

ESSAYS

THE EMPATHY PRINCIPLE

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I. INTRODUCTION

Imagine a string of pearls. From a distance, the string appears stable, cohesive, and well-defined: a white curl against its owner's brown skin. Closer inspection, however, reveals the individuality of each pearl. One observes fluidity in the necklace as a whole. As the wearer bends and moves, each pearl rotates and slides along its string. The composition of the necklace is in constant flux. And despite the cool, liquid beauty of these magnificent miniature spheres, they owe their existence to

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some nagging irritation within the pink folds of an oyster's body.

Professor Steven H. Shiffrin argues against a general theory of the First Amendment, adopting instead an eclectic vision of constitutional adjudication characterized by flexibility, creativity, spontaneity, and diversity.¹ He likens the Constitution to a large, Roman Catholic church containing many tabernacles.² Each tabernacle represents a different constitutional value, such as “liberty, equality, self-realization, respect, dignity, autonomy, or . . . tolerance.”³ To this array, he adds another tabernacle, “that representing diversity,” arguing that “[t]he first amendment’s purpose and function in the American polity is . . . to . . . affirmatively . . . sponsor the individualism, the rebelliousness, the antiauthoritarianism, [and] the spirit of nonconformity within us all.”⁴

This Essay endorses Professor Shiffrin’s eclecticism and abandons the search for a general constitutional theory. It likens the Constitution to a string of pearls, rather than to a chapel, in order to illustrate in secular terms its approach to constitutional interpretation. Like a pearl necklace, the Constitution appears stable, cohesive, and well-defined from the distance of the academy or the higher courts. Scholars and jurists weave general theories that cloak the Constitution in the striking apparel of logic and predictability, but on closer inspection, one observes the individuality in each constitutional pearl. Values such as liberty, equality, and dissent constitute the discrete packages of an apparently cohesive constitutional whole. They shift and rotate so that liberty might fall into the central position in one case and equality in another. The Constitution is thus in perpetual flux. And those shifting values responsible for its flux possess an exquisite pearl-like beauty—despite the fact that they owe their existence to some injustice in the body politic.

This Essay identifies another pearl on the constitutional strand: that of empathy. Part I discusses the procedural and substantive components of a jurisprudence based in empathy. Part II situates the empathy principle within existing legal theory. And Part III applies the principle to an actual case. The Essay concludes that the identification,

1. See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 9-45 (1990).

2. See *id.* at 105. In Roman Catholic theology, a tabernacle houses the spirit of Jesus Christ. *Id.*

3. *Id.* at 5.

4. *Id.*

naming, and utilization of an empathy principle would advance the interests of outsider groups.

II. EMPATHY IN CONSTITUTIONAL ADJUDICATION

This Section explores the meaning of empathy as a guiding principle in constitutional adjudication. It explains the procedural position of empathy in judicial decision-making and identifies some of the substantive values empathetic jurists would embrace.

A. *Using Empathy to Guide the Adjudicative Process*

According to H.L.A. Hart, legal rules characteristically have a core of determinacy, encompassing the familiar or plain case, and a penumbra of indeterminacy, lying outside the rule's plain meaning. "Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*."⁵ Where a new and unfamiliar situation presents itself, arguments both for and against the application of a particular general rule might exist. A judge encountering such arguments must choose between such alternatives.

Suppose, for example, that an unforeseen event, E, occurs, giving rise to a lawsuit in which legal rule R arguably applies. Suppose further that the various parties to the lawsuit argue for different interpretations of rule R. Each of those interpretations (R_1, R_2, \dots, R_N) may be a reasonable construction of R. In this sense, the judge faced with E is not inescapably bound by one or another interpretation of R; the language of R will bear the various constructions offered by the parties. Nevertheless, the legal context in which R exists provides guidance for the judge's exercise of discretion. In choosing the best interpretation of R, she may look to the underlying purposes of R; to its legislative history; to canons of construction; or she may turn elsewhere. But wherever she turns, according to Professor Hart, she will perform a rule-producing function.⁶ She will manipulate the open texture of the law.

Judges routinely face such problems; they wrestle with indeterminacy. But they do so most profoundly in deciding constitutional issues. Cases that depend for their resolution on the Constitution—a

5. H.L.A. HART, *THE CONCEPT OF LAW* 124 (2d ed. 1994).

6. *See id.* at 132.

document that occupies a revered institutional position—involve some of society's most monumental concerns. A jurisprudence based in empathy has special legitimacy in this context both because of its sensitivity to the human dimensions of controversy and because of its consistency with the antimajoritarian posture of the Constitution itself. An empathy principle, grounded in the particular facts of a given case, could supplement appeals to plain language, legislative history, and canons of construction, placing another constraint on judicial rule production.

The dictionary defines “empathy” as the “[I]dentification with and understanding of another’s situation, feelings, and motives.”⁷ In order for jurists to use empathy to guide their interpretation, then, they must both understand and identify with a given litigant’s position. They must appreciate the external factors influencing her behavior, such as her race and class, and they must additionally appreciate the more subtle, internal factors, such as her emotions, feelings, desires, and needs. Empathy, in short, requires a people-centered approach. It requires a jurist to cast aside her provincialism and to stand in someone else’s shoes. It requires her to get inside the skin of another human being.⁸

B. Using Empathy to Identify Values

But what substantive values would this empathy principle produce? What considerations would it place at the center of constitutional interpretation? In general, it would stand in opposition to the meanspirited, chauvinistic vision that currently dominates the political and legal landscape. It would define the good life inclusively, acknowledging the rights and needs of all citizens regardless of the various communities to which they belong. Empathetic jurists would view conservative constitutionalism and its false claims of political neutrality with skepticism.⁹ They would decisively support institutional

7. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 603 (3d ed. 1993).

8. This process is especially appropriate for countries with immigrant traditions like the United States. Empathy awakens in an individual his connection to other people. Ancestry and national origin are subsumed by a vision of shared citizenship. But empathy is not color blind. It rejects the melting pot metaphor. From the standpoint of empathy, the population of the United States more accurately resembles a tossed salad. Each element of the salad adds something unique, important, and desirable to the mix. Each element is essential to the whole. Yet each element retains its individuality even as it forms a portion of this whole.

An empathy principle would not, however, allow this appreciation for diversity to degenerate into a Balkanization of interests. It would not confuse multiculturalism with ethnocentrism. It would balance the tendency to degenerate into warring tribes with a modernist vision of unity.

9. See, e.g., Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 690-91 (1990).

methodologies and substantive interpretations that advance human welfare. They would reject the liberal model of human interaction in which individuals operate in isolation, atomistically, in an environment of dualities,¹⁰ but they would embrace those elements of liberal theory that celebrate our common humanity.

An empathy principle would take account of oppression, recognize the Constitution's antimajoritarian posture, and unabashedly exalt the substantive component of the Due Process Clause. First, any jurisprudence based in empathy must gather its inspiration from the lives of oppressed peoples. In the United States, empathetic jurists must reflect upon the institution of slavery and its contemporary legacies of poverty, educational failure, familial disruption, and crime. They must reflect upon the subordination of women as well. Second, an argument from empathy must embrace the Constitution's antimajoritarian attitude and its proponents must vehemently protect individuals and groups from overreaching by both the government and the majority. They must, moreover, acknowledge the profound shift in federal-state relations wrought by the Civil War. Finally, an empathy principle must honor this nation's commitment to human liberty. The authors of the Fourteenth Amendment intended with the Privileges or Immunities Clause to give substantive rights to citizens of the United States.¹¹ But the Supreme Court's evisceration of that clause in the *Slaughter-House* decision shifted the full weight of those rights onto the Due Process Clause. A jurisprudence based in empathy acknowledges this history and continues to develop the substantive due process doctrine with the word "liberty" as its ungainly fountainhead.

10. Western liberal thought is characterized, for example, by dualistic imagery that positions man against nature, man against man, man against the state, and so forth. See *infra* Part III.A.

11. Section One of the Fourteenth Amendment to the United States Constitution provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In 1873, only five years after its ratification, the Supreme Court construed the Privileges or Immunities Clause for the first time. It held that the Clause applies only to those privileges or immunities established by a state for its citizens and that it does not place certain rights "under the special care of the Federal government." According to Professor Tribe, this reading of the Privileges or Immunities Clause rendered it essentially superfluous. And in the words of Justice Field, who dissented from the *Slaughter-House* decision, it made the Clause "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." The *Slaughter-House* Cases, 83 U.S. 36, 96 (1873) (Field, J., dissenting).

III. EMPATHY AND EXISTING TRADITIONS

This Section situates the empathy principle within existing legal theory. It discusses how such a principle would either modify, incorporate, or reflect the philosophies of John Stuart Mill, C. Edwin Baker, Steven H. Shiffrin, Catharine A. MacKinnon, and Derrick Bell.

A. *John Stuart Mill and the Foundations of Liberal Theory*

In his classic manuscript, *On Liberty*, John Stuart Mill explored “the nature and limits of the power which can be legitimately exercised by society over the individual.”¹² In so doing, he presented the ideas, images, and nomenclature that continue to this day to shape liberal theory. A jurisprudence based in empathy would co-exist amiably with Mr. Mill’s philosophy because liberal theory in fact harbors an embedded empathy principle. For example, Mr. Mill evidenced a high degree of empathy for minority groups when he contended that “[i]f all mankind minus one were of one opinion . . . mankind would . . . [not be] justified in silencing that one person . . .”¹³ And John Rawls’ *A Theory of Justice* contains an overtly empathetic device in its original position.¹⁴ An empathy principle would, therefore, embrace many of the arguments presented by Mr. Mill and other liberal theorists.

But an empathy principle would also modify those arguments. It would incorporate communitarian values into liberal theory. It is axiomatic to Mr. Mill’s thesis—albeit implicit rather than explicit—that the individual occupies an antagonistic position *vis-à-vis* the state. Mr. Mill’s views in this regard have shaped and been shaped by a peculiarly Northern European world view which focuses almost obsessively on the individual and which pits man against nature, against man, and against the state. Other groups have not perceived this antagonism. According to Richard Kiwanuka, for example, the African conception of human beings does not place them “in a constant struggle against society for the

12. JOHN STUART MILL, *ON LIBERTY* 3 (David Spitz, ed., 1975).

13. *Id.* at 18.

14. JOHN RAWLS, *A THEORY OF JUSTICE* (1971). The original position requires one to almost literally “get under the skin of another human being.” See *supra* Part II.A. Professor Rawls’ original position is a hypothetical, pre-societal constitutional convention, attended by a number of rational delegates, all of whom are shrouded in a “veil of ignorance” such that “no one knows his place in society, his class position or social status; . . . his fortune in the distribution of natural assets and abilities, [or] his intelligence and strength . . .” *Id.* at 137. Because of the requirements of the original position, the bargain struck at this hypothetical constitutional convention represents the best scheme of liberty such that (1) each citizen experiences the most extensive individual liberty compatible with a like liberty for all and (2) political and social inequalities exist only if they benefit the least advantaged members of society. *Id.* at 199.

redemption of their rights.”¹⁵ On the contrary, many African (and other) peoples understand humanity not as isolated individuals, but as members of a group. This group—whether a small community or a political state—is not seen as the individual’s primary antagonist. An empathy principle would incorporate this communitarian perspective on citizenship.

B. *C. Edwin Baker, Steven H. Shiffrin, and the First Amendment*

Proponents of the marketplace-of-ideas theory claim that “we are best off with freedom of speech.”¹⁶ They therefore argue against suppression in almost any form. In *Human Liberty and Freedom of Speech*, C. Edwin Baker deconstructed this argument,¹⁷ contending that suppression may at times benefit society. A ban on Nazi propaganda in the 1930s might, for example, have prevented the horrors of the Holocaust.¹⁸ And in the present day, regulations on certain commercial speech could arguably benefit the United States. Consequently, Professor Baker’s theory allows for the denial of constitutional protection to certain types of expression, including commercial speech.¹⁹

A jurisprudence based in empathy would share with Professor Baker’s theory an antimajoritarian attitude and a sensitivity to associational interests. It would certainly adopt Professor Baker’s interpretation of the marketplace-of-ideas theory. It might, in addition, lend support to arguments for regulating racist speech, commercial speech, pornography, and campaign speech.²⁰ And it might allow government to level the playing field with regard to First Amendment activities, facilitating the speech of groups excluded, by economic and other forces, from fully entering the marketplace of ideas.

It is not, however, clear that an empathy principle would allow a near-complete denial of constitutional protection to commercial speech. The identities of the relevant parties—corporate speakers and the community at large—do not lend themselves to empathetic deliberation.

15. Richard N. Kiwanuka, *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*, 82 AM. J. INT’L L. 80, 82 (1988).

16. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 18 (1989).

17. According to Professor Baker, the marketplace-of-ideas argument for nonsuppression suffers from three fatal flaws: (1) its historical foundations are infirm; (2) its assumptions are ambiguous; and (3) its conclusions are impossible to verify. *See id.* at 17-19.

18. *See id.* at 18-19.

19. *See id.* at 196-97. Baker argues that “when an owner uses property purely instrumentally to exercise power over others, that usage and the related commercial speech should be subject to legislative control.” *Id.* at 224.

20. This restriction might take the form of spending limits, for example.

One cannot ask a jurist to stand in the shoes of a corporation in the same way that one can ask him to stand in the shoes of a Jane Roe or a Michael Hardwick. Like other free speech issues, the corporate speech issue seems to turn more on the systemic implications of various holdings, rather than on the affects those holdings on people's lives. If so, an empathy principle lacks suitability for First Amendment controversies. It may have more relevance to other parts of the Constitution, like the Fourteenth Amendment.

The most appropriate vehicle for advancing empathetic values in the First Amendment arena may be a dissent principle like that presented by Professor Shiffrin in *The First Amendment, Democracy, and Romance*.²¹ This is so for three reasons. First, a dissent-centered approach to constitutional adjudication requires an understanding of and an identification with the position of the outsider. This is precisely the function of the empathy principle. After all, one need not employ empathy to understand the position of the insider, since that position is celebrated in the habits, traditions, and customs of any society.

In addition, an emphasis on dissent avoids provincialism because it requires jurists to step away from themselves. Professor Shiffrin's approach to constitutional adjudication thus protects citizens who have concepts of the good life that differ from prevailing norms.²² Under his approach, *FCC v. Pacifica Foundation*²³ would have come out differently.²⁴ The Court would not, in other words, have "upheld the imposition of sanctions against a radio station for broadcasting a George Carlin monologue called 'Filthy Words.'"²⁵ Although the *Pacifica* majority failed to recognize that Mr. Carlin's attack on "the prescribed orthodoxy"²⁶ constituted precisely the type of speech the First Amendment should protect, the dissent did not. Justice Brennan gave voice to a dissent principle in describing the majority's opinion as demonstrating "a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities."²⁷ He likewise gave voice to an empathy principle.

21. See SHIFFRIN, *supra* note 1, at 86-109.

22. See *id.* at 89.

23. 438 U.S. 726 (1978).

24. See SHIFFRIN, *supra* note 1, at 80-81.

25. *Id.* at 80.

26. *Id.*

27. *Id.* at 81 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 775 (1978) (Brennan, J., dissenting)).

Finally, a dissent-centered approach to constitutional adjudication is, like a jurisprudence based in empathy, respectful of diversity. It is antimajoritarian. It promotes an understanding of outsider groups, protects minority visions of the good life, and shields from censure those who would challenge the habits, cultures, and traditions of the majority.²⁸ If it risks encouraging dissent in whatever direction—opening the door, for example, to racist ideologies—an empathy principle could cabin this tendency.

C. *Catharine A. MacKinnon, Derrick Bell, and Outsider Jurisprudence*

This subsection discusses how an empathy principle would fit into outsider jurisprudence by analyzing outsider critiques of liberal theory and by analyzing an empathy principle's consistency with dominance and critical race theories.

1. Empathy and Liberal Theory

A jurisprudence based in empathy would accept the cogent criticisms of liberal theory offered by Catharine A. MacKinnon and Derrick Bell. Empathetic jurists would abandon the single-minded liberal obsession with abstract systems (like free speech) and focus in addition on substantive systems (like racism). They would admit that “every time you score one for white supremacy in one place, it is strengthened every place else.”²⁹ Similarly, they would temper liberal theory's focus on individualism, agency, autonomy, and choice by contextualizing those concepts with such phenomena as race, class, and gender. They would thereby resist the liberal tendency to perpetuate the status quo.

But a jurisprudence based in empathy would not entirely abandon liberal values. It would, for instance, emphasize antimajoritarian ideas.³⁰ And it would continue to speak in terms of rights. Rights are the barometer of a collective morality. They are “a pantheon of possibility.”³¹ They have benefited people of color, women, religious minorities, lesbian, gay and bisexual people, and the disabled. And in the hands of empathetic jurists, they can continue to do so.

28. *See id.* at 56-63 (arguing that democracy and majority rule are not inevitably fused).

29. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 165 (1987).

30. *See supra* Part II.B.

31. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 25 (1992) (quoting Patricia Williams).

2. Empathy and Dominance Theory

Professor MacKinnon's dominance theory begs for the adoption of an empathy principle in constitutional adjudication concerning women's rights. A jurisprudence based in empathy would therefore embrace and advance her work. In particular, it would accept her critique of patriarchy, exposing the ways in which male supremacy perpetuates female subordination. It would give voice to the countless women who suffer from a system of entitlements that promotes the interests of men at the expense of women. And it would work to change that system. It would object, for example, to a medical regime in which men's needs define appropriate health care; to an occupational regime in which men's life cycle defines the world of work; to an educational regime in which men's perspectives define quality in scholarship; and to a preferencing regime in which men's military service defines citizenship.

Empathetic jurists would challenge a decision like *Geduldig v. Aiello*,³² in which the Supreme Court denied to women disability coverage for normal pregnancies under a California statute despite the fact that the statute compensated workers for voluntary disabilities, such as cosmetic surgery and sterilization, and for disabilities unique to, or primarily affecting, men, such as prostatectomies, circumcision, hemophilia, and gout. Similarly, they would expose the sexism inherent in preferencing systems like that upheld by the Supreme Court in *Personnel Administrator of Massachusetts v. Feeney*.³³ Although women comprised only 1.8% of veterans in Massachusetts at the time of the suit, "all veterans who qualif[ied] for state civil service positions . . . [were] considered for appointment ahead of any qualifying nonveterans."³⁴ Thus, men received most civil service positions. An empathetic jurist would question the neutrality of such a system, perhaps accepting an analogy between military service and motherhood—both of which require personal sacrifice and both of which contribute greatly to society.

Empathetic jurists would, in summary, appreciate the harms of patriarchy. They would question the legitimacy of a democracy in which a member of a majority group has never held the top executive office and in which members of this group comprise only six percent of the national

32. 417 U.S. 484 (1974).

33. 442 U.S. 256 (1979).

34. *Id.*

legislature.³⁵ However, an honest and refined empathy principle would modify Professor MacKinnon's theory as well.³⁶ It would compel jurists to listen to women's stories of subordination, but it would also compel them to listen to women's stories of agency and self-determination.³⁷ They would consequently resist customs and traditions that eroticize hierarchy and inequality and that construct female sexuality as "[s]ubjection itself, with self-determination ecstatically relinquished"³⁸ But they would realize in addition that many women enjoy sex and that their enjoyment is authentic—despite the fact that misogyny shapes the reality in which sexual relations occur. Perhaps empathetic jurists would adopt the liberal perspective on sex and pornography, notwithstanding Professor MacKinnon's attack on that perspective.³⁹ Perhaps they would see sexuality as natural, healthy, and potentially egalitarian. Perhaps they would understand that all the body's appetites are worthy of attention.

Jurists who stood in the shoes of women and girls would find more than the "qualities and characteristics of powerlessness" in them.⁴⁰ They would reject Professor MacKinnon's claim that women's different voice (as described by Carol Gilligan) does not belong to them—that it exemplifies only that which male supremacy has, for its own benefit, either allowed or attributed to them. Empathetic jurists would necessarily appreciate that the cultures created by subordinated groups have worth and beauty and that they attest to the physical and spiritual strength of those groups. According to Martha Mahoney, Marxist thinkers "identify[] the oppressor and that which is taken through oppression . . . [in the context of] a positive vision of the worker and the nature of work,

35. See Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights: A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 455 (1992). Professor Becker appears to use empathetic reasoning in her analysis of the Bill of Rights when she demonstrated ways in which the Framers, either consciously or unconsciously, wrote a document that protected the interests of people like themselves. But can one describe her reasoning as empathetic when she, herself, is an insider within the community of women for which she speaks? Although Professor Becker did not need to "get inside the skin of another human being" in her analysis, she did, nevertheless provide the raw materials from which her readers could empathize with the position of women, and in this sense, her endeavor employed principles of empathy.

36. See, e.g., Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

37. An empathy principle would thus mirror feminist theory's consciousness-raising sessions.

38. MACKINNON, *supra* note 29, at 172.

39. *Id.* at 160, 172-73.

40. *Id.* at 38.

not merely [in the context of] a vision of the evil of exploitation.”⁴¹ Marxism, she says, contains an analytical step in which there exists a positive claim about the dignity and potential of the oppressed. Professor MacKinnon seems to shortchange that analytical step in her dominance theory. An empathy principle would remedy her omission.

3. Empathy and Critical Race Theory

The object of this Essay—to identify and describe a jurisprudence based in empathy—owes its existence to Derrick Bell. Professor Bell’s use of allegory demonstrates the empathy principle in action. His stories communicate a powerful and compelling vision of racial oppression, engendering empathy in the reader in a way that dry statistics and traditional legal writing can not.⁴² Many white people will not, for example, understand “the horrified feelings of the subjects of . . . statistics”⁴³ on slavery and black unemployment unless their empathetic capacities are stimulated. Only empathy can cause them to affirmatively demand pay equity, educational fortification, adequate welfare systems, aggressive affirmative action programs, and so on. Intellectual understanding alone will not suffice. A jurisprudence based in empathy would thus adopt many of Professor Bell’s arguments; it would attack white-skin privilege just as it would attack a system male entitlement.

Some empathetic jurists would agree with Professor Bell that “liberal democracy and racism in the United States are historically, even inherently, reinforcing.”⁴⁴ Those jurists would probably reject liberal tradition. Others, however, would embrace that tradition, albeit with some modifications. Kimberle Crenshaw, for example, reproves critical legal scholars’ attack on liberal theory, observing that

[t]he Critics’ principal error is that their version of domination by consent does not present a realistic picture of racial domination. Coercion explains much more about racial domination than does ideologically induced consent. Black people do not create their oppressive

41. Martha Mahoney, *Whiteness and Women, in Practice and Theory: A Reply to Catharine MacKinnon*, in *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE* 130 (Mary Becker, et al. eds., 1994).

42. Professor Bell is the father of the storytelling method so prevalent in critical race theory and in feminist jurisprudence. It is only fitting, then, that he would inspire the thesis of this Essay, given that the power of this method lies in its ability to put the reader in the shoes of another (potentially very different) person.

43. BELL, *supra* note 31, at 148.

44. *Id.* at 10.

worlds moment to moment but rather are coerced into living in worlds created and maintained by others. Moreover, the ideological source of this coercion is not liberal legal consciousness, but racism.⁴⁵

In her view, although scholars like Mark Tushnet, Robert Gordon, and Alan Freeman correctly “trash” liberal theory for failing to go far enough in transforming society, they nonetheless mistakenly ignore its ability to challenge white supremacy and to build political movements. In addition, their suggestion that African Americans consent to their subordination is only partly true. Members of oppressed groups do, of course, internalize stereotypes directed at their communities—coming to believe, for instance, that straight hair and light skin are more beautiful than kinky hair and dark skin—but they also resist hegemonic ideologies.⁴⁶

An empathy principle could exist either within or outside of a liberal tradition. But regardless of its theoretical situation, it would reason from the point of view of African Americans, women, and members of other subordinated groups. It would force insiders to recognize their similarities to outsiders. It would be antimajoritarian as well as communitarian; it would be skeptical of a marketplace-of-ideas conception of free speech; it would protect minority conceptions of the good life; and it would work to tear down a system of white supremacy and patriarchy that undermine this nation’s commitment to democracy and equality.

IV. APPLYING EMPATHY

Perhaps no contemporary case exemplifies the need for an empathy principle in constitutional adjudication better than *Bowers v. Hardwick*, a case in which the Supreme Court upheld a Georgia statute criminalizing same-sex erotic activity.⁴⁷ This Section tells the story

45. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988).

46. *Id.* at 1360. In his analysis of fascist domination, Italian neo-Marxist scholar Antonio Gramsci observed that subordinated classes lend considerable support to hegemonic ideologies. *Id.* at 1350 & n.73. In order to subordinate a group, one must, according to Mr. Gramsci, secure spontaneous consent for the subordinating ideology from the great mass of the population. One must also use coercive and potentially violent power in order to discipline those groups who fail to give such consent. *Id.* at 1360. African Americans, who do not, in large part, accept the legitimacy of their subordination, would fall into the latter category. *See id.* at 1357.

47. 478 U.S. 186 (1986).

behind the *Hardwick* case, critiquing the Court's holding in terms of its lack of empathy.

On the morning of August 3, 1982, Officer K.R. Torick arrived at the home of Michael Hardwick with an invalid arrest warrant for a failure to appear in court.⁴⁸ A house guest answered the door and waved him into the home. Once inside, he either observed or heard two men engaging in mutual fellatio. He entered Mr. Hardwick's bedroom and arrested both men, refusing to leave the room or turn his back while they dressed. Mr. Hardwick's companion, a married schoolteacher, begged Officer Torick not to jeopardize his marriage or his job.⁴⁹ After handcuffing the men, Officer Torick drove them to the central police station, where he had them photographed, fingerprinted, and charged with committing the crime of sodomy, defined by a Georgia statute as "any sexual act involving the sex organs of one person and the mouth or anus of another."⁵⁰ He made certain that the guards and other inmates knew that they had been arrested for "cocksucking."⁵¹ If convicted, the two men faced from one to twenty years in prison.⁵²

Attorneys from the Georgia affiliate of the American Civil Liberties Union approached Mr. Hardwick shortly after his arrest.⁵³ They had visited courtrooms every day for the previous five years in the hopes of finding a case like his.⁵⁴ The fact pattern seemed ideal. Mr. Hardwick had not engaged in sexual activity "in the presence of

48. For details of the Hardwick arrest, see PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 392-403 (1988); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1422-24 (1988).

49. The schoolteacher pled to a lesser charge and decided that, because of the risk to his job, he could not go on with the case. IRONS, *supra* note 48, at 396.

50. GA. CODE ANN. § 16-6-2(a) (1996).

51. IRONS, *supra* note 48, at 396.

52. "A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years." GA. CODE ANN. § 16-6-2(b) (1996).

53. IRONS, *supra* note 48, at 382. In 1957, when the ACLU issued its first national policy statement on gay rights, it endorsed the constitutionality of sodomy statutes. The ACLU also considered an employee's homosexuality relevant to the issuance of a security clearance. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1583 (1993). Ten years later, the ACLU endorsed the idea that the privacy rights recognized in *Griswold v. Connecticut* should extend to all private consensual sexual conduct between adults, homosexual as well as heterosexual. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 213 (1983). In 1973, the ACLU created the Sexual Privacy Project in order to challenge government regulation of sexuality. Cain, *supra*, at 1584. By 1975, over half the states had nullified their sodomy laws. See IRONS, *supra* note 48, at 385. In 1983, the ACLU teamed up with the Lambda Legal Defense and Education Fund to host a national meeting of lesbian and gay legal organizations in order to develop a strategy for attacking sodomy laws. LAMBDA LEGAL DEF. & EDU. FUND, *LAMBDA UPDATE* 3 (Feb. 1984).

54. IRONS, *supra* note 48, at 396, 397.

strangers” or kept his “windows and doors open to the whole world.”⁵⁵ Officer Torick had arrested him for behavior occurring in the privacy of his own home, “a sanctuary to which . . . the [Constitution] accords special protection.”⁵⁶ And Mr. Hardwick, unlike other potential defendants, had a supportive family and did not fear the loss of his job if he became involved in a gay-rights case.⁵⁷

On March 31, 1986, in the face of mixed results in the trial and appellate courts, Laurence H. Tribe argued Michael Hardwick’s case before the United States Supreme Court. Professor Tribe, a Harvard law professor and one of the pre-eminent constitutional law scholars in the country, had appeared before the Court more than a dozen times and had an impressive record.⁵⁸ He contended that “private, consensual, adult sexual acts partake of the traditionally revered liberties of intimate association and individual autonomy” protected by the Constitution.⁵⁹ Six decades of privacy precedent, according to Professor Tribe, mandated an outcome that favored Mr. Hardwick.⁶⁰ At the close of oral arguments, the *Hardwick* team could taste victory. They were sure they would win.⁶¹ But the Supreme Court, focusing its inquiry narrowly on the sexual intimacy between same-sex couples, found that the penumbral right to privacy elucidated in prior case law did not extend to homosexual sodomy.⁶² In the words of Michael Hardwick, “Nobody expected it.”⁶³

55. *Rotary Int’l v. Rotary Club of Duarte*, 107 S. Ct. 1940, 1947 (1987) (citation omitted). Many sodomy charges result from behavior that occurs in public or semi-public areas. *See* IRONS, *supra* note 48, at 396-97.

56. TRIBE, *supra* note 48, at 1434-25 (footnotes omitted).

57. “I was fortunate enough to have a supportive family who knew I was gay. I’m a bartender, so I can always work in a gay bar. And I was arrested in my own house. So I was a perfect test case.” IRONS, *supra* note 48, at 397.

58. *Id.* at 388.

59. TRIBE, *supra* note 48, at 1428.

60. *See id.* at 1422-23.

61. IRONS, *supra* note 48, at 399 (presenting Michael Hardwick’s account of March 31, 1986).

62. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

63. IRONS, *supra* note 48, at 400. Michael Hardwick described the day he learned of the Supreme Court’s decision:

A friend of mine had been watching cable news and had [seen a report of the Court’s decision] When I opened the door he was crying and saying that he was sorry, and I didn’t know what the hell he was talking about. Finally I calmed him down and he told me what had happened: that I had lost by a five-to-four vote.

I was totally stunned. . . . I just cried—not so much because I had failed but because to me it was frightening to think that in the year of 1986 our Supreme Court . . . could make a decision that was more suitable to the mentality of the Spanish Inquisition.

Perhaps the *Hardwick* team failed to anticipate the majority's fervent antipathy toward same-sex erotic activity. The majority simply could not stand in the shoes of two gay men. It could not appreciate that "[f]or some, the sexual activity in question . . . [in the *Hardwick* case] serves the same purpose as the intimacy of [heterosexual] marriage."⁶⁴ Justice White's insistence that the decision presented no judgment as to "whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable"⁶⁵ is belied by the Court's intense and unnecessary focus on "homosexual sodomy," by its refusal to express an opinion on the constitutionality of the Georgia statute as applied to heterosexual sodomy, and by its myopic vision of history. The *Hardwick* majority aptly expressed society's reprobation of homosexuality and, in an opinion profoundly lacking in empathy, "cut off constitutional protection [of privacy] 'at the first convenient, if arbitrary boundary.'"⁶⁶

V. CONCLUSION

In the midst of an overwhelmingly conservative and provincial judiciary, litigants like Michael Hardwick urgently need a jurisprudence based in empathy. Although the legal and political philosophies of John Stuart Mill, C. Edwin Baker, Steven H. Shiffrin, Catharine A. MacKinnon, and Derrick Bell already contain an empathy principle, progressive jurists must identify and name this principle in order to

Id. Hardwick described calling his attorneys, Kathy Wilde, of the ACLU, and Professor Tribe, looking for some encouraging words. Professor Tribe "was more devastated than [Hardwick] was." *Id.* *Newsweek* magazine printed a poll that said fifty-seven percent of the population opposed the decision. *Id.* at 401.

64. *Hardwick v. Bowers*, 760 F.2d 1202, 1204-06 (11th Cir. 1985).

65. *Bowers*, 478 U.S. at 190.

66. *TRIBE*, *supra* note 48, at 1422 (quoting from *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)). Justice Burger's concurrence adds another layer of antipathy to the *Hardwick* decision. In his concurrence, Justice Burger quotes William Blackstone's description of homosexuality as "an offense of 'deeper malignity' than rape . . ." *Bowers*, 478 U.S. at 197 (Burger, J., concurring). *See also* West, *supra* note 9, at 664. But rape involves a nonconsensual sexual act. It almost always involves a male perpetrator who forces a female victim to submit to some sort of vaginal penetration. It is accompanied by varying degrees of violence or coercion. According to the FBI, one rape occurs every five minutes. Over a million American women have survived rape. In a nation purportedly dedicated to maximizing liberty for all its citizens, the law's failure to protect women from sexual violence, or to vindicate women's rights when sexual violence occurs, is deeply hypocritical. And Justice Burger's description of rape, borrowed from Blackstone, seems unspeakably callous. How can a judge on this nation's highest court consider consensual, adult sexual activity to be more offensive than violent sexual invasion? Justice Burger's concurrence says to men that they are better off having forcible sexual intercourse with a woman than making love to a male sexual partner.

harness its energy. If they add the pearl of empathy to their constitutional strand, it will help them to infuse the courts with qualities of inclusion, compassion, and egalitarianism.