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Introduction: Where is There? Locating, Dislocating and Relocating Gender, Sexuality in Physical and Discursive Space

*Adele M. Morrison**

INTRODUCTION

In keeping with the theme of LatCrit XII, *Critical Localities: Epistemic Communities, Rooted Cosmopolitans, New Hegemonies and Knowledge Processes*,¹ the essays in this cluster critically explore gender, sexuality and location or “whereness”—the combination of physical and discursive space. In introducing this cluster, I address the manner in which each essay examines the impact of gender and sexuality on whereness and vice versa. My assertion is that gender and sexuality can be located (spotted or placed), dislocated (removed or displaced), and relocated (transferred or replaced) and in doing so, individuals, communities, identities, and locales may be transformed and that each author addresses some aspect of this transformation.

In his essay, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*,² Marc R. Poirier states that “specific spaces and places” can be transformed by and through the performance of gender and sexuality, and

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¹ LatCrit XII, Twelfth Annual LatCrit Conference, Florida International University College of Law, Miami, Florida. October 4-6, 2007.

² Marc R. Poirier, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FIU L. REV. 307 (2008).

so too can the performance of gender and sexuality be transformed by and through the location in which they are performed.³ Though the following essays each tackle a different subject area and cover issues much broader than gender/sexuality and “whereness,” all employ a critical analysis to address both transformation of location by gender and sexuality and of gender/sexuality by location. Each essay includes a focus on at least one institution—in the broadest sense of the word. Marc R. Poirier examines the institution of marriage;⁴ Aziza Naa-Kaa Botchway examines “religion,” culture, and nations;⁵ Larry Catá Backer explores the United States government, focusing on the Presidency;⁶ and Diane J. Klein examines popular culture, specifically prime-time television.⁷ Common to these institutions is that each has its own “imperatives [and] patterns of subordination.”⁸ In this cluster introduction, I briefly explore the ways in which these four essays critically locate, dislocate and relocate gender and sexuality in both physical and discursive space within these institutions⁹ as I address the question, “where is ‘there’ for gender and sexuality?” Each essay, in its own way, finds that for subordinated sexual and gender identities—lesbian, gay, bisexual, transgender (hereinafter LGBT) people and women—that question is answered at least once “not here,” even as the location of “here” varies. However, each essay also manages to find a positive location for those with subordinated genders and/or sexualities.

I first consider Professor Poirier’s essay where he works in the context of LGBT identities to examine the physical and discursive spaces or lack thereof for same-sex marriage.¹⁰ I begin with this essay because Poirier helps in understanding the “whereness” that I assert all these essays address. Part II turns to *Abolished by Law—Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana*, where Aziza Naa-Kaa Botchway addresses the specifically gendered practice of the Trokosi.¹¹ Botchway explores the way in which the location, in this case within culture and religion, of a gendered practice—female sexual slavery—can allow its continuation even as it comes into conflict with national and internation-

³ *Id.* at 309.

⁴ *See id.*

⁵ *See* Aziza Naa-Kaa Botchway, *Abolished by Law—Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana*, 3 FIU L. REV. 369 (2008).

⁶ *See* Larry Catá Backer, *Gendering the President Male: Executive Authority Beyond Rule of Law Constitutionalism in the American Context*, 3 FIU L. REV. 341 (2008).

⁷ *See* Diane J. Klein, *Latino Masculinities Under The Microscope: Stereotyping and Counterstereotyping on Five Seasons of CSI: Miami*, 3 FIU L. REV. 395 (2008).

⁸ *Id.* at 399.

⁹ *See* Poirier, *supra* note 2, at 311 (defining discursive space).

¹⁰ *Id.* at 311-17.

¹¹ Botchway, *supra* note 5, at 369-70 (defining Trokosi as when “young virgin girls in Ghana who . . . become (sexual) slaves of a fetish priest as punishment for the alleged sins and/or crimes of a family member.”).

al law. In Part III, I look at Larry Catá Backer's work, *Gendering the President Male: Executive Authority Beyond Rule of Law Constitutionalism in the American Context*.¹² In critiquing Harvey Mansfield's article, *The Law and the President: In a National Emergency, Who You Gonna Call?*,¹³ Professor Backer works with the construction and performance of masculinity and femininity in the Presidency under rule of law constitutionalism and the differences when that performance is located in the domestic or private sphere versus the international or public sphere.¹⁴ In Part IV, I address how Professor Klein, in her article *Latino Masculinities Under The Microscope: Stereotyping and Counterstereotyping on Five Seasons of CSI: Miami*, tackles the presentation of Latino identity on the network television show *CSI: Miami*. She examines a "Latinoness" within the contexts of the criminal activity and law enforcement settings of the show itself and ultimately within Miami, Florida—the location of the LatCrit XII Conference that produced this symposium.

This introduction concludes by noting that in each essay there is a current of defiance against attempts to permanently dislocate gender and sexuality from discursive and physical spaces. Each essay shows that efforts to dislocate these identities, and the subordinated people themselves, are ineffective because sexuality and/or gender manage to remain on location or to relocate elsewhere, even to places they are still not accepted. In closing I state that "whereness" and sexuality and gender are vital aspects of LatCrit analysis, and thus each of these essays is an important part of this symposium.

I. SAME-SEX MARRIAGE: GROUNDING GENDER, SEXUALITY, AND WHERENESS

Marc Poirier's essay discusses discursive and physical space in asking and answering the question "where is same-sex marriage?" The question refers not only to the discussion about same-sex marriage, but specifically to where same-sex marriages can be performed. The focus of this query is on whether particular sites and/or locations are or are not available for solemnizing same-sex marriages. Poirier also addresses how locations of sexuality performativity are limited and controlled by law and custom,¹⁵

¹² Backer, *supra* note 6.

¹³ Harvey Mansfield, *The Law and the President: In a National Emergency, Who You Gonna Call?*, 11 THE WKLY STANDARD (17) Jan. 16, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/563mevpm.asp> (last visited Mar. 22, 2008).

¹⁴ Backer, *supra* note 6, at 341, 346-62.

¹⁵ Poirier, *supra* note 2, at 311; see also Botchway, *supra* note 5, at 371 (discussing how law and custom control gender and sexuality by determining the fates of numerous women and girls).

which speaks to a broader issue of where LGBT identities are “allowed” to be.

As Poirier notes, discussing issues of gender and sexuality can make people uncomfortable, sparking a desire in some “not to have to go there,”¹⁶ meaning individuals prefer not to have to address any aspect of life that brings attention to sexuality in general and discrimination based on gender and sexuality in particular. Poirier writes that when it comes to issues of gender and sexuality, “[T]he local and personal level is where change must ultimately occur, if a change is mandated via larger normative structures within our society, such as statutory or case law, is to take hold.”¹⁷ Essentially, according to Poirier, it is individuals who must be changed in order to effect larger change. This point brings to mind the question, “what is the change that must happen to these individuals?” Though I do agree that individual change does effect larger change, I argue that it is also possible to change the gender and sexuality of a location and/or to relocate gender and sexuality themselves. This locale change and/or relocation can in turn effect larger social change. For example, those who move into or out of particular neighborhoods can alter their demographics and identity such that they become identified as “gay” neighborhoods when “enough” LGBT people move in and they lose that identity when “too many” LGBT people move out.¹⁸ I assert that the idea that gender and sexuality can be relocated, maybe to small town America, is what undergirds some of the fears of same-sex marriage. It is the notion that LGBT folk or same-sex relationships will contaminate a particular locale and thus “traditional” marriages and the children they produce will be poisoned. The idea is that, as Poirier discusses, the discursive space¹⁹ of, in this case, marriage is altered by a different performance of sex and gender in the physical space.

According to Poirier, it is the “socially visible performances”²⁰ of LGBT people, couples and families that alter the discursive space by relocating LGBT identities into places where the LGBTness has been disallowed or dislocated. This raises the question of whether these “socially visible performances” must be localized or not. In other words, are LGBT performances as individuals, couples, and parents different depending on the locale²¹ or institution²² —the “where” —and should they be? If the an-

¹⁶ Poirier, *supra* note 2, at 309.

¹⁷ *Id.* (citations omitted).

¹⁸ See, e.g., Patricia Leigh Brown, *Gay Enclaves Face Prospect of Being Passé*, N. Y. TIMES, Oct. 30, 2007, at A1, available at <http://www.nytimes.com/2007/10/30/us/30gay.html> (last visited Mar. 22, 2008) (discussing the Castro in San Francisco).

¹⁹ See Poirier, *supra* note 2, at 311.

²⁰ *Id.* at 310.

²¹ By locale I mean “a place or locality, esp. with reference to events or circumstances connected with it.” Dictionary.com, <http://dictionary.reference.com/browse/locale> (last visited Oct. 18, 2008).

²² The institutions in this case are the Boy Scouts and a college.

swer is yes, then the burden is placed on the subordinated to change their sexuality or gender, or at least the performance of it, in order to be accepted within greater society. But changing the performance undermines it and, even if the performance can be changed or is changed in one particular place, it appears that gender and sexuality cannot be actually dislocated. The *Boy Scouts v. Dale* case is an example of this. Mr. Dale was not out when he was within “Boy Scout” space, yet he was excluded because his sexuality performance in a separate and less rigidly regulated space, at his college, was unacceptable to the Boy Scouts.²³ Even if there are “daily microperformances”²⁴ that are localized, one may not shed the identity itself—thus, here gay, there gay, everywhere gay. Subordinated groups are expected to perform differently depending on location, but yet even when the performance is altered, the subordinated identity/persons is/are still deemed to be unacceptable in that, as with Mr. Dale, once identity attaches one simply is, as in this case, gay, and the location of the gayness ceases to be the primary concern, dislocated by the gayness in and of itself. It is still expected, however, that one will perform his or her subordinated identity differently based on where it is being performed, and there are some spaces where LGBT identity is banned altogether. One of those spaces with an outright ban is marriage.²⁵ Marriage simply is a dominant group—heterosexual and cisgender²⁶—space.

Poirier goes on to explain why LGBT persons are problematic for traditionally dominant groups. He writes: “I argue that same sex couples are troubling for traditionalists in part because their daily visible performances as couples fail to follow the structures and strictures of sexuality, gender and family that inhere in traditional marriage and that traditionalists view as central to the reproduction of social structures from one generation to the next.”²⁷ The point is that it is simply LGBT existence that is the problem. The ‘failing to follow,’²⁸ of which Poirier writes, may be some intentional act, but more often it is simply being out or outed. This outness is both in the discursive and physical space, the cultural and geographic location.

The discursive space and cultural locus of the institution of marriage is contentious, but so too is the actual physical space and geographic location where the marriages occur. Until the push for legal and social recognition

²³ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644-45 (2000).

²⁴ Poirier, *supra* note 2, at 310-11, 325, 328.

²⁵ There are several exceptions to the ban on same-sex marriage. These exceptions as of this writing include the countries of Canada, Spain, The Netherlands, Belgium and South Africa, and the states of Massachusetts, Connecticut and (though limited and under challenge at this time) California in the United States.

²⁶ Julia Serano, WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 33 (2007) (“People who are non-transgender may be described as being cisgender.”).

²⁷ Poirier, *supra* note 2, at 311.

²⁸ *Id.*

of lesbian and gay relationships, there was little if any consideration for the impact of same-sex marriages or gay weddings as they were private arrangements and events, meaningful only to those involved. There was no official recognition and thus no battle over meaning or impact within the law. It was the onset of a national discourse on gay marriage that made same-sex relationship-celebratory ceremonies possibly dangerous to wider society, and thus, even those performed outside Massachusetts²⁹ became problematic to the point that they needed to be quashed and/or the participants punished.³⁰

LGBT identity has come to occupy a significant portion of discursive space, but also LGBT people have come to claim a larger part of physical space as well. The issue of physical presence has been revealed as important in court cases addressing the exclusion of LGBT persons or groups from institutions, organizations or events.³¹ At issue seems to be the literal presence of the homosexual body in a particular location. As Poirier points out, in *Dale* “the Court repeatedly discusses the issue in terms of Dale’s ‘presence’ in the organization, using the image of communicative ‘presence’ of the body no less than four times.”³² This indicates that there is no way to dislocate sexuality from body.³³ If one knows of another’s sexual orientation, the individual has a communicative presence. This is the premise undergirding the policy of “Don’t Ask, Don’t Tell.”³⁴ The idea is that if the military does not “know” then “it” (homosexuality) does not actually exist and the individual may remain in place. However, if “it” is revealed then

²⁹ See *Goodridge v. Dept. of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003) (granting marriage rights to same-sex couples).

³⁰ See, e.g., *Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997) (female plaintiff has job offer withdrawn once employer learns of her plans for a same-sex wedding).

³¹ See *Boy Scouts*, 530 U.S. at 640 (gay man excluded from the Boy Scouts); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (LGBT organization excluded from marching in the Boston St. Patrick’s Day Parade); *Shahar v. Bowers*, 836 F.Supp. 859 (N.D. Ga. 1993) (lesbian attorney excluded from working for the Georgia Attorney General’s office).

³² Poirier, *supra* note 2, at 315 n.47 (quoting the following text from the Court’s opinion: “We must then determine whether Dale’s presence as an assistant scoutmaster would significantly burden the boy scouts’ desire to not ‘promote homosexual conduct as a legitimate form of behavior.’” *Boy Scouts*, 530 U.S. at 656. “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message” *Id.* “[T]he presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts’ choice not to propound a point of view contrary to its beliefs.” *Id.* at 654. According to Poirier, “Justice Stevens’ dissent is also quite clear that the majority’s opinion rests on communicative presence, not on the possibility that Dale might become an open advocate of gay causes at those time and places where he is being a Boy Scout.” (internal citations omitted)).

³³ Other essays in this cluster indicate how gender and ethnicity also cannot be dislocated from the body. See *Botchway*, *supra* note 5, at 380 (discussing women and girls who are sent into sexual slavery because they are women and girls); see also *Klein*, *supra* note 7, at 411-15 (discussing Eric Delko, the Latino CSI who is differentiated from white CSI’s through his dark skin especially as compared to pale, redheaded CSI boss, Horatio Caine).

³⁴ 10 U.S.C. § 654 (1997) (policy essentially excluding out lesbian, gay and bisexuals from serving in the United States military).

the military “knows” and the individual service member must be removed. Though couched in “homosexual conduct”³⁵ language, the “Don’t Ask, Don’t Tell” policy is firmly rooted in the need to dislocate the homosexual body from the military. So too in *Dale*, as Poirier notes, “because Dale is an ‘avowed homosexual[,]’ his own body is already marked. It conveys a message by its very ‘presence within the Boy Scouts.’”³⁶

Location is part of law itself. Issues such as jurisdiction, venue and which law controls in both national and international contexts are revealing. Each of the essays included here has the law itself with which to contend. Poirier, in addressing location as territory, geography, states or countries, discusses the concept of “whereness” of people versus whereness in real estate, ultimately determining that “[a] person’s whereness perhaps ought to have different consequences from real estate’s whereness.”³⁷ Laws which control based on the territory in one which is located ultimately result in a patchwork of laws regulating morality.

This leads to a question of whether all sexuality is local, meaning whether the morals of one locale, as determined by the dominant group, should control. Without addressing issues of morality (such as whether this is a legitimate area for governmental control or whether same-sex marriages that are valid in one jurisdiction ought to be valid in other jurisdictions barring public policies or laws to the contrary), the question arises whether jurisdictions with differing marriage rules are attempting to regulate what other states or jurisdictions can and cannot do with regard to same-sex marriages. States that choose to confer certain benefits or status on same-sex couples should be allowed to do so without being undermined by states that choose not to do so. Poirier suggests that maybe the state that conferred the status should maintain jurisdiction over the couple, regardless of whether or not the pair are domiciled in the state.³⁸ Domicile would not affect status, but merely the recognition of that status.³⁹ Thus same-sex couples married in Massachusetts or Connecticut would still be married even if they moved to another state (even if their new state of residence would not permit them access to the same benefits granted to mixed-sex married couples). But one aspect of the anti-same-sex marriage argument is that the presence of a legitimately-married-same-sex couple has a negative effect on mixed-sex married couples. The problem is that in some states same-sex marriage is viewed not as a “local public good,”⁴⁰ but as a local public evil, and that

³⁵ 10 U.S.C. § 654(13) (1997) (“The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.”).

³⁶ Poirier, *supra* note 2, at 312 (internal citations omitted).

³⁷ *Id.* at 322.

³⁸ *Id.* at 318.

³⁹ *Id.* at 321.

⁴⁰ *Id.* at 324.

allowing same-sex spouses to even exist within the boundaries of a given state, it is argued, will have a horrible impact on the citizenry and the state as a whole. Thus, states should be legally permitted to exclude or banish them from their midst.

Poirier ventures into an area that Aziza Botchway⁴¹ addresses when he writes of what he refers to as the “aterritorial nomos approach.”⁴² Here the issue is one of culture and the accommodation of different cultures, addressing “cultural and moral pluralism.”⁴³ Rather than on geographical whereness, the focus is on the commonality of a community’s culture. The idea is that individuals can create accepting communities within specific locations that are aterritorial.⁴⁴ These self-constructed communities would have spiritual or moral jurisdiction over such issues as whether or not to permit same-sex marriage. When/if there is conflict within those communities or locales an individual or group could choose to leave for friendlier climes.⁴⁵ Choosing to leave is a self-dislocation whereas banishment, such as what happens to the Trokosi,⁴⁶ is dislocation by other members of the community. Poirier discusses dislocation by both the self and others. Botchway discusses the banishment of girls and women, a gender dislocation of girls from home to away, never to return.⁴⁷ Larry Catá Backer discusses a kind of dislocation by external forces when he writes about intragender policing of masculinity where men regulate the masculinity of other men and dislocate aspects that do not comport or banish men who do not conform.⁴⁸ And Diane Klein discusses a dislocation of Latino masculinity, especially in the context of Cuban identity, by other Latino identities and constructs of masculinity.⁴⁹

There are specific dislocations from place, but also from discursive space; however, if gender and sexuality were tied not to place but to cultural community, it would appear that dislocations would be limited. One could choose to leave the community, go “straight” as it were; however, this would be voluntary dislocation, not banishment. Also, as Poirier points out that, by participating in one discursive space or another, we can have different forms of marriage that coexist within a territorial jurisdiction.⁵⁰

Another option for dislocation and relocation of discursive spaces, such as marriage, is to dislocate it from the law and relocate it to a more

41 Botchway, *supra* note 5, at 369.

42 Poirier, *supra* note 2, at 325-28.

43 Poirier, *supra* note 2 at 325.

44 Poirier, *supra* note 2, at 326 (using religious communities as an example).

45 Poirier, *supra* note 2. at 326-27.

46 Botchway, *supra* note 5, at 370-71.

47 Botchway, *supra* note 5, at 391.

48 Backer, *supra* note 6, at 341.

49 Klein, *supra* note 7, at 395.

50 See Poirier, *supra* note 2.

comfortable place. For example, marriage could be relocated to where religion lies. Still, there is the question of physical space. Where weddings are performed is an issue for locations, for geographies, for territories. And the result of the marrying that people do is still a part of the discursive space. The issue in *Shahar*⁵¹ was that she located herself as married outside of the safe discursive space of her community, the locale with moral jurisdiction. In that public discursive space she and her marriage were rejected. But in *Shahar* there was an issue of physical space as well in that there was to be a wedding. It is actual public space, the physical location for the marriage ceremony—the wedding itself—that Poirier addresses when writing about the Ocean Grove, New Jersey case.⁵² A wedding needs a physical place, and therefore gender and sexuality are being performed in public through the rite of marrying. Marrying is a public act; the wedding is the stage on which that act is performed. The where of the wedding indicates the validity, or lack thereof, of the marriage. As Poirier concludes, “in seeking to attain the normalizing status of marriage, they nevertheless do it differently and so redefine it. Whether this reaffirms or significantly undermines the underlying, traditional, gendered structure of the institution remains to be seen.”⁵³ Changing marriage in particular, and gender and sexuality in general—the process of locating, dislocating and relocating marriage, gender and sexuality—possibly has the impact of lessening dominant group power while showing potentially great positives for subordinated groups and society as a whole.

II. TROKOSI: CULTURAL/RELIGIOUS LOCATIONS OF FEMALE SEXUAL SLAVERY

Aziza Botchway’s essay focuses primarily on Ghana as the location for the practice of the Trokosi, which Botchway states “describe[s] both the practice [of female sexual slavery] and the virgin female forced to serve the priest involved in the practice.”⁵⁴ Here the issue is that the Trokosi, though violative of national and international law, is justified by culture and religion. The place and position of women is circumscribed by geographic location, in this article the focus is on Ghana; the physical spaces, which are the temples in which girls and women are enslaved; and the discursive space of domestic and international law as it interacts with culture and religion in determining women’s lives.

⁵¹ *Shahar*, 836 F.Supp. at 859.

⁵² Poirier, *supra* note 2, at 329-30.

⁵³ *Id.* at 335.

⁵⁴ Botchway, *supra* note 5, at 371.

The “fetish priest [] is the proxy for the gods”⁵⁵ and the Trokosi can be something with which to bargain for a family or village experiencing bad luck or they can be used to serve out the sentence of a man convicted of a crime.⁵⁶ When a deal is struck, the girl or woman is dislocated from her home and relocated to the temple. Her gender and gender role are dislocated as she is transformed from being a girl, woman, and daughter into slave and wife, “married” off to the fetish priest in order to bring good luck or as penance for a crime that may not have been committed at all.⁵⁷ As Botchway notes, the child may even be relocated far away from home such that, if she were ever freed, she would be a stranger in a strange village.⁵⁸ Regardless of location she is still an outcast.⁵⁹

In the discursive space of Ghanaian law, women and girls are “not overtly discriminated against.”⁶⁰ The law also asserts protection for human rights as well as special protection for children.⁶¹ Ghana is also a signatory to, and has ratified several international human rights treaties, which the Trokosi contravenes.⁶² In both the domestic and international spheres, Ghanaian girls and women should be protected against sexual enslavement that is the Trokosi. But the argument asserted by those in support of the continuation of the Trokosi is that it is a religious and cultural practice that is and should continue to be protected as such.

Botchway asserts that the Trokosi is located within the religious and cultural practices of Ghana as opposed to located within the boundaries of international human rights anti-discrimination laws.⁶³ Thus the fates of women and girls are determined by cultural relativism, and they are doomed to be sent off to be sexual slaves. Even though laws exist that can and should protect women and girls, their intent and reality are dislocated from each other. The intent of treaties and conventions may be to provide women lives free from slavery,⁶⁴ however the reality is that they may not be “worth the paper [they are] printed on”⁶⁵ if they cannot in reality prevent women from being discriminated against and bartered into sexual slavery.

Like Poirier, Botchway asserts that the change must take place at the local level. What must occur is that villages must begin to dislocate their fates from the gender enslavement of women. Botchway suggests that

⁵⁵ *Id.* at 372 (footnote omitted).

⁵⁶ *Id.* at 373.

⁵⁷ *Id.*

⁵⁸ *Id.* at 369.

⁵⁹ *Id.*

⁶⁰ Botchway, *supra* note 5, at 378.

⁶¹ *Id.* at 386-90.

⁶² *Id.*

⁶³ *Id.* at 390-91.

⁶⁴ *Id.* at 392.

⁶⁵ *Id.*

Ghana should “(1) begin with parental education, (2) provide support groups for these women and (3) punish the priests.”⁶⁶ These suggestions each serve to dislocate the constructed roles for girls and women in places that practice the Trokosi from the economic and legal troubles that individuals and communities face and to relocate girls and women under the rule of law, domestic and international. In practical terms, women and girls may need to be relocated into actual geographic locales where they are not forced into sexual slavery or can successfully escape if coerced or forced into the practice.

III. THE PRESIDENCY:

LOCATING GENDER IN THE WHITE HOUSE AND HOMELAND (SECURITY)

Professor Larry Catá Backer tackles the issue of gender in the context of the rule of law and the U.S. Presidency.⁶⁷ This work both responds to an essay by Harvey Mansfield titled, *The Law and the President: In a National Emergency, Who You Gonna Call?*,⁶⁸ and expands on the issue of gender in the Presidency. The location for the construction of gender is in the context of domestic versus international arenas or the private versus the public sphere. Backer makes the argument that “Mansfield suggests that Presidential power—gendered male—clearly suggests that the President’s Constitutional powers extend beyond the mere execution of the laws.”⁶⁹ Backer writes, “[i]f law is male, . . . then rule of law is defectively male (and thus subordinate as female)—passive, docile, and risk averse.”⁷⁰ The physical location for this discussion is in the “post 9-11” United States, however, the gendering of the Presidency and the argument that presidential powers are not bound by “rule of law” or “rule of law constitutionalism” is not limited to the early twenty-first century.⁷¹

Backer addresses the location of ideologies in noting that it is “well understood in the West” that ideologies have “power . . . to discipline and subordinate women” directly as well as through “defining, disciplining and subordinating the ‘female’ in men.”⁷² These ideologies are located most broadly in “the west,” more narrowly within the “American government” and specifically, the Presidency.⁷³ They are also located within a discursive space bounded by law in general and, specifically, by the U.S. Constitution.⁷⁴ According to Backer, in Mansfield’s essay it is “rule of law constitu-

⁶⁶ Botchway, *supra* note 5, at 390.

⁶⁷ Backer, *supra* note 6, at 341.

⁶⁸ Mansfield, *supra* note 13.

⁶⁹ Backer, *supra* note 6, at 341.

⁷⁰ *Id.*

⁷¹ *Id.* at 351.

⁷² *Id.* at 341 (footnote omitted).

⁷³ *Id.*

⁷⁴ *See id.* at 341.

tionism” that works to essentially gender the “‘true’ constitutional framework envisioned by the Founders” as female, and thus it is rendered both defective and ineffective especially when it comes to keeping America safe in an international context.⁷⁵ Mansfield uses this idea of the Presidency, which is constructed as male, being feminized by rule of law constitutionalism to explain why there is a constitutionalism that actually demands that the President “act beyond law under certain circumstances.”⁷⁶ Thus, for Mansfield there is a location that is beyond the law and that location is at least masculine, if not fully male, space. It is a location that is in the public sphere, concerned with protecting the nation from the international “evil doers” hell bent on doing harm to the United States.⁷⁷ Backer points out that this is the traditional man’s role as savior and protector. The location of the rule of law that is legitimately female is within the domestic sphere, where women have always belonged.

In her essay, Botchway locates gender and gendering squarely within one specific cultural context while Backer writes of a gendering which is “trans-cultural.”⁷⁸ Regardless whether one or many, the communities (locations), geographic and otherwise, are places and spaces that construct gender and control gendering. Gender is located within institutional systems of power. The power of gender constructions and performances to subordinate is partially determined by the location of the subordination—where it is working. Backer notes that the subordination of women is located in both the public and private spheres and is accomplished directly and indirectly by subordinating women as women and women as not men.⁷⁹

It is the ascription of certain traits to certain genders in certain locations that makes for the gendering of, in this case, the Presidency, the President, and his actions. This gendering is accomplished by constructing certain traits and certain behaviors as feminine. They are constructed as feminine partially because of where they are performed, in this case the locating of actions within the domestic sphere and under the rule of law. By adhering to the rule of law the action becomes female. It is extra-legal actions that are male. As Backer writes, “It comes as no surprise, then, that male elites in the United States, like those in other nations, continue to protect the male gender borderlands of behavior norms. And there is no more powerful set of behavior norms than law in the United States.”⁸⁰ Law is loca-

⁷⁵ Backer, *supra* note 6 at 343 (quoting Mansfield).

⁷⁶ *Id.*

⁷⁷ See Manuel Perez-Rivas, *Bush Vows to Rid the World of ‘Evil-doers’*, Sept. 16, 2001, <http://archives.cnn.com/2001/US/09/16/gen.bush.terrorism/> (noting President Bush’s use of the term “evil-doers.”).

⁷⁸ Backer, *supra* note 6, at 344.

⁷⁹ *Id.* at 363.

⁸⁰ *Id.* at 346.

tion in and of itself. What the legal system does is to relocate those who are behaving counter to the law back within its purview. Fundamentally, the location issue is that there is a difference between the private and public spheres. The private is domestic and the public international. The domestic is feminine and the public masculine. That public space is male space and is beyond law. Mansfield's unitary executive is beyond even the rule of law because he is located outside the law and it is only a "He" who is able to be located beyond the law. A "She" is always located within legal bounds because she is a she.

Mansfield, and Backer in critiquing him, both invoke other locations such as a "well ordered governmental house" which has a gendered aspect to it in the sense that a house is a domestic space and that is women's space.⁸¹ The question is does the White House make the man? This house has:

functional differentiation[s] inherent in separation of powers [which are] both necessary and natural given the characteristics of each of the elements of government—a domestic and rule bound legislature, and judiciary—in contradistinction to the assertive and unbound protective power of the executive. Constitutionalism merely institutionalizes and assimilates these natural distinctions.⁸²

In this case the female/feminine, male/masculine distinctions are natural. The legislature and judiciary are domestic, rule bound and feminine, and the executive is protective, public, extra-legal, and masculine.⁸³

But it is not only the branches of government that are spatially gender limited, so too is the Constitution itself. Says Backer, "Rule-of-law constitutionalism is female space and, for Mansfield, insufficient. He tells the reader: '[y]et the rule of law is not enough to run a government,'⁸⁴ and it was government that the Constitution created."⁸⁵ According to Mansfield, government needs to be located within the law and to be able to relocate outside it. That which is within it is subordinate to that which is outside it. There is a gendered hierarchy: public/international/extra-legal presidential and dominant, and private/domestic/rule of law legislative/judicial and subordinate. The law itself is feminine and discretion is masculine.⁸⁶ The separation of powers has a location and, again, it is the domestic and feminine sphere versus the public and masculine sphere.

⁸¹ *Id.* at 350.

⁸² *Id.* at 346 n.33.

⁸³ *Id.* at 351.

⁸⁴ Mansfield, *supra* note 13.

⁸⁵ Backer, *supra* note 6, at 351.

⁸⁶ *Id.* at 358.

For the executive not to have extra-legal or “extra-legislative” power⁸⁷ is to weaken him, thus creating an effeminate and hen-pecked executive. The Presidency is male and must be understood as such. The President *must* be understood as male because of the location of the extra-legal aspects of the law. It is in the public sphere, the job is that of protector of both the public and the domestic sphere, not the controller of the private sphere, and it is according to the Constitution that this is the way it is. Mansfield asserts that the president cannot be located under the rule of law because, according to Backer, “the *rule-of-law* cannot apply when law does not apply.”⁸⁸ There is a space within American constitutionalism, Mansfield argues, “when liberties are dangerous and law does not apply.”⁸⁹ “Lawlessness of this sort is both moral and lawful, precisely because it rejects the weakness and stability [read femininity] of rule-of-law constitutionalism.”⁹⁰ It is the male’s responsibility to protect the home. It is the President’s responsibility to protect the homeland. Thus, the Presidency itself is masculine space. In closing, Backer sums up Mansfield’s argument and explains why the Presidency is thus gendered male. “If law is male, Mansfield suggests, then rule-of-law is defectively male (and thus subordinate as female)—passive, docile, and risk-averse.”⁹¹ The result, Backer argues, is that the Presidency becomes “corroded”⁹² and transformed into a form of dictatorship.

[B]y imposing and enforcing these differences, differences based on a need to distinguish male from female behavior—more from less valued—Mansfield’s exercise in “manliness” is symptomatic of the more subtle and corroding subversive nature of the hierarchy of male gendering. Intra-sexual gender role hierarchies, based on a normative model of male role supremacy, continue to marginalize the normatively female, both within each sex and between the sexes. When this marginalization becomes the stuff of constitutional analysis, “*caudillismo* cannot be too far behind.”⁹³

Backer does end by noting, “The gendered legal order still survives intact.”⁹⁴ However, it is the “traditional binary,” not Mansfield’s inverted one, “which genders rule of law as male, and the domestic portion of the private sphere, female and thus extra-legal” that survives.⁹⁵ Under the traditional gender binary, the unregulated space that is extra legal is female space, not male space. It is extra-legal not because of a superiority, but because it is

⁸⁷ *Id.* at 355.

⁸⁸ *Id.* at 347 (emphasis in original).

⁸⁹ Mansfield, *supra* note 13.

⁹⁰ Backer, *supra* note 6, at 357.

⁹¹ *Id.* at 362.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

not worthy of the attention of the State. The masculine space of the unitary executive warrants attention and should be located where it will receive much scrutiny.

IV. ON TELEVISION: (RE)(DIS)LOCATING LATINOS IN (CSI) MIAMI

Diane Klein begins her essay by locating it firmly within the LatCrit arena by invoking LatCrit V,⁹⁶ and situating this work within the cultural studies arena addressed by “many LatCrit scholars.”⁹⁷ It is, according to Klein, the LatCrit way to be democratic even in the cultural realm because like culture studies, LatCrit “rejects the distinction between so-called low culture and high culture and argues that all forms of culture need to be studied in relation to a given social formation.”⁹⁸ In this case, Klein is examining *CSI: Miami* as a cultural phenomenon that presents and represents Latinos. Her work is a response to the call put out by Professor Perry to “interrogate the cultural narratives that reinforce and perpetuate racial biased workplace situations.”⁹⁹ Klein examines two workplaces, the workplace of the show itself and what it represents, as well as the police station and forensic laboratory, workplaces within the show. Similar to the other articles in this cluster, Klein addresses the cultural narratives that shape gender and sexuality. Here, the cultural narrative tells of Latinos/as on television as both actors and characters, and the stereotyping and sometimes counter-stereotyping that occurs.

Klein’s essay explores multiple locations: the workplace of the television production, Miami—the locale of the show itself—and the presentation of the fictionalized workplace, as well as fictionalized Miami. There are also personal locations/locales. Gender and sexuality themselves are locations with the actual meaning of where a person “is” at the time, as in where they would be placed or place themselves on sexuality or gender continua, such as the Kinsey scale.¹⁰⁰ There is also the issue of the influence of geographic locale on gender and sexuality as well as the influence of other identities. Klein’s focus is on “institutional, rather than psychological sources of racism and discrimination.”¹⁰¹

Klein examines five seasons of *CSI: Miami*, constructing an elaborate coding system to address the issue of stereotyping. She notes different ma-

⁹⁶ Klein, *supra* note 7, at 396.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 397 n. 8.

¹⁰⁰ ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638 (W.B. Saunders Company 1948); KINSEY et al., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (W.B. Saunders Company 1953)(explaining sexual behavior at a given time through the use of a zero to six scale with zero meaning exclusively heterosexual and six meaning exclusively homosexual).

¹⁰¹ Klein, *supra* note 7, at 398 n.12

for themes specifically, finding a running theme of masculinity and criminality expressed primarily through the Latino characters including Eric Delko, the one Latino CSI. Though the white male CSIs also break the rules, it seems that rarely do they break the law, whereas Delko does. Latinos are also portrayed as the “Latin lovers.” This, too, includes Eric Delko.

Locales are conflated when it comes to the Latinos in *CSI: Miami*. Klein points out that rarely are the locales from whence the Latinos come differentiated from the others. Though occasionally one does note a real or fictionalized Latin American country a character may come from, generally there is a sense of Pan-Latinoness about the characters and the storylines. It is as if differentiating between and among the individuals would take too much research and, thus, all Latinos are lumped together as one identity.

Though often lumped together geographically as well as stereotypically, there is the case of what Klein explains¹⁰² and Lolita Inniss identifies as the “exemplary other.”¹⁰³ Klein identifies that the exemplary other is based on stereotyping, explaining that: “The construction of certain members of a group as ‘exemplary others’ is a subordinating technique. It co-opts those it identifies as ‘exemplary,’ and does so by enforcing their differences from other members of the subordinated group.”¹⁰⁴ Stereotyping can locate identities in the camp of “other” or “exemplary other” both of which are removed from the one who is the standard by which the “others” are judged. The question for *CSI: Miami* is whether Eric Delko is simply “other” or “exemplary other.” Given that the context is Miami, which has a very high Cuban population, having a Cuban, non-Anglo man working in law enforcement as a CSI might not be uncommon. However Delko may be an exemplary other, an extra special Cuban Man, not like the “simply” others.

It is also possible that the Eric Delko is an example of racialized gender or gendered racial counter stereotyping when taken as a three-dimensional character. He is generally located “outside the dominant stereotypes of criminality and hypersexuality”¹⁰⁵ and, for the most part, passes the “‘stereotype commutation’ test,”¹⁰⁶ in that the character of Eric Delko did not have to be Latino, though it may have been odd to have an office located in Miami and not have a Cuban character.

Klein also addresses class and location by specifically analyzing “Latinos in Upper Class Racially-Mixed Neighborhoods.”¹⁰⁷ All identities—race, class, ethnicity, gender and sexuality—have locational aspects. Klein

¹⁰² *Id.* at 414.

¹⁰³ Lolita Inniss, *Bicentennial Man: The New Assimilationism and the Foreigner Among Us*, 54 RUTGERS L. REV. 1101, 1116-17 (2002)(internal citations omitted).

¹⁰⁴ Klein, *supra* note 7, at 414.

¹⁰⁵ *Id.* at 419.

¹⁰⁶ *Id.* at 400, 420.

¹⁰⁷ *Id.* at 419-20.

concludes that *CSI: Miami* has managed to de-Latinize or to Anglicize a very Latino/a location/geography—the city of Miami—dislocating a distinctly Latino, particularly Cuban, identity. Also *CSI: Miami* both dislocates and relocates Latino sexuality within and without the workplace and within and without Miami, both the real and the fictionalized place.

CONCLUSION

These four essays call attention to the notion that physical space, as in actual locations, can be both normative and normalizing. Where one performs one's gender/sexuality can indicate that a certain level of normality is attached to that identity. Certain aspects of Cuban masculinity may be identified as normal in Miami but may be considered less normal elsewhere. It is generally considered normal to have sex in private and abnormal or deviant to have sex in public. Marrying within a church can normalize same-sex relationships in a way that legal sanctioning does not. The idea is that there are proper or socially-sanctioned places to perform identity and improper ones. The proper/improper dichotomy is as socially constructed as gender and sexuality itself, and, as the essays point out, can serve to harm subordinated identities. Some identities are considered to have no proper social location, as with LGBT identities, and with others, the Trokosi for example, the proper location is a deadly one.

As the essays indicate, subordinated people and identities continue to search for and create places to perform their sexuality and gender and to live their lives. LGBT persons will be a part of marriage and the marriage debate. Women are a part of international human rights law and will continue to work to implement laws within Ghana and other areas practicing Trokosi until they are relocated physically and discursively to a place of safety. The feminine, even if stereotypically defined as domestic, cannot be excluded from the Presidency because it is through and against the female and thus femininity that males and masculinity are constructed and defined. There is no masculine without the feminine and thus the Presidential space already and always includes the female. Finally, regardless of whether Latino masculinity is stereotyped or counter-stereotyped, locating *CSI: Miami* in Miami is to be in Latino space. It is one place where Latinos simply are and, to paraphrase Patricia Williams, the presence of Latinos within, as opposed to without, the bell jar of a "real" or "fictionalized" (CSI) Miami changes the dynamic forever.¹⁰⁸

As Diane Klein notes, studying all levels of culture is an aspect of LatCrit scholarship.¹⁰⁹ Location or "whereness,"¹¹⁰ which includes both

¹⁰⁸ PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, 101 (1991).

¹⁰⁹ Klein, *supra* note 7, at 395.

¹¹⁰ Poirier, *supra* note 2, at 321-22.

physical and discursive space, is part of cultural analysis. Each of these essays shows the importance of gender and sexual whereness in the construction of law and culture. Klein's essay raises the specific question of locale—the geography itself, the actual there that is there—fictionally constructed or not and its effect on gender and sexuality. I was inspired by Klein's article to ask the question: Is gender and/or sexuality different in different locales? All four essays lead me to answer "yes". What I mean is that the actual place itself does have an effect on gender and sexuality and vice versa. I assert that there is an argument to be made that weather, temperature, topography, architecture, etcetera—the specifics of locale—do construct and/or affect the performance of gender or sexuality, and the performance of gender and sexuality effect the actual places themselves. These essays only touch on this in a limited manner thus leaving work for other LatCrit scholars to further address gender, sexuality, and critical localities and to posit more answers to the question, "Where is there?"