirical data on contemporary anti-lesbian/gay violence, see \textit{Comstock}, \textit{supra} note 4, at 120-37.
148. Justice Henderson of the South Dakota Supreme Court wrote:

Lesbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see \textit{Leviticus} 18:22), she should be totally stopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. . . . There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan "Egyptian Book of the Dead" bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement. This case is in a divorce setting. If it were under the juvenile code of this state, rights to a child could be \textit{totally terminated}, through a petition, by reason of "environment . . . injurious to the child's welfare" imposed by parents upon a child. [citation omitted].
\end{quote}

\footnote{149} \textit{Id.} at 893.
\footnote{150}
revelations reveal more about the court’s violence toward lesbianism than about Lisa Chicoine’s mothering. For example, the first listed revelation finds fault with the mother for being a victim of child sexual abuse—a violence from which the law apparently did not protect her. The court describes the violence of her own sexual abuse as her “psychological problem.” Another psychological problem is her “active homosexual relationships with several female partners.” The violence of the clinical word “homosexual” is inflamed with other sexual transgressions such as “active” and “several” partners. Thus, Lisa Chicoine is exiled even from the “good homosexual” category that some courts have employed to shield monogamous and discreet “homosexuals” from the law’s violence.151

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The record in this case reveals:

1. Lisa has experienced a myriad of psychological problems including an eating disorder, depression, suicidal threats, sexual abuse as a child and active homosexual relationships with several female partners.

2. In the last two years of marriage, Lisa was absent from the home frequently.

3. Lisa openly admits that she is an active homosexual and that she had many sexual encounters with female partners during her marriage.

4. Lisa and the children moved out of the marital home and into Lisa’s lover’s home.

5. Lisa and her lover were affectionate toward each other in front of the children, caressing, kissing and saying “I love you.”

6. The older son reacted by saying “Mommy don’t touch,” or “Don’t!” when Lisa and her lover held hands.

7. Lisa and her lover were in an intimate position in bed when the oldest son entered the room. Lisa told her son to go back to bed and when questioned by her son why she was lying on top of the other woman, Lisa told him she was telling secrets. Lisa did not stop the sexual act to comfort her son.

8. On at least two occasions, Lisa took the children to gay bars in Sioux City when she was out looking for her lover.

9. On some occasions when the children were not present, Lisa publicly danced with females, kissing and caressing them on the dance floor.

10. On some occasions, James and Tyler were allowed to get in bed to sleep with Lisa and her lover. Sometimes Lisa would be unclothed.

11. Lisa and her lover discussed getting married and raising the children in a homosexual marriage.

12. Lisa admits that it is inappropriate to hold hands, kiss, and show affection to her lesbian partners in front of her children.

13. Lisa has openly exposed her homosexual feelings in front of her sons on more than one occasion.

14. Dr. Arbis testified that “unless Lisa blatantly and consciously encourages them [the children] to engage in sexual behavior, or blatantly exhibits her sexual behavior in front of them, they will not receive any adverse developmental messages in terms of their own sexual preferences.”

Id. at 893-94.

151. For example, in M.A.B. v. R.B., 510 N.Y.S.2d 960 (N.Y. Sup. Ct. 1986), a trial court modified a custody decree in favor of a “homosexual” father, repeatedly using judgments like “discreet,” “not flamboyant,” and “decorous, not blatant.” Id. at 963. The court also noted the father’s relationship with a [sole] partner as “stable and of eight years duration.” Id. at 966.
Other enumerated revelations from the court also make clear Lisa Chicoine's exile from the "good homosexual" category; Not only has she demonstrated affection to her lover in front of the children, but the record also states that "Lisa and her lover were affectionate toward each other in front of the children, caressing, and kissing and saying 'I love you.'" 152

The court also finds noteworthy Lisa's audacity in comparing homosexuality to heterosexuality: "Lisa and her lover discussed getting married and raising the children in a homosexual marriage;" as well as her "admission" of her misconduct: "Lisa admits that it is inappropriate to hold hands, kiss, and show affection to her lesbian partners in front of her children." The court's revelations from the record comprise a mirror of wrongdoing. A lesbian mother cannot avail herself of attempts at respectability without being ludicrous and even her attempts to conform her conscience to the dictates of the law are rendered evidence against her.

The standard by which the court measured Lisa Chicoine's capacity to visit her children is the best interests of the children.153 This seemingly innocuous standard has within it a violence toward lesbianism, and toward any sexuality other than heterosexuality. The danger of Lisa Chicoine is that she might communicate any "adverse developmental messages in terms of [the children's] own sexual[ity]."154 Adverse developmental messages are any messages that interfere with heterosexuality. Almost all custody cases involving lesbian or gay parents rest on the foundation that it is not in the best interests of any child to mature into anything other than a heterosexual.155


153. Chicoine v. Chicoine, 479 N.W.2d at 894.

154. Id.

155. This assumption has marked the litigation and supporting social science evidence submitted on behalf of lesbian (and gay) parents. As noted by Nancy Polikoff in her discussion about the education of judges:

Lawyers representing lesbian and gay parents often call witnesses to educate judges; these witnesses are primarily mental health professionals who testify that homosexuality is not a mental illness, that the children will not be harmed by living with a lesbian or gay parent, that the children will not become lesbian or gay as a result of living with a lesbian or gay parent, that lesbian and gay people do not have a propensity to molest children, and so on.

Nancy D. Polikoff, Educating Judges About Lesbian and Gay Parenting: A Simulation, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 173, 175 (1991) (emphasis added). Polikoff also cites to an amicus curiae brief filed by Lambda Legal Defense and Education Fund, Inc. on behalf of a gay man seeking to adopt a two-year-old girl. The brief included a review of the psychological literature supporting the conclusion that "the father's sexual orientation would not affect the child's sexual orientation." Id. at 175 n.4. The psychological expert witness on behalf of the lesbian mother testified that when asked whether she had a preference about the children's sexual orientation, the mother replied that "her choice was that both be heterosexual since it would be easier on them in their lives." Id. at 217. The future sexual orientation of the children as a component of their best interests may not always be explicitly stated.
Lisa Chicoine’s case results in her being denied the company of her children. It is a daily violence that many lesbian mothers have endured. The violent message of Lisa Chicoine’s case is that lesbians are not sanctioned as mothers. The violence of this message is shielded from the lesbian law students; they live, after all, in New York, not South Dakota. Yet they have also read the same message in the more liberal cases in the more liberal states: lesbians can only be mothers if they are very, very good girls.156

The violence of legal discourse about lesbian mothers, however, is not limited to lesbian motherhood. The violence of cases such as Chicoine is that lesbians, whether we are mothers or not, must be eradicated. What lesbian law students understand when they read cases like Chicoine, and even liberal legal discourse, is that it is not in the best interest of anyone to be a lesbian. What lesbians know is that we are the children who did not mature into what the law mandated for us.

III. On Arson

We are not to be encouraged. We are not to be allowed to mature into ourselves. Our legal history is a history of fire. We have been burned at the stake in countless countries, in uncounted incidents, with the sanction of the law.157 Given the law’s violence toward lesbians, it is tempting to relegate lesbians to the status of victims. This victim status might entitle us to glorification,158 but I am interested in our survival.159

Standards such as whether the parent’s sexuality “adversely affects” or “harms” a child often implicitly includes presumptions of adversity and harm from any sexuality other than heterosexuality.

156. This is the rule of the exemplary lesbian. See, e.g., Doe v. Doe, 284 S.E.2d 799, 806 (Va. 1981) (reversing lower court’s approval of adoption by child’s stepmother on ground that the natural mother’s lesbian relationship alone does not outweigh clear and convincing evidence that she is a fit parent “in every other respect”). Cf. White v. Thompson, 569 So. 2d 1181, 1184 (Miss. 1991) (affirming removal of children from their mother’s custody to that of their paternal grandparents on the ground that she was an unfit parent “morally or otherwise” due to her financial situation, past adulterous behavior, marijuana use, and her lesbian relationship). For further discussion, see Robson & Valentine, supra note 138.

157. Perhaps the most well documented case is that of Margaretha Linck, whose method of execution is unclear; the opinion devotes considerable energy to deciding whether burning or other methods are most appropriate, but is inconclusive. See A Lesbian Execution in Germany, 1721: The Trial Records, 6 J. HOMOSEXUALITY 27 (Brigette Eriksson trans., 1980). For a discussion of other lesbian executions by burning, including a discussion of the relationships between lesbianism and the European witch burnings, see Robson, supra note 22; Robson, supra note 5, at 39-40.

158. Not only does the sanctification of the victim mark much religious ideology, but the victim also has a privileged place in the legal system. See generally ANDREW J. MCKENNA, VIOLENCE AND DIFFERENCE: GIRARD, DERRIDA, AND DECONSTRUCTION 76, 78 (1991) (discussing the symbolism victims hold for the general public, especially in the context of sacred rituals). In postmodernist theory, the victim also has a privileged position, especially in the work of Rene Girard. As expressed by McKenna, writing about Girard’s work in conjunction with the work of Derrida:

The victim is the matrix of difference and the origin of differance, the play of differences:
Violence mediates the relationship between lesbians and law not only because the law is inherently violent and expresses some of that violence toward lesbianism, but also because lesbianism is inherently violent and expresses some of that violence toward the legal regime. Lesbianism exists as a violent rupture in the law’s enforcement of heterosexual hegemony. Lesbianism expresses its violence whenever it exists, even when this existence is not in direct resistance to the law’s violence.

Interrogating whether lesbian violence or legal violence is originary is akin to asking the chicken and egg question: neither is very productive. Rather than being interested in whether legal violence mandated the violent resistance of lesbianism or whether lesbian violence produced the violent repression of the law, I am more interested in the survival and perpetuation of lesbianism. It is the violence of lesbianism that is responsible for its survival.

Throughout this Article, the categories of law, violence, and lesbian have been interrogated and related, but essentially undefined. Law as a category should probably best be left undefined in a law review article. “Lesbian” as a category is barely definable against various political backdrops: a postmodernist influenced “queer theory” that regards all categories as suspect, suggestions that to define lesbian is to succumb

between signer and signified, sacred and profane, violence and peace, and chaos and community, whose presence to itself as cum-unus is mediated by the designation of the victim and the deferrals of violence that stem from that originary difference.


159. By survival I mean two things. First, I mean the survival of individual lesbians on a daily basis—a survival that depends upon access to the necessities of life such as food, shelter, work, safety, and love. Second, I mean our survival as lesbians—a survival that depends upon our freedom not to barter our sexualities, philosophies, cultures, identities, and histories in order to have access to the first type of survival.

160. I thus agree with Judith Roof, who writes about originary pursuits in the context of lesbian sexuality, that:

Concepts of origins appearing to embody the desirable attributes of a reformed culture are lures that distinguish an originary cause, then confuse that cause with its effects. In this focus on cause/effect, a consciousness of desire as a driving force tends to be subordinated to the seductive mirage of the impossible but ideal object . . . . Origins are alluring because their imagined pattern of joiner and multiplicity opposes the alienating singularity that enables the operation of binary oppositions—because they promise both fullness and the power to change all representations beyond the origin itself.


161. It is important to remember that any definition of lesbian, like the definition of any term or category, is a political act and not simply a “factual dispute.” In concrete terms, for lesbians the debate may have “political implications about the best way to conceive lesbianism in order to advance the cause of lesbian/gay liberation and feminism.” Ann Ferguson, Is There a Lesbian Culture?, in LESBIAN PHILOSOPHIES AND CULTURES 63, 69 (Jeffner Allen ed., 1990).

162. See, e.g., Judith Butler, IMITATION AND GENDER INSUBORDINATION, in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 13, 14 (Diana Fuss ed., 1991) (“To install myself within the terms of an identity category [like lesbian] would be to turn against the sexuality that the category purports to
to heterosexism,\textsuperscript{163} and a history of silence, racism, and classism.\textsuperscript{164} An attempt to define violence, however, might be useful, especially given the contradictory definitions of violence in the legal and philosophical scholarship.\textsuperscript{165} Violence as a category might be capable of definition either in the classical sense of a logical system of shared properties, or in the cognitive sense as prototypically generated.\textsuperscript{166} However, violence itself is often considered illogical and noncognitive; it is outside the realm of language so necessary for the act of definition. "Violence is the supreme gesture of closure toward the other. It constitutes a world of unreason where discourse is no longer possible."\textsuperscript{167} Similarly, lesbianism may also be illogical and noncognitive; it may be a gesture of closure toward the other that is male. Lesbianism may be a world of unreason where discourse with the other is closed to the extent that the discourse is a dialogic process about lesbianism.\textsuperscript{168} But whether
describe.").

\textsuperscript{163} The undesirability of defining lesbian is expressed by one lesbian philosopher in her path-breaking work \textit{Lesbian Ethics}:

In naming this work 'lesbian,' I invoke a lesbian context. And for this reason, I choose not to define the term. To define 'lesbian' is, in my opinion, to succumb to a context of heterosexualism. No one ever feels compelled to explain or define what they perceive as the norm. If we define 'lesbianism,' we invoke a context in which it is not the norm.

Sarah L. Hoagland, \textit{Lesbian Ethics: Toward New Value} 8 (1988). Hoagland also notes that defining "lesbian" may also come from a desire to determine "who gets to count" so that we can "defend our borders from invasion," but that even if we could have a clearly articulated definition of lesbianism, "it would not serve us in the way we have imagined." \textit{Id.}

\textsuperscript{164} See supra notes 14, 17 and accompanying text.


\textsuperscript{166} See supra notes 10, 11 and accompanying text (discussing the classical and cognitive theories of categorization).


\textsuperscript{168} Discourse, reason, and the dialogic process are inextricably related, and are opposed to irrationality and violence, especially in liberal conceptions of law:

In pursuit of the discourse ideal, liberalism affirms the right of each of us to voice interests or claims of entitlement in the face of the other's, or the state's, power. This is a right not only to speak, but also to be heard. For true dialogue can only proceed respectfully, with each party intent on both understanding and being understood by the other. Accordingly, persuasion (when it does not deceive) is the hallmark of the dialogic process.


Perhaps more interesting, however, is the conflict between Sherwin's, \textit{supra} note 167, conceptual
lesbianism is cognitive, linguifiable, unreasonable, or closed, I suggest that lesbianism must be non-negotiable. This non-negotiability may be enforced with violence or not, but it is itself violent.

Confronted with our own violence, the learned (domesticated?) response may be to recoil. This response is specifically enforced by rules of law that make it criminal to advocate violence against the (male) rule of law. Our negative response to violence may also be derived from our experiences as victims and witnesses to male violence. Thus, any new perspective on violence that urges lesbians to adopt violence may be illegal and appear to mimic the worst of male values. However, there is a helpful distinction between “acceptable and unacceptable violence,” a distinction between a violence directed at emancipatory change and a violence directed at conservative order.

opposition of persuasion and violence and the theories of lesbian philosopher Joyce Treblicot, who posits a “dyke method” of nonpersuasion based upon the violent coercion inherent in persuasion, even through dialogic processes or discourse. See Joyce Treblicot, Dyke Methods, in Lesbian Philosophies and Cultures 17 (Jeffuer Allen ed., 1990).


170. See, e.g., 18 U.S.C. § 2385 (1988), providing:

    Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

    Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

    Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof--

    Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

    If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

    As used in this section, the terms “organizes” and “organize”, with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons.


172. This distinction is loosely based on Jacques Derrida’s reading of Walter Benjamin’s Critique of Violence, in which Derrida distinguishes between the “founding violence” of law, which Benjamin terms “mythic,” the violence that conserves, maintains and enforces law, and the “annihilating violence of destructive law,” which Benjamin terms “divine.” Derrida, supra note 14, at 981.
This distinction is displayed in the physical world in the element of fire. Like violence, fire can be both good and bad, helpful or harmful. One's body remembers fire that has warmed and flushed the skin as well as fire that has burned and curled the flesh. Fire is an image that recurs in lesbian theory and poetics, a metaphor to describe a lesbian as a "woman ablaze who is reborn from the essential of what she knows (she) is." Fire is also an essential element that occurs in lesbian mythology, a connection between current colloquialisms and ancient rites. Fire is prominent in lesbian-feminist philosophizing, an image that permeates lesbian-feminist desire.

Fire is identified with women—women to the exclusion of men—in almost every cultural tradition. In one tradition, linguified in the Aboriginal language of Dyirbal, the schematization of reality results in the

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173. Fire transfers itself from burning thing to nearby burnable thing. Fire is strongly responsive to wind, and a tiny fire can be encouraged by human breath. Fire will live in one place if it is periodically given new things to consume. If constantly attended it can be kept alive indefinitely, neither raging nor dying. . . . In times of damp and cold to be just the right distance from a fire is to be as happy as in golden sunlight; but to be too close or to let it touch you is terrible, because fire kills and eats living things. Left alone, fire may dwindle into dark red lumps, increasingly frosted with grey-white ash, but up to the time of its death it can be brought to life and made as vigorous as ever by feeding it bits of fire-willing grasses and twigs, and blowing softly upon it.


175. See JUDY GRAHN, ANOTHER MOTHER TONGUE 235-48, 260-61 (1984) (tracing lesbian and gay cultural attributes, words, and phrases). Grahn connects the slang term "frig" (to rub a woman's genitals with the fingers) with the Latin term *fricatrix*, meaning "she-who-rubs" in the sense of friction and fire-making: "The ancient belief was that fire resided in the wood, coming out when the wood was rubbed in a particular manner and that creative/sexual fire resided in the female pudenda, also coming out when it was rubbed a certain way." *Id.* at 236. Grahn also connects the British slang term for a lesbian, "wick," with the candles used in European witchcraft ceremonies and voodoo rituals: "The wick, that part of a candle or lamp from which fire can be called forth is . . . the very essence of the female sexual-creative force." *Id.* at 239.

176. See MARY DALY, PURE LUST: ELEMENTAL FEMINIST PHILOSOPHY 197-314 (1984) (positing the "pyrospheres" as the second realm on women's journey to enter "metamorphospheres." According to Daly, women need to develop themselves as "Volcanic Furies" who practice "pyromancy," a word taken from the archaic term meaning to fight fire with fire which Daly redefines as "Fighting with Fire/Desire." *Id.* at 260; see also MARY DALY WITH JANE CAPUT, WEBSTER'S FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE 157 (1987) (defining "pyrogenesis" as "the birthing/flaming of Female Fire; the Sparking of Radical Feminist Consciousness").

177. Women, exclusive of men, are not necessarily lesbians. Nevertheless, the exclusion of men raises at least an arguable implication of lesbianism in exclusively female enclaves.

178. World myths, folk traditions, and anthropological studies agree that women first discovered how to use and produce fire . . . . Fire was the tool of tools; through its use foods could be dried and conserved for future use, and some poisonous plants and fruits made edible. It was women who developed all the early associated industries of cooking and ceramics in which fire was the critical tool.

category of *balan*, a category that encompasses women, fire, and objects of violence.\(^\text{179}\) This category exists in opposition to three other categories of experience/language, including the category of *bayi* that encompasses men, snakes, and the moon. Cognitive theorists explain the Aboriginal categorization present in the grammatical structures of Dyirbal language,\(^\text{180}\) using a “domain of experience” theory.\(^\text{181}\) For example, Aboriginal speakers of Dyirbal link women with fire and danger, and are capable of explaining these links in a narrative fashion: “Women is a destroyer. 'e destroys anything. A woman is fire.”\(^\text{182}\)

Fire is not limited to destruction, however, and fire’s creative use is especially pronounced in Aboriginal culture. Stephen Pyne, a cultural historian and scholar of fire notes that European colonizers reported a continent ringed with fire as Aborigines continued their tradition of using fire to communicate, to travel, to hunt, and, in general, to control their environment.\(^\text{183}\) In Australia fire was both singular and universal: “It was almost everywhere and it was everywhere intensely felt.”\(^\text{184}\) The omnipresent firestick carried by the Aborigines symbolized Aboriginal life.\(^\text{185}\)

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179. LAKOFF, supra note 10, at 92-95. While taking the title of his book *Women, Fire and Dangerous Things: What Categories Reveal About the Human Mind* from this example, Lakoff relies on the work of other anthropological linguists. See, e.g., R.M.W. DIXON, WHERE HAVE ALL THE ADJECTIVES GONE? (1982) (analyzing the importance of inter-language class correspondences and distinctions); ANNETTE SCHMIDT, YOUNG PEOPLE’S DYIRBAL: AN EXAMPLE OF LANGUAGE DEATH FROM AUSTRALIA (1985).

180. All languages have categorical structures within their grammar. One of the most familiar examples to feminists is the category of gender in language. As French lesbian-feminist Monique Witting observes, gender is a sociological category that permeates grammar and linguistics, especially in the form of personal pronouns that “are the enforcement of the sex in language.” MONIQUE WITTING, The Mark of Gender, in THE STRAIGHT MIND 76, 79 (1985).

181. LAKOFF, supra note 10, at 99-100. Lakoff explains domain of experience theory as being a general principle that there are certain domains of experience that are significant for categorization. Thus, when categorizing, elements within the same domain of experience will necessarily be in the same category. For example, fish and fishing implements are within the same domain of experience, so both would be placed in the same language category. Further clarity is achieved if this is compared with the classical means of categorization by listing properties.

182. Id. at 100-01 (quoting SCHMIDT, supra note 179). Lakoff does not rest his argument on the speaker of Dyirbal, however, as he believes that “[n]ative speakers of a language are only sometimes aware of the principles that structure their language.” Id. at 100. For Lakoff, the speaker’s statement proves only that “for this speaker, there is a conceptual link of some kind between the presence of women in the category and the presence of fire and danger.” Id. at 101.


Fire left no part of Australia untouched, and where Aborigines congregated, in seasonal gatherings or for more durable residence, free-burning fire proliferated. “It seems impossible,” Eric Roll concluded, “to exaggerate the amount of burning in Aboriginal Australia.” The coastal resources of Australia sustained an almost circumcontinental settlement; Aboriginal fires ringed the island continent. The most influential of European explorers, Captain James Cook, referred matter-of-factly to “this continent of smoke.” . . . That Aborigines burned, and burned extensively, cannot be disputed.

184. Id. at 137.

185. See id. at 137 (“For the Aborigine, fire was a universal solvent of ecological existence, and the
The firestick was a symbol not only of the practical effects of fire, but of the spiritual ones as well. Fire "differentiated the human world from the nonhuman, yet it bridged the mental world with the material."\(^{186}\) It was an archetype of both the power and danger at the core of human existence. It was a cognitive center: "[A]s a context, fire invited contemplation, and as an object, it demanded explanation."\(^{187}\) While the Aboriginal emphasis on fire may be extraordinary, it is certainly not unique.\(^{188}\)

Arson is my new perspective on violence, as violence mediates the relationship between lesbians and law. Slashes are firesticks. Ashes are our lesbian lives; the law’s lies. Having survived the fires of violence set to extinguish us, we continue to survive as an incendiary category.

\footnote{firestick, a universal implement.
\(^{186}\) Id. at 105.  
\(^{187}\) Id. at 106.  
\(^{188}\) Stephen Pyne does not limit his comments to Aborigines:

The human revolution that fire helped make possible was ambivalent. Humans were not genetically programmed to start, preserve, use, explain, or otherwise live with fire, whose prevalence and power made it a profoundly variegated and even contradictory phenomenon, ideally positioned to explain and exemplify the specialness and ambivalence of human existence. So clearly, among the animals, was fire a uniquely human possession that its origins could be related to the origins of humans, and its exercise to the special duties and responsibilities incumbent upon humans. The possession of fire—at once both an extraordinary power and an exceptional danger—was an archetype for human behavior.}

\footnote{\textit{Id.} at 106. Similarly, other writers on fire note the special status of fire:  

Fire is a discontinuity, a chemophysical reaction that, for ancient man [sic], had no transitional phase. He could not have practiced with almost-fire. Moreover, his mastery of it is the more remarkable because, at the beginning, fire was very frightening to him. Almost all animals seem to be endowed with a profound fear of fire.}

\footnote{\textit{Rowsome, supra} note 173, at 41. \textit{See also} Gaston Bachelard, The Psychoanalysis of Fire viii 188. (1964) (tracing different fire "complexes" from literary myth: the "Novalis complex," which deals with the unfallen world and the return of man to his original home; the "Prometheus complex," which implies the ascension of man from a human state to a quasi-divine state; and the "Empedocles complex," which refers to the apocalyptic destruction of the world by fire); James Frazer, Myths of the Origins of Fire 7 (Alan C. M. Ross trans., 1964) ("[F]ire is thus a privileged phenomenon which can explain anything.").}