

## Oscar Wilde's Long Tail: Framing Sexual Identity in the Law

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## OSCAR WILDE’S LONG TAIL: FRAMING SEXUAL IDENTITY IN THE LAW

Laura I. Appleman\*

*This Article argues that narrative has been the hidden link in the intersection between law and sexual identity, shaping and structuring the relationship between the two. The power of the hidden narrative continues to influence legal decisions today, such as the national debate on same-sex marriage. I contend that the basis for this complicated relationship began with a few critical nineteenth century events, in particular the widely publicized trials of Oscar Wilde for the crime of sodomy. I aim to restore the camouflaged work of narrative to its rightful place in our understanding of sexual identity in the law. In so doing, I hope not only to dissect and expose the complex interrelationships between law, narrative, and sexuality, but also to clarify the shifting dynamics of legal sexual identity. Although the Wilde trials, the emergence of gay rights, the act/identity divide, and the same-sex marriage debates have been variously discussed in both legal and humanities scholarship, they have never been studied as a whole, viewed through the lens of the hidden narrative. This Article asserts that only through recognizing the role of narrative in structuring our legal definition of sexual identity will we ever be able to understand how and why courts decide gay rights cases in the way they do.*

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I. INTRODUCTION: LAW, NARRATIVE, AND SEXUAL IDENTITY

Separated by 115 years and over a century’s worth of cultural change, the 1895 trials of Oscar Wilde<sup>1</sup> and the 2010 federal litigation over California’s Proposition 8<sup>2</sup> possess some remarkable similarities. Both had highly visible players on the legal stage—Oscar Wilde in 1895 and superstar litigators David Boies and Ted Olson in 2010.<sup>3</sup> Both attracted a tremendous amount of media attention. And both functioned as a stage for enacting social-cultural anxiety over sexuality.

Perhaps most critically, however, both the Wilde trials and the Proposition 8 trial publicly expressed the myriad hidden narratives structuring our legal understanding of sexual identity, displaying for

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1. Oscar Wilde was a celebrated poet, writer, playwright, belletrist, and public figure in late nineteenth century England. Wilde rose to fame as a public figure when at university in Oxford, where he founded a group of similarly minded young men who promoted a cult of the aesthete, both in dress and in lifestyle. Once Wilde left Oxford, his antics as a man-about-town with his group of male companions received enormous press, both in England and in America. Following a hugely successful speaking tour of the United States, Wilde settled in London and began to write plays, the most popular of which was *The Importance of Being Earnest*, a light comedy of manners filled with drawing room hijinks hinting at a variety of homosexual identities. Ultimately, Wilde “led an aesthetic revolution against the stifling proprieties of the Victorian era, championing a new freedom in artistic expression.” Steven Lubet, *The Importance of Being Honest*, 8 GREEN BAG 2D 163, 163 (2005); see also MICHAEL S. FOLDY, *THE TRIALS OF OSCAR WILDE: DEVIANCE, MORALITY AND LATE-VICTORIAN SOCIETY*, at ix–x (1997) (tracing Wilde’s “incredible five-year run of virtually uninterrupted critical successes”).

2. Proposition 8 was a public initiative in California that added a section to the state constitution banning same-sex marriage. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193–94 (9th Cir. 2011).

3. See Maureen Dowd, *An Odd Couple Defends Couples That Some (Oddly) Find Odd*, N.Y. TIMES, Jan. 17, 2010, at WK9.

all the relationship between narrative, law, and sexual identity.<sup>4</sup> Narrative, explicit and implicit, has been the hidden link between law and sexual identity, shaping and structuring the relationship between the two. Importantly, as this Article will argue, this complex and difficult relationship is based on events occurring in the late nineteenth century, in particular the widely publicized trials of Oscar Wilde for the crime of sodomy.<sup>5</sup>

In this Article, I aim to restore the camouflaged work of narrative to its rightful place in our understanding of legal sexual identity. In so doing, I hope to clarify the shifting, labile dynamics of sexual identity at work in the law. Although the Wilde trials, the emergence of gay rights, the act/identity divide, and the same-sex marriage debates have been discussed in both legal and sociological scholarship,<sup>6</sup> they have never been studied as a whole, viewed through the lens of the hidden narrative. Only by recognizing how narrative continues to quietly structure our legal definition of sexual identity will we ever be able to understand how and why courts decide gay rights cases in the way they do.<sup>7</sup>

Oscar Wilde's three trials provided a forum to display and enact Anglo-American anxieties over sexual identity politics—with deadly consequence. Wilde, a celebrity on both sides of the Atlantic, was constantly in the press, and the scandal of his trials proved remarkably popular.<sup>8</sup> In part, this popularity ensued because Wilde's trials were one of the first public displays of “deviant” sexual identity.<sup>9</sup> Public understanding and interest in same-sex marriage function in a similar pattern today. In other words, same-sex marriage occupies the same

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4. See *infra* Parts II, IV.B.

5. See *infra* Part II.

6. See, e.g., Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1726 (1993) (noting that an adequate understanding of sodomy “requires an acknowledgement that the historiography of sodomy is permeated by the instability of act and identity”); Melinda S. Miceli, *Morality Politics vs. Identity Politics: Framing Processes and Competition Among Christian Right and Gay Social Movement Organizations*, 20 SOC. FORUM 589, 590 (2005) (examining the conflict between Christian Right organizations and gay-rights advocates by applying a social movement organization framing analysis to battles over sexuality issues in public education); Anthony R. Reeves, *Sexual Identity as a Fundamental Human Right*, 15 BUFF. HUM. RTS. L. REV. 215, 215–16 (2009) (noting the contemporary relevance of the second Oscar Wilde trial); Sarah A. Soule, *Going to the Chapel? Same-Sex Marriage Bans in the United States, 1973–2000*, 51 SOC. PROBS. 453, 453 (2004) (analyzing “factors that influence state bans on same-sex marriage”).

7. See *infra* Parts III–IV.

8. See, e.g., *Central Criminal Court*, TIMES (London), Apr. 4, 1895, at 7 (“The case excited great public interest, and the court was crowded.”).

9. See *infra* text accompanying notes 37–61.

cultural space in twenty-first century society as the newly “discovered” figure of the homosexual did in the nineteenth century.<sup>10</sup>

As illustrated by the explosion of the Wilde trials, sexuality became a key aspect of identity by the end of the nineteenth century, permeating all domains of knowledge, feeling, culture, and subjectivity.<sup>11</sup> Nothing could avoid sexuality’s long tendrils. Thus, to understand the origins of our current legal and social unease with same-sex marriage, sexual orientation, and identity politics, we must first return to the site of their construction: Oscar Wilde’s trials and punishment.<sup>12</sup>

Sexual identity in the law, long contained in one oppressive homosexual/heterosexual dyad, has been greatly influenced by paradigm-shifting nineteenth century events like the criminalization of male homosexuality in 1885 England,<sup>13</sup> the medicalization of gayness,<sup>14</sup> and the sensationalized Wilde trials. For over one hundred years, the law’s strategy for controlling homosexuality has been to contain it, shrinking it to one act and one understanding.<sup>15</sup> This homophobic singularity of legal interpretation sets itself against a gay multiplicity of meaning,<sup>16</sup> an explosion of multiple gay voices: These voices are, in a critical sense, multiple narratives that resist the domination of one legal voice.

The slippage we find between narrative and sexual orientation in the law belies the role of narrative in the structuring of the act/identity debate—a debate that forms an intrinsic part of the legal status of sexual orientation.<sup>17</sup> Underlying our ideas of legal sexual identity<sup>18</sup> is

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10. See *infra* Parts III–IV.

11. CHRISTOPHER CRAFT, *ANOTHER KIND OF LOVE: MALE HOMOSEXUAL DESIRE IN ENGLISH DISCOURSE, 1850–1920*, at 27–28 (1994).

12. See *infra* Part II.

13. In 1885, England’s Parliament passed the Labouchère Amendment, which made male homosexual acts criminal. See Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, § 11 (Eng.), *repealed by* Sexual Offences Act, 2003, c. 42, § 140, sch. 7 (Eng.) (designating as a misdemeanor acts of “gross indecency” between two males).

14. As I discuss in Part II, the 1892 publication of Richard von Krafft-Ebing’s *Psychopathia Sexualis* did much both to popularize and to recast gay acts into a gay male identity that was to be treated by the medical establishment. See also William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007, 1022–25 (1997) [hereinafter Eskridge, *Construction of the Closet*] (discussing Krafft-Ebing’s *Psychopathia Sexualis* and Havelock Ellis’s *Sexual Inversions*).

15. See *infra* Part III.A.

16. By “a gay multiplicity of meaning” I mean a multifaceted gay identity.

17. See *infra* Part III.

18. The legal definition of sexual identity is heavily based on using acts to define identity. Thus, doing homosexual “acts” is enough to give you a sexual identity legally defined as homosexual. This pigeonholing often creates a legal sexual identity that is not truly reflective of gay, lesbian, bisexual, transgender, or queer identity.

an entire web of narrative and story telling that has still not been fully exposed.

This complex configuration of law, narrative, and sexual orientation particularly impacts the law's contemporary attempts to grapple with the politics of homosexual identity.<sup>19</sup> Specifically, the complicated construction of homosexuality created in the late nineteenth century has shaped the politics of homosexual identity at work in noteworthy gay rights cases, such as *Bowers v. Hardwick*,<sup>20</sup> *Romer v. Evans*,<sup>21</sup> *Lawrence v. Texas*,<sup>22</sup> and the same-sex marriage opinions from states like Massachusetts, New Jersey, Iowa, California, and Rhode Island.<sup>23</sup>

Part II will locate the creation of legal homosexuality in the nineteenth century paradigm shift from male-on-male sexual acts to homosexual identity.<sup>24</sup> I will then trace some of the current legal interpretations of gay identity to the Oscar Wilde trials, which simplified the nineteenth century psychotherapeutic notions of the homosexual and funneled them into the public sphere.<sup>25</sup>

Part III will first look at the slippage between act and identity that was crystallized in *Bowers v. Hardwick*.<sup>26</sup> It will take a detailed look at *Romer v. Evans* and *Lawrence v. Texas*, exposing the unarticulated narratives lurking beneath the surface and exploring the way in which both texts continue to reify the same rift between act and identity, despite their otherwise positive contributions to gay rights.<sup>27</sup> Then, Part III will look at how this crystallization has appeared repeatedly in recent military cases and legislation such as "Don't Ask, Don't Tell."<sup>28</sup>

Part IV will examine the recent spate of state court same-sex marriage decisions, including *Goodridge v. Department of Public Health*,<sup>29</sup> *Lewis v. Harris*,<sup>30</sup> *In re Marriage Cases*,<sup>31</sup> *Chambers v. Ormiston*,<sup>32</sup> and

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19. William Eskridge illustrates this in his persuasive writings on the topics of sexual orientation and identity. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419-23 (2001) (describing the evolution of "identity-based social movements" as a process in which law provides stigmatized groups a forum for objecting to exclusion and discrimination by hostile groups, thus laying claim to constitutional rights).

20. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

21. 517 U.S. 620 (1996).

22. 539 U.S. 558.

23. See *infra* Part IV.A.

24. See *infra* text accompanying notes 36-58.

25. See *infra* text accompanying notes 59-83.

26. See *infra* Part III.A.

27. See *infra* Part III.B-C.

28. See *infra* Part III.D.

29. 798 N.E.2d 941 (Mass. 2003).

30. 908 A.2d 196 (N.J. 2006).

*Varnum v. Brien*.<sup>33</sup> In this Part, I will argue that the Wildean narrative legacy produced state court definitions of gay identity that are just as narrow, if not as toxic, as the more familiar territory of act-equals-sexual-identity.<sup>34</sup> Part IV also will examine some of the narrative and rhetoric surrounding the recently passed anti-gay marriage propositions, focusing particularly on the battle over California's Proposition 8 and its ongoing federal litigation.<sup>35</sup>

Finally, Part V will offer a few concluding thoughts on the law's acknowledgment of the role of narrative in sexual identity.

## II. MAPPING THE HIDDEN NARRATIVE

The Wilde trials were a forum where hidden narratives first structured the relationship between law and sexual identity. These narratives were simultaneously literary, cultural, psychological, and pseudo-scientific. This was no accident, as sexualized identity, in general, and homosexual identity, in particular, emerged predominantly at the end of the nineteenth century.<sup>36</sup> In the first volume of his *The History of Sexuality*, Michel Foucault discussed the tremendous paradigm shift from sexual acts to sexual orientations or identities. Foucault located the genesis of a distinct sexual identity at about 1870:

The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. . . . Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.<sup>37</sup>

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31. 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *declared unconstitutional* by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding that California's Proposition 8 eliminates the right of same-sex couples to access the designation of "marriage" but does not affect their right to establish "an officially recognized family relationship"); *see also* *Strauss v. Horton*, 207 P.3d 48, 75–77 (Cal. 2009).

32. 935 A.2d 956 (R.I. 2007).

33. 763 N.W.2d 862 (Iowa 2009).

34. *See infra* Part IV.A.6.

35. *See infra* Part IV.B.

36. *See* Kenneth L. Schneyer, *Avoiding the Personal Pronoun: The Rhetoric of Display and Camouflage in the Law of Sexual Orientation*, 46 RUTGERS L. REV. 1313, 1319 (1994) (explaining the relatively recent emergence of a discrete identity group of people who are "homosexual").

37. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Pantheon Books 1978).

The new, late nineteenth century understanding of a “homosexual” or “invert,” a person who was structured and defined by his<sup>38</sup> sexual proclivities—a person who not only participated in “inverted” acts but embraced and helped comprise an “inverted” subculture—ended up having consequences for all Anglo-American society.

Although sodomy laws were imported from England to the colonies in the seventeenth century, until the late nineteenth century, sodomy was classified with all other nonprocreative sex outside of marriage and criminalized as “against public morals and decency” but applied to the general population.<sup>39</sup> In contrast, in the “gay” 1890s, heterosexuality seemed to be pitted against homosexuality, a repressive “either/or” dichotomy that faced off the *one* (one “right” sexuality) against the *many* (a multiplicity of sexualities and identities). This crisis of sexuality and identity permeated every facet of Anglo-American society, a phenomenon that continues to this day.

Assisting in this shift from sexuality-as-act to sexuality-as-persona were a multitude of cultural, legal, and literary actors, all exploding on the stage of late nineteenth century London. Laying the foundation for the spectacular scandal of the Wilde trials were two key texts of self-proclaimed science, widely available on both sides of the Atlantic. The “new secularized vocabulary” drawn from these texts would be heavily used in classifying homosexuality as a degenerate status, not

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38. I use “his” instead of a gender-neutral term because lesbianism at the turn of the century was poorly defined, not criminalized, and never included in the Wildean escapades of gay life. See Eskridge, *Construction of the Closet*, *supra* note 14, at 1010 (noting that after 1880 urban-American enforcement of sodomy prohibitions “increasingly focused on men committing consensual acts (oral sex, increasingly) with one another”). In fact, very close relationships, encompassing the erotic, were common between nineteenth century women. See, e.g., DREW GILPIN FAUST, *MOTHERS OF INVENTION: WOMEN OF THE SLAVEHOLDING SOUTH IN THE AMERICAN CIVIL WAR* 142 (1996) (detailing how young women around the time of the Civil War, deprived of heterosexual courtship, turned to each other “for a surrogate interior life”). However, the anti-sodomy laws did ultimately affect lesbians as well: “The medicalization which yielded inverts and homosexuals as objects of control was more centrally interested in controlling the bodies of women, by prohibiting abortion and contraception, by valorizing marriage to a man, and by demonizing same-sex intimacy with other women.” Eskridge, *Construction of the Closet*, *supra* note 14, at 1098.

39. As Eskridge notes,

[T]he presumptive sinfulness of bodily pleasure . . . was the overwhelming reason for punishing sodomy [in early America]. . . . When American states systematically codified their criminal laws in the middle and late nineteenth century, most of them included sodomy prohibitions in the same title or chapter as, and in close proximity with, adultery, fornication, blasphemy, and incest (typically termed “crimes against public morals and decency”).

William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 647 [hereinafter Eskridge, *Historiography*].

merely sinful conduct.<sup>40</sup> The 1892 translation of Richard von Krafft-Ebing's *Psychopathia Sexualis*<sup>41</sup> and the 1897 publication of Havelock Ellis and J. A. Symond's *The Study of Sexual Inversion*<sup>42</sup> were both pivotal in this regard.<sup>43</sup> These two texts—narratives, if you will—popularized and promoted the bifurcation between the heterosexual and the homosexual, spreading the idea that the “invert,” like the “hysteric” and the “suicide,” was an aberration—a particular *type* of person, not a tendency found in all people and all flesh.<sup>44</sup>

The translated texts of *Psychologies of Sex* and *Sexual Inversion* were widely read and discussed, contributing greatly to the idea that homosexuality was a way of life, albeit a neurotic one,<sup>45</sup> that hopefully could be cured by the wonders of medicine and science<sup>46</sup>: “What had once been figured as a perverse potential residing in all beings . . . bec[a]me a definitive singularity; inversion, masochism, fetishism, etc., [were] classified as functional diseases of the ‘sexual instinct.’”<sup>47</sup>

40. *Id.* at 651–52 (discussing the shift in emphasis from conduct to status).

41. The text of *Psychopathia Sexualis* was originally published in German in 1886. Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 *YALE J.L. & HUMAN.* 163, 180 & n.56 (2008). It was reprinted for an English-speaking audience in 1892. Eskridge, *Construction of the Closet*, *supra* note 14, at 1023. R

42. Although it was ultimately suppressed in England, the text was later published in America as volume two of Ellis's huge work, *Studies in the Psychology of Sex*. CRAFT, *supra* note 11, at 31. R

43. See Eskridge, *Construction of the Closet*, *supra* note 14, at 1022–23 (discussing the impact of these works). *Sexual Inversions* helped bring the idea of the “invert” to the Anglo-American medical world. *Id.* at 1023. R

44. *Id.* at 1022–23 (including the texts as examples of the trend towards conceiving inversion as status rather than act).

45. *Id.* at 1022–25. But see KEVIN KOPELSON, *LOVE'S LITANY: THE WRITING OF MODERN HOMOEROTICS* 157 n.6 (1994) (pointing out that readers of Krafft-Ebing's book were warned that “homo-sexuality” was limited to the sexual life, without affecting character and mental personality). Though Kopelson's point casts a slightly different light on the text's general reception and interpretation, I would argue that regardless of the author's intentions, the homosexual's inclusion in this “psychopathic” classification led the general audience to regard homosexuals as just another character in a parade of abnormality, all of whom were defined as wrongly different from the rest of society.

46. See KOPELSON, *supra* note 45, at 1 (“Followers of Michel Foucault consider sexuality to be a vexed and vexing cultural construction formed by, at the very least, three powerful discourses: theology, medicine, and law.”). There are strong similarities between the medical establishment's treatment of women and gays: both have been treated as diseased, flawed, and/or in need of counseling and medicine. See generally ELAINE SHOWALTER, *HISTORIES: HYSTERICAL EPIDEMICS AND MODERN CULTURE* (1997). By medicalizing difference, the establishment had a way of restraining and controlling anxiety-causing characters who threaten to disrupt—if not explode entirely—the complex web of empire, nationalism, sexual construction, and spectacularly enforced gender roles that was the bulwark of nineteenth century British society (and, to a slightly lesser extent, American society as well). R

47. CRAFT, *supra* note 11, at 29. R

In this way, the late nineteenth century discourses on inversion<sup>48</sup> prompted the polarization of heterosexual and homosexual identities, using the latter as a foil for proper, godly,<sup>49</sup> and empire-building sexuality.<sup>50</sup>

The Anglo-American legal world mirrored this new interest in sexual identity and “deviance.” In 1885, Parliament passed the Labouchère Amendment,<sup>51</sup> which criminalized the act of homosexual sodomy<sup>52</sup> but glossed it as a ban on “gross indecency.”<sup>53</sup> As William

48. The Hellenistic movement at Oxford contributed to the discussion in this new form of sexual identity. Although a detailed discussion is not in the scope of this Article, the popularization of man-boy love—in both its spiritual and physical manifestations—and Hellenistic philosophy, combined with Oxford’s decadent, showy undergraduates (one of them, of course, Oscar Wilde) and the University’s close proximity to London, led to societal recognition of at least the less disruptive elements of this new male “type.” See LINDA C. DOWLING, *HELLENISM AND HOMOSEXUALITY IN VICTORIAN OXFORD* 27–28 (1994) (describing the Hellenistic movement at Oxford as a “space within which may be glimpsed the major themes of a subsequent twentieth-century struggle for homosexual tolerance and civil rights, a fully developed language of moral legitimacy, of physical wholesomeness, of the psychic richness, beauty, and creativity of male love”). Such was the influence of these vibrant personas, variously labeled as aesthetes and dandies, that Gilbert and Sullivan wrote an entire musical parodying their movements. In *Patience*, which features the young Wildean aesthete Bunthorne, W.S. Gilbert wrote songs that poked fun while acknowledging their “artistic” influence. Such lines as “If you walk down Piccadilly with a poppy or a lily in your mediæval hand,” which appeared in the stanza celebrating “An attachment à la Plato,” can be read as clear indicators of the central place that discussion of homosexuality took in late nineteenth-century England. W.S. GILBERT & ARTHUR SULLIVAN, *THE COMPLETE PLAYS OF GILBERT AND SULLIVAN* 169 (1976).

49. The new crystallization of male heterosexuality fit in well with the idea of Muscular Christianity, a more “manly” kind of faith. See Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 848–49 (2006) (“The muscular Christianity movement . . . introduced Americans to the idea that sports were integral to the development of men, who society worried were becoming too effeminized . . . Athletics . . . were deliberately touted as the antidote to this perceived weakness. In this context, participating in athletics was as much about defining what it means to be a man as what it means to be *not* a woman.”).

50. As Eskridge argues in a similar vein, the legal demonizing of same-sex intimacy simultaneously helped “normalize” opposite-sex relationships. Eskridge, *Construction of the Closet*, *supra* note 14, at 1094–96.

51. Also known as the “Blackmailer’s Charter,” the Labouchère Amendment (an addition to the Criminal Law Amendment Act) was thought to lead to an increase in the number of suicides committed by homosexuals. KOPELSON, *supra* note 45, at 34. Many desperate homosexuals saw suicide as their escape, as the now-legalized exposure could mean social, professional, and economic ruin, if not incarceration. *Id.*

52. Sodomy was criminalized before the gay nineties, of course; it was a serious, occasionally capital offense in both England and America until the late twentieth century. Eskridge, *Historiography*, *supra* note 39, at 643–45, 659. *Homosexual* sodomy, however, was not singled out as a particular crime in England until 1885. See Eskridge, *Construction of the Closet*, *supra* note 14, at 1012 (explaining that the sixteenth century crime of buggery referred to anal intercourse by either two men or a man and a woman). Likewise, in the United States, before the 1880s, “[c]rime-against-nature statutes were the only formal regulations of same-sex intimacy,” and they were rarely enforced, particularly in cases involving

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Eskridge observed, “Coming at a time when subcultures of male inverts had formed at the fringes of society, Labouchere’s Amendment was an important regulatory expansion that permitted English authorities to regulate those subcultures through arrests for oral sex (which was understood to be the chief object of ‘gross indecency’).”<sup>54</sup> The enthusiastically enforced Labouchère Amendment made both the acts and the very being of the homosexual illegal but refused to name the very actions it criminalized.<sup>55</sup> From the beginning, the narrative of homosexual acts and identity, seen as one and the same, was hidden from public view but had dire legal consequences.

Likewise, it was not until at least the late nineteenth century that *male-on-male* sodomy specifically was criminalized in America; before that, although sodomy was illegal, it was equally illegal for all to perform.<sup>56</sup> In the 1880s, “sodomy laws came to be more systematically enforced in major American cities, and they came to be enforced increasingly against consensual same-sex intimacy.”<sup>57</sup> For various reasons, sodomy, as performed by “inverts” and “degenerates,” merited increased discussion in the last twenty-some years of the nineteenth century.<sup>58</sup>

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consenting adults. *Id.* at 1015. Indeed, sodomy laws were primarily enforced “in situations more akin to rape and seduction, that is, where a man was allegedly assaulting a less powerful man, child, woman, ward, or animal.” *Id.* at 1014. After 1880, in the urban settings of the East, Midwest, and West Coast, sodomy laws were increasingly enforced against men committing consensual acts with each other. *Id.* at 1016–17.

53. The amendment reads as follows:

Any male person who, in public or private, commits, or is a party to the commission of or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, § 11 (Eng.).

54. Eskridge, *Construction of the Closet*, *supra* note 14, at 1026–27.

55. *See supra* note 53.

56. *See* Eskridge, *Construction of the Closet*, *supra* note 14, at 1012 (“[T]he regulatory philosophy of sodomy or crime-against-nature laws was not focused on consensual same-sex intimacy for the first 350 years of Anglo-American regulation.”). As Eskridge explains, “As they were applied in 1868, sodomy laws were *not* inconsistent with [the libertarian presumption]. As I argued to the Supreme Court in *Lawrence*, reported cases in the nineteenth century were wholly limited to unconsented sexual activities or, later on, public activities.” William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1055 (2005) [hereinafter Eskridge, *Body Politics*].

57. Eskridge, *Construction of the Closet*, *supra* note 14, at 1012. Eskridge goes on to note that a number of states, including Michigan, Massachusetts, Maryland, and California, specifically banned oral sex between males, while other states, such as Pennsylvania, amended their existing laws to prohibit both oral and anal sex. *Id.* at 1027.

58. Eskridge, *Historiography*, *supra* note 39, at 655.

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Things all came to a head with the three trials of Oscar Wilde in the late 1890s. The first of Wilde's three trials was actually a criminal libel trial he brought against the Marquis of Queensberry for accusing him of "Posing as a Somdomite [sic]."<sup>59</sup> For the mores of that era, it was unacceptable to even insinuate such a grave insult, and the press covering the first trial would only refer to Queensberry's sobriquet as "some objectionable words written on a visiting card."<sup>60</sup> The silent narrative of Wilde's sexual orientation, or potential proclivities, was thus so radioactive that not only did the papers refuse to name it, but it ultimately poisoned Wilde's role as the original plaintiff, leading to the incarceration of Wilde, not Queensberry, for "gross indecency."<sup>61</sup>

Ultimately, Wilde lost the libel case, but his loss did not spell the end of Wilde's time in court. On the evening his libel trial ended, Wilde was arrested on the charge of "gross indecency," partially based upon the evidence Queensberry had gathered in his own defense and partially based on the extremely damaging testimony Wilde gave during his cross-examination in the libel case.<sup>62</sup> This second case ended in a hung jury.<sup>63</sup> Once Wilde's dirty laundry, physical and narratological, was aired, however, the British Crown would not let it be buried. The gross indecency charges were retried in front of another jury, and in this third trial, Wilde was convicted and sentenced to two years of hard labor.<sup>64</sup>

Widely publicized throughout England, North America, and Europe, Oscar Wilde's trials conflated the author's writing with his life, mixing his fictional narratives with his real-life stories. Put another way, the trials were both "documented events and representational de-

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59. Ed Cohen, *Typing Wilde: Construing the "Desire to Appear to Be a Person Inclined to the Commission of the Gravest of All Offenses,"* 5 YALE J.L. & HUMAN. 1, 1-2 (1993). As the Queen's Counsel, Sir Edward Clarke, explained,

The words of the libel were not directly an accusation of the gravest of all offences—the suggestion was that there was no guilt of the actual offence, but that in some way or other the person of whom those words were written did appear—nay, desired to appear and pose to be a person inclined to the commission of that gravest of all offences.

*Central Criminal Court*, *supra* note 8. In other words, even the insinuation that Wilde was enacting a false narrative of homosexuality was so damaging as to be criminal. R

60. *Police*, TIMES (London), Mar. 11, 1895, at 4; *see also Central Criminal Court*, *supra* note 8 (referring to the subject of the libel suit as "a visiting card of Lord Queensberry's . . . and it had written upon it certain words which formed the libel complained of"). R

61. *See* Anne B. Goldstein, *Reasoning About Homosexuality: A Commentary on Janet Halley's "Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick,"* 79 VA. L. REV. 1781, 1786-88 (1993) (discussing the libel trial and its aftereffects).

62. *Id.* at 1788-89.

63. FOLDY, *supra* note 1, at 66. R

64. Lubet, *supra* note 1, at 53. R

vices.”<sup>65</sup> This conflation was nowhere more evident than in the prosecution’s use of Wilde’s books and plays as actual evidence of his immorality and indecency in his latter two trials for “gross indecency.”<sup>66</sup>

One of the most damaging pieces of “evidence” used against Wilde in his “gross indecency” trials was the purported link between Wilde’s literature and his life—information drawn out of Wilde during his cross-examination at the first libel trial.<sup>67</sup> Arguing that “Wilde was a man of letters and a dramatist of prominence and notoriety and a person who exercised considerable influence over young men,” Queensberry’s plea of justification to Wilde’s libel charge claimed,

[T]hat the said Oscar . . . Wilde . . . did write and publish and cause and procure to be printed with his name upon the title page thereof a certain immoral and obscene work in the form of a narrative entitled “The Picture of Dorian Gray” which said work was designed . . . to describe the relations, intimacies, and passions of certain persons of sodomitical and unnatural habits, tastes, and practices.<sup>68</sup>

Wilde’s writings were transformed into an assertion that his sexual practices were not only necessary public knowledge<sup>69</sup> but also a reflection of his own life. Wilde’s own writings were neatly co-opted by his accusers and turned against him. Punished for his subversive texts, he was veritably hoisted by his own narrative petard.

The literature that Wilde wrote was given weight because of its narrative components, that is, due to its purported relevance to and reflection of the author’s life.<sup>70</sup> Ironically, while Wilde was undergo-

65. Judith Fingard, Book Review, 43 AM. J. LEGAL HIST. 83, 83 (1999) (reviewing FOLDY, *supra* note 1).

66. This followed the approach of Queensberry’s counsel in the libel trial, who invoked *The Picture of Dorian Gray* while cross-examining Wilde. FOLDY, *supra* note 1, at 2; Goldstein, *supra* note 61, at 1786–87.

67. See Cohen, *supra* note 59, at 3–4 & n.4 (describing the focus on Wilde’s writings during the libel trial and noting the importance of the evidence gathered by Queensberry to the subsequent trials). The transcript of Wilde’s first trial, which included the incredibly damning cross-examination focusing on both his taste for literature and for young men, was read into the proceedings at both of his subsequent trials. See FOLDY, *supra* note 1, at 5–18, 34–35 (providing excerpts of the cross-examination).

68. Cohen, *supra* note 59, at 3 (second alteration in original).

69. *Id.* Cohen additionally asserts that by “[i]nterpreting the interactions between the male characters in *The Picture of Dorian Gray* as a reflection of the ‘sodomitical and unnatural’ relations that Wilde was supposed to have engaged in his life . . . the defense plea introduces a theory of representation that defines Wilde’s text as a vehicle ‘calculated to subvert morality and to encourage unnatural vice.’” *Id.* at 3–4 (footnote omitted).

70. See *id.* at 4 (“[B]y linking the claim that Wilde was a particular type of sexual ‘character’ (and not that he had committed certain sexual acts) to a suggestion that this charac-

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ing the humiliating spectacle of his trials, his play, *The Importance of Being Earnest*,<sup>71</sup> was unfolding on the stage. They performed simultaneously for their London audiences.<sup>72</sup> Both concerned homosexuality,<sup>73</sup> but while the play was a gleeful celebration of the invert's double life, the trial was a condemnation of that life. Ultimately, brutally, the legal narrative triumphed.

In Wilde's second and third trials, the use of "psychological" narratives, although obscured, was much more subtle. The varied character-narratives created by Krafft-Ebbing's book—specifically, the invert and the sadist—were invoked by the prosecution to convict and humiliate the author. Wilde was also extensively cross-examined about his novel *The Picture of Dorian Gray*,<sup>74</sup> a cross-examination that was later used to "prove" Wilde had engaged in sodomy.

No longer just a mere perpetrator of sodomical acts, Wilde, through the course of the trial, was transformed into a homosexual *being*—one whose main identity was his "inverted" nature. Sadism and homosexuality were seen as equivalent in the late nineteenth century, with the invert in general (and pederast in particular) often read as murderous victimizers of their young beloveds.<sup>75</sup>

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terization had larger social implications because he was a writer, [Queensberry's] plea introduces the possibility of reading Wilde's sexual proclivities into his writing in order to confirm him as a 'certain person of sodomitical and unnatural habits, tastes, and practices.' In other words, by foregrounding the literary text as an indication of its author's . . . sexual characteristics, the plea attempts to construct a way of discerning and subsequently signifying sexual 'tendencies' without reference to sexual acts.").

71. *The Importance of Being Earnest: A Trivial Comedy for Serious People* was a light comedy of manners concerning two young women who think themselves engaged to the same non-existent man. As with much of Wilde's work, it satirized late Victorian society and proprieties.

72. As Christopher Craft explains:

It is one of the bleaker ironies of English literary history that even as *Earnest* was brashly entertaining audiences at the St. James Theatre, where it had opened on 14 February 1895, its author was subjected to a fierce and dogged institutional chastisement, the prosecution and persecution of the famous trials of 1895. From 5 April, when Wilde was arrested for "acts of gross indecency with another male person" until late in the same month, when George Alexander was compelled by public opinion to remove *Earnest* from the boards, the two spectacles ran concurrently: the one all gay insouciance, the other pure bourgeois retribution; the one a triumph of evanescent, if not quite indeterminate, signification, the other a brutal travesty in which the author would be nailed to the specificity of his "acts."

CRAFT, *supra* note 11, at 138–39.

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73. See *Transgression Under the Skin of Popular Decadence* (unpublished manuscript) (on file with author), for an explication of the subversive homosexual punning that runs through *Earnest*.

74. FOLDY, *supra* note 1, at 5. *The Picture of Dorian Gray*, Wilde's only novel, involved a young man who sells his soul to keep his beauty, living a life of debauchery that is reflected only in his hidden portrait.

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75. KOPELSON, *supra* note 45, at 31.

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During the trials, Wilde's relationship with Lord Alfred Douglas, his friend and consort, was cleverly recast as evil victimizer and innocent victim.<sup>76</sup> As part of his defense in the first libel trial, Douglas's father, the Marquis of Queensberry, successfully portrayed his son as a good young man who had been tempted and nearly ruined by the seduction of the dissolute Wilde.<sup>77</sup> The ultimate success of this tale, which ended for Wilde in a jail term, excommunication from his wife and children, and exile, illustrates the pervasiveness of these narratives, their insidious ability to inscribe their meaning on the face of the law, and their potential to disrupt and ruin homosexual lives. This particular historical instance of blurred boundaries between narrative and sexual orientation in the law reflects narrative's hidden role in the structuring of the act/identity debate.<sup>78</sup>

One of the earliest instances of the intersection of law, narrative, and sexual orientation, the Wilde trials set the course for a continuing interrelation among the three. The use of these narratives in Wilde's trials created a tradition in sexual orientation law: using insidious narratives to damn the prosecuted while never specifically naming the actual crimes alleged.<sup>79</sup> It is this failure to name, this attempted erasure of the very narratives that structured these cases as involving "crimes against humanity," that is the legacy of the Wilde trials.<sup>80</sup>

These politics of homosexual camouflage merged with the obfuscated accounts of gross indecency, creating a structural relationship

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76. See H. MONTGOMERY HYDE, *THE TRIALS OF OSCAR WILDE* 143 (1962).

77. See DOWLING, *supra* note 48, at 141. Dowling argues that Queensberry concocted this "deeply satisfying fiction" to recast himself in the role of affectionate father and Douglas in the role of wayward but ultimately moral son. *Id.*

78. By the act/identity debate I mean the debate still continuing to this very day over whether homosexuals should be defined by act (that is, acts of sodomy) or by a homosexual identity.

79. To put it another way, as Eskridge does, "law contributed to the construction of the sexual closet." Eskridge, *Construction of the Closet*, *supra* note 14, at 1011 (emphasis omitted).

80. This refusal to name—the narratological tool that ultimately ruined Wilde—is well documented in contemporary accounts of the trials. For example, the London papers, the primary carriers of narrative in the era, refused to specify what exactly Wilde was being prosecuted for in his second and third trials—a triumph of inspecificity that still marks our own grappling with how to label homosexuality. See *Central Criminal Court*, *TIMES* (London), Apr. 26, 1895, at 13 (describing the indictment against Wilde for "acts of gross indecency"); *Central Criminal Court*, *TIMES* (London), May 24, 1895, at 19 (describing the charges against Wilde for "unlawfully committing certain acts with Charles Parker and Alfred Wood, and with certain persons whose names were unknown").

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between narrative, sexual orientation, and the law.<sup>81</sup> Together, they constructed a homosexual culture of inarticulate identities:

The rhetoric of (and epistemology represented by) “the Love that dare not speak its name” was the product of centuries of bespeaking sodomitical conduct in terms of an unspeakable erotic negative: *nefandam libidinem*, “that sin which should be neither named nor committed”; the “detestable and abominable sin, amongst Christians not to be named,” “things fearful to name,” “the obscene sound of the unbecoming words.”<sup>82</sup>

At the time of Wilde’s notoriety, these sorts of descriptions of homosexual acts were common, reflecting a dominant ideology that required homosexuality to “go without saying.”<sup>83</sup>

The very act of not naming the unspeakable, however, simply made the unnamed all the more conspicuous: “The very convention of *namelessness* thus belies itself, thereby revealing the strategically foreclosed gap whose very unspeakability is articulated within and by discourse. The unspeakable . . . is always spoken by a historically contingent structure of beliefs, institutions, and practices to which the unspeakable must thereafter refer . . . .”<sup>84</sup> Such confusing smokescreen practices apply to narrative as well as to sexual orientation.<sup>85</sup> Narrative and sexual orientation function as hidden factors that strongly influence everything around them. Like the love that “dare not speak its name,” narrative remains the little-seen keystone in the bridge connecting sexual orientation and the law.

These kinds of rhetorical problems deriving from the recognition and naming of homosexuality pervade not only the general question of gay rights but also the rhetoric of the specific legal texts that discuss

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81. As Linda Dowling notes, Wilde has come to represent a “name onto which law and journalism . . . so ceaselessly project their theories and loathing and fears.” DOWLING, *supra* note 48, at 153.

82. KOPELSON, *supra* note 45, at 158–59 n.14 (citations omitted).

83. *Id.* (internal quotation marks omitted).

84. CRAFT, *supra* note 11, at 6–7 (emphasis added); see also Courtney Megan Cahill, *(Still) Not Fit To Be Named: Moving Beyond Race to Explain Why “Separate” Nomenclature for Gay and Straight Relationships Will Never Be “Equal,”* 97 GEO. L.J. 1155, 1185 (2009) (discussing an Illinois court’s explicitly articulated decision not to name sodomy as part of a “well-established theological and common law tradition,” and quoting a Tennessee court’s remark that “[b]ecause ‘everyone knows what a crime against nature is’ when they see it . . . the crime itself need not be ‘spell[ed] out’” (second alteration in original)).

85. See generally GERALD PRINCE, *NARRATOLOGY: THE FORM AND FUNCTIONING OF NARRATIVE* 36–37 (1982) (discussing the importance of implicitly communicated information to narrative and noting that “the retrieval of implicit information often depends on operations involving knowledge of the world, of social customs, of rhetorical or generic conventions, etc.”).

and adjudicate those rights.<sup>86</sup> If we interpret “rhetorical” in the broadest possible fashion, that is, to mean language in general, then we see that understanding the current relationship between sexual orientation and the law requires us to first explore the narratives, legal and otherwise, that create and support our understanding of sexuality. This is an important task because, as Laurence Tribe has argued in relation to *Lawrence v. Texas*, “[t]rying to make sense of the conclusions judges have reached by attending carefully to the rulings they have actually rendered in the name of substantive due process reveals . . . very different narrative[s].”<sup>87</sup> It is the work of these hidden narratives that I hope to expose and to explore in this Article.

### III. A HISTORY OF OBSCURITY: THE SLIPPAGE OF IDENTITY NARRATIVES IN TWENTIETH CENTURY LAW

*“Interpretative disputes most often arise precisely when there is no . . . common reading.”*<sup>88</sup>

Homosexuality, obscure and ambiguous since its “creation,”<sup>89</sup> resists simple classification.<sup>90</sup> So, too, do its narratives.<sup>91</sup> Slippery, complex, and alternately multivalent or criminally singular, the modality of gay narrative is difficult to contain or constrain, particularly when these narratives enter the legal arena. Hidden or unnamed, these narratives remain unchanged in large part from their Wildean antecedents and continue to structure the way the law regulates sexual identity.<sup>92</sup>

Faced with this multiplicity of narratives, however, we often have a deep desire to systematize. When these narratives are introduced into legal texts, so often used to reify and to order, the Linnaen<sup>93</sup> urge

86. Schneyer, *supra* note 36, at 1316; *see also, e.g.*, Cahill, *supra* note 84, at 1185 (discussing the approaches of two American courts to the issue). R

87. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004).

88. Sanford Levinson & Steven Mailloux, *Preface* to INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER, at ix, xii (Sanford Levinson & Steven Mailloux eds., 1988). R

89. *See supra* notes 36–50 and accompanying text.

90. *See, e.g.*, Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 800–01 (1979) (illustrating difficulties identifying what the term “homosexual” entails and using “sexual acts,” rather than identity, to define the term). R

91. *See, e.g.*, CRAFT, *supra* note 11, at 46 (explaining “the critical and taxonomic problem of whether [Tennyson’s] *In Memoriam* ‘can properly be termed homosexual’”). R

92. *See, e.g.*, Cahill, *supra* note 84, at 1184–86 (tracing Sir William Blackstone’s eighteenth century understanding of sodomy as “a crime not fit to be named” through then-Chief Justice Burger’s 1986 concurrence in *Bowers v. Hardwick*, 478 U.S. 186 (1986)). R

93. Carl Linnaeus classified all animals, insects, and plants into one vast orderly network. Editorial, *The Legacy of Linnaeus*, NATURE, Mar. 15, 2007, at 231, 231.

is uncontrollable. As Gerald Prince explains, Roland Barthes described the very same urge for order in narratology:

[W]henever we read a narrative, we organize it and interpret it according to several codes or sub-codes: a linguistic code and a cultural code, of course; but also a hermeneutic code, in terms of which certain parts of a given text function as an enigma to be solved and certain others as a solution to that enigma, or the beginning of a solution, or a false solution . . . .<sup>94</sup>

As articulated by Prince, Barthes's theory explains the difficulty faced by courts encountering the multiplicity of narratives present in many sexual orientation cases. The primary difficulty is in deciphering the strategies courts use to "solve" the "enigma" of gay rights.

How do courts interpret the texts of amended constitutions, the testimony of expert witnesses, and the substance of amicus curiae briefs? How, in other words, are all these indeterminate legal narratives read and understood? As Prince argues, "In any narrative communication, it is not the narrative code as a whole—whatever it may be—which intervenes but rather what the sender and the receiver have assimilated of the code and, more particularly, what each has selected from his personal stock to encode or decode the message."<sup>95</sup> Applying this approach to sexual orientation law, the interpretation of anti-sodomy statutes—whether viewed as straightforward or rife with ambiguity—is clearly a function of context and of the interpreter's personal stock stories.<sup>96</sup>

Many of these stock stories, of course, rely on a discourse shaped in the late nineteenth and early twentieth century.<sup>97</sup> This discourse relied on

[T]hemes of sodomy (criminal acts), inversion (violation of social gender norms), and sexual psychopathy (dangerous and uncontrollable desires) to produce a mythic figure—The Homosexual—who could be regulated for any of three

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94. PRINCE, *supra* note 85, at 106–07.

95. *Id.* at 108.

96. I borrow the phrase "stock stories" from Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2421–22 (1989) (suggesting that when a person "picks and chooses from . . . available facts to present a picture of what happened," his interpretation, or "stock story[,] is not the only one that can be told").

97. See FOLDY, *supra* note 1, at 83, 91 (describing how certain individuals in the mid-nineteenth century sought to describe and "understand[ ] the confusing phenomenon of same-sex passion," and highlighting one individual's assertion that the Wilde trials "created a public image for the 'homosexual'" (quoting JEFFREY WEEKS, *SEX, POLITICS & SOCIETY* 103 (1989)) (internal quotation marks omitted)).

reasons: committing illegal acts, challenging gender roles associated with her or his sex, or having specified sexual desires, or “homosexual tendencies.”<sup>98</sup>

Stock stories, of course, are populated by stock characters. In *Morphology of the Folktale*, Victor Propp studied the Russian fairy tale, applying the orthodox formalist method to a structural analysis of the fairy tale.<sup>99</sup> If we borrow from Propp’s “functionalist” view of narrative structure, we can identify similar stock characters in the stories told in legal opinions. Although Propp identifies seven “dramatis personae” in all fairy tales, such as “The Villain,” “The Hero,” and “The Princess and Her Father,”<sup>100</sup> the gay stock stories used in “sexual orientation” opinions produce “The Evil Seducer of Children,”<sup>101</sup> “The Morally Corrupt,”<sup>102</sup> “The Sexual Deviant,”<sup>103</sup> and “The Easily Susceptible to Blackmail.”<sup>104</sup> It is the courts’ reliance on these fundamentally

98. Eskridge, *Construction of the Closet*, *supra* note 14, at 1069.

99. At the end of his book, Propp uses a quote from Alexander Veselóvsky’s *Poëtika* to make the point that even the most complicated narrative simplifies with the distance of time:

Is it permissible in this field also to consider the problem of typical schemes . . . schemes handed down for generations as ready-made formulae capable of becoming animated with a new mood, giving rise to new formations? . . . Contemporary narrative literature, with its complicated thematic structure and photographic reproduction of reality apparently eliminates the very possibility of such a question. But when this literature will appear to future generations as distant as antiquity, from prehistoric to medieval times, seems to us at present—when the synthesis of time, that great simplifier, in passing over the complexity of phenomena, reduces them to the magnitude of points receding into the distance, then their lines will merge with those which we are now uncovering when we look back at the poetic traditions of the distant past—and the phenomena of schematism and repetition will then be established across the total expanse.

V. PROPP, *MORPHOLOGY OF THE FOLKTALE* 116 (2d ed. 1968) (alterations in original).

Extending Propp’s idea to the legal context carries great appeal. From a great chronological distance, reconsidering old statutes and opinions along formulaic lines could achieve a greater understanding of them. Specifically, I hope to use the tropes of the Wilde prosecutions to identify the basic narrative deployed to justify discrimination and homophobia in American legal rhetoric.

100. *Id.* at 79–80 (listing seven “spheres of action” present in fairy tales).

101. *See, e.g.*, *United States v. Carlson*, 236 F. Supp. 2d 686, 690 (S.D. Tex. 2002) (describing a U.S. Customs Agent’s baseless stereotyping that the Internet chat room in question was frequented by “homosexual men interested in young boys”).

102. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting) (“But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful . . .”).

103. *See, e.g.*, *Dahl v. Sec’y of U.S. Navy*, 830 F. Supp. 1319, 1331 (E.D. Cal. 1993) (quoting a Department of Defense report noting “the fearful imagery of homosexuals polluting the social environment with unrestrained and wanton expressions of deviant sexuality”).

104. *See, e.g.*, *Able v. United States*, 880 F. Supp. 968, 974 (E.D.N.Y. 1995) (“In 1982, the Department of Defense issued a policy mandating dismissal of homosexuals in part ‘to

homophobic stock characters that taints their opinions, clouds their judgment, and engenders a backlash against homosexuals.<sup>105</sup>

Further, the courts' reliance on these stock characters in legal texts can leave space for them to insert their own vision of homophobic horrors. Peter Brooks, in his discussion of narrative functioning, argues that "narrative stories depend on meanings delayed, partially filled in, stretched out."<sup>106</sup> The legal world functions with only partial knowledge about homosexuality, but it acts—and rules—as to homosexuality despite this limited and confined understanding. This constricted paradigm has disastrous ramifications for the gay rights movement as a whole.

Ultimately, legal definition of gay and lesbian rights often becomes a question of narrative interpretation.<sup>107</sup> As Gerald Prince

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prevent breaches of security' that presumably would arise if a closeted homosexual were blackmailed."), *vacated*, 88 F.3d 1280, 1300 (2d Cir. 1996).

105. See, for example, COLO. CONST. art. 2, § 30b (providing "no protected status" for homosexual, lesbian, or bisexual individuals and commonly referred to as "Amendment 2"), *invalidated by Romer*, 517 U.S. 620; Oregon's unsuccessful Proposition 9, PHIL KIESLING, SEC'Y OF STATE, VOTERS' PAMPHLET (NOV. 3, 1992) (requiring the government to discourage homosexuality); and Cincinnati's Article XII, distinguished from Colorado's unconstitutional section 30b in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296–97 (6th Cir. 1997) (barring "homosexuals, as homosexuals, from obtaining special privileges and preferences"), but later repealed by voters, Gregory Korte, *Idea Shift Deep-Sixed Article XII*, CINCINNATI ENQUIRER, Nov. 7, 2004, at A1.

106. PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE* 21 (1992). The observation concludes a discussion of Barthes's *S/Z*. Barthes sets up a situation we constantly encounter when reading the "sexual orientation" opinions: the "deja-lu," or the already read and written. As Brooks points out,

The text is seen as a texture or weaving of codes (using the etymological sense of "text") which the reader organizes and sorts out only in provisional ways, since he never can master it completely, indeed is himself in part "undone" in his effort to unravel the text. . . . In other words . . . the possibility of following a narrative and making sense of it . . . belong[s] to the reader's literary competence, his training as a reader of narrative. *The reader is in this view himself virtually a text, a composite of all that he has read, or heard read, or imagined as written.*

*Id.* at 18–19 (emphasis added) (footnote omitted). This last phrase is particularly resonant because, in many ways, it is what the legal world has *imagined as written* that determines their outcomes. Specifically, it is what these courts have *imagined* sodomy and homosexuality to mean that has structured their responses to the gay-rights initiatives.

107. The question of interpretation in legal texts has been a contested one. Compare Owen M. Fiss, *Objectivity and Interpretation*, in *LAW AND LITERATURE: A HERMENEUTIC READER*, *supra* note 88, at 229, 239 (arguing that "the objective character of legal interpretation [does not] arise from agreement" over the text's prescriptive values but from "disciplining rules"), with Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1326 (1984) (arguing that Fiss's reliance on "'disciplining rules'" to direct legal interpretation "will not do" because "they themselves [are not] available or 'readable' independently of interpretation"). In addition to Owen Fiss and Stanley Fish, such legal luminaries as Patricia Williams and Richard Delgado have also jumped into the fray. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 138–39 (1991) ("[T]he word of law . . . is a subcategory of the underlying

writes, “[A] passage can function hermeneutically if it encourages questions about the identity of someone or something . . . , for example through a term whose reference is unknown.”<sup>108</sup> A passage such as the anti-sodomy law at issue in *Bowers v. Hardwick*, for example, functions hermeneutically in this way, as it brings into play the interpretative morass of homosexual identity at the very site of attempted definition and enclosure.<sup>109</sup> This uncertainty and confusion over sexual identity in the law—this contested narrative—still shapes and structures the legal debate about homosexuality.

A. *From Wilde to Bowers v. Hardwick: The Legal Crystallization of Act into Identity*

The ordering of homosexual acts into identity, first articulated in the late nineteenth century during a major sexual paradigm shift,<sup>110</sup> continues to structure the legal system’s understanding of sexual orientation, even in the twenty-first century. Then, as now, the law bisects act and identity into two separate and opposing categories<sup>111</sup>: those of oppressive, limited interpretation (act) versus those of fluid,

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ing social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to a consensus of ideals. When a society loses sight of those ideals and grants obeisance to words alone, law becomes sterile and formalistic; lex is applied without jus and is therefore unjust.”); Richard Delgado, *Where Is My Body? Stanley Fish’s Long Goodbye to Law*, 99 MICH. L. REV. 1370, 1370–71 (2001) (reviewing STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* (1999)), and “recommend[ing] a pragmatic, anti-normative approach [to legal discourse], similar to Fish’s, but applied more broadly”). The result is that the hermeneutics of legal narratives is still a matter of debate. Yet whether or not one agrees with Stanley Fish’s ultimate thesis, he makes a critical point regarding the ultimate “objectivity” of legal tools:

The content of the law, even when its manifestation is a statute that seems to be concerned with only the most technical and mechanical of matters (taxes, for example), is always some social, moral, political, or religious vision; and when someone objects to a decision “on the basis of some ethical or religious principle,” his objection is not “external” to the law . . . but represents an effort to alter the law, so that one’s understanding of what was internal to it would be different.

Fish, *supra*, at 1337. When applied to a statute that clearly is *not* “concerned with only the most technical and mechanical of matters”—Colorado’s Amendment 2, for example—the social, moral, and/or religious visions behind such referendums matter all the more.

108. PRINCE, *supra* note 85, at 107.

109. The state law in question made it a crime punishable by up to twenty years in prison to “perform[ ] or submit[ ] to any sexual act involving the sex organs of one person and the mouth or anus of another.” *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (quoting GA. CODE ANN. § 16-6-2 (1984)).

110. See *supra* Part II.

111. See Halley, *supra* note 6, at 1722 (“The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity.”).

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multivalent interpretation (identity). The shift from what once was a multiple, flexible category of sexuality to a stringent and rigid singularity of a gay act occurred simultaneously with the definition and classification of (homo)sexual identity:

What for centuries had been thought of as a multivalent sexual flux, a polytropic wandering inherent in *all* flesh, in *every* body, would be effectively arrested by a kind of taxonomic freeze-framing; the fluid vagrancies of the flesh would be crystallized into discrete and hermetic categories, especially into sexualities whose disjunctiveness would be determined along the axis of object choice: either the homo *or* the hetero. . . . [T]he binarism . . . would help shape modern being and culture; it worked to fashion the reality it would then go on to describe.<sup>112</sup>

Thus, although the end of the nineteenth century shifted from an acts-based definition of gayness (sodomy) to a definition based on identity, this shift certainly did not result in more freedom for those attracted to the same sex.<sup>113</sup> By the 1920s, as Eskridge has pointed out, a shift in how same-sex relationships were perceived occurred: “If the first shift was from the *sinful sodomite* to the degenerate invert, the second was from the *degenerate invert* to the *psychopathic homosexual*.”<sup>114</sup>

This new binary categorization—homosexual versus heterosexual—attempted to control the new homosexual identity by shrinking it to “discrete and hermetic categories.”<sup>115</sup> In other words, along with the identification of sexuality as the defining personal characteristic, an ironically limiting definition was forged, based on an all-encompassing general identity—“homosexual”—which was still essentially (and negatively) defined by acts. These acts (and their actor) were now doubly cursed: They were not only traditionally, biblically sinful but also *different* and *other*.<sup>116</sup>

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112. CRAFT, *supra* note 11, at 5.

113. See Eskridge, *Construction of the Closet*, *supra* note 14, at 1029–30 (noting a correlation between broadened crime-against-nature laws and drastically increased arrest rates, and suggesting that both phenomena were “part of a larger social process—social coercion against people with gender-bending and inverted sexual tastes”).

114. *Id.* at 1054.

115. CRAFT, *supra* note 11, at 5.

116. And possibly, if one followed Freud, they were also dangerous and predatory. See Eskridge, *Construction of the Closet*, *supra* note 14, at 1063 (explaining that “American doctors in the 1920s combined some features of Freud’s thought with entrenched ideas they had elaborated from Krafft-Ebing and the eugenics (antidegeneracy) movement” and that “the homosexual was the quintessential psychopath, for he was by Freudian definition a man whose sexual development had been derailed, rendering him intrinsically perverted”).

As the twentieth century dawned, American courts began to be a bit more explicit about what, precisely, the “unmentionable conduct” in a “crime of nature” might entail. Although still remaining ambiguously flexible, the terms were fleshed out a bit by state statutes and opinions detailing what was forbidden sexual conduct and which body parts were suspect.<sup>117</sup> As the century progressed, homosexuality became increasingly associated with acts of sodomy, and the identification and demonization of homosexuals continued apace.<sup>118</sup> Combined with Freudian discourse, which labeled the homosexual male as a “sexual psychopath,” this association led to increasing regulation and criminalization of male-on-male acts of oral and anal sodomy.<sup>119</sup>

Thus the late nineteenth and twentieth century definition of homosexual, neither quite act nor identity, did not successfully crystallize sexual preference. On the contrary, the notion of the homosexual persona as shaped by acts of sodomy only led to newly oppressive dynamics within the legal arena. These dynamics took center stage in the American legal world when the battle for sexual privacy and the right to same-sex intimacy began in the latter part of the twentieth century.

By the 1970s, many states stopped arresting individuals for consensual sodomy.<sup>120</sup> This was not true in the South, however, where states continued to apprehend and prosecute men for homosexual intimacy, whether public or private.<sup>121</sup> This practice was confirmed and validated by the Supreme Court of the United States’s 1986 ruling in *Bowers v. Hardwick*.<sup>122</sup>

In ruling on a facial challenge to a gender neutral statute that never specifically mentioned homosexuality, the Court relied on a

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117. See Eskridge, *Historiography*, *supra* note 39, at 658–59 (explaining how courts and state legislatures broadened the definition of sodomy to include oral sex, eventually specifying what body parts could be involved, the relationship of the parties, and the circumstances of the crime).

118. See *id.* at 659 (“The main transformation was an explicit association of sodomy (the act) with homosexuality (the status)—and the association of both with child molestation (act) and sexual psychopathy (status).”).

119. See *id.* at 660 (“Reflecting concepts about sexuality propounded by the American followers of Freud, regulators focused their concern on the ‘sexual psychopath’—the aggressive male who could not control his impulses and threatened children. The homosexual male was identified as the quintessential sexual psychopath, and regulatory attention was sharply focused on this new creature.”).

120. *Id.* at 664–65.

121. *Id.* at 665.

122. See generally 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

stringently anti-gay narrative, one built on “sheer bad scholarship,”<sup>123</sup> to criminalize homosexual sodomy.<sup>124</sup> The basis of the *Hardwick* Court’s opinion and understanding of same-sex intimacy was the elliptical, demonizing narratives born in the late nineteenth and early twentieth centuries.<sup>125</sup> The narratives in *Hardwick* provided a direct link to those articulated in the Wilde trials, relying on one act (sodomy) to define an entire sexual identity (homosexuality), while insisting that this sexual identity never be defined.<sup>126</sup> As in the Wilde trials, the *Hardwick* Court carefully crafted its opinion around a negative space, helping define heterosexual identity by what it was not.<sup>127</sup>

The bifurcation between act and identity endorsed by the *Hardwick* Court set a damaging course for the legal future of gay rights and the possibility of securing protected status. The story underlying the *Hardwick* Court’s ruling is a familiar tale of reductionism, limited identity, and abbreviated rights—tales seen in the narratives born out of the Wilde trials. By reducing all possible facets of homosexuality into one act and one word—sodomy—the *Hardwick* Court quashed gays back into the old mold, one that defined same-sex acts as both a general “gross indecency” and a singular horror. In other words, *Hardwick* exemplifies “how modern prejudice against gay people seizes upon their presumptive commission of sodomy and totalizes their identity around those acts.”<sup>128</sup>

In doing so, the Court managed to tidily erase all components of gay identity, using the ambiguous but familiar rubric of “unmentionable acts.” What was left was only a narrow frame of reference: *Hardwick*’s majority opinion used the front of fundamental rights to camouflage their reliance on homophobic narratives, narratives purportedly illustrating the “ancient roots”<sup>129</sup> and fundamental “moral-

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123. Halley, *supra* note 6, at 1752.

124. The statute at issue provided, in relevant part: “A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.” *Hardwick*, 478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)). Writing for the majority, Justice White rejected the respondent’s due process claims, which Justice White explained were “at best, facetious” given the “ancient roots” of prohibitions against sodomy. *Id.* at 192, 194.

125. See Eskridge, *Construction of the Closet*, *supra* note 14, at 1107 (“The ‘roots’ of the [*Hardwick*] Court’s focus on homosexuality were . . . the antifeminist movement and the eugenic sexologists of the period between 1880 and 1946.”).

126. In other words, the *Hardwick* Court refused to define homosexuality as a sexual identity per se, basing its definition solely on sexual acts.

127. For example, in discussing the reach of its precedent, the Court noted that homosexuality had no connection to family, marriage, or procreation. *Hardwick*, 478 U.S. at 191.

128. Eskridge, *Historiography*, *supra* note 39, at 634.

129. *Hardwick*, 478 U.S. at 192.

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ity”<sup>130</sup> of their reasoning. This reliance on homophobic narratives was most starkly exposed when the Court refused to assert “a fundamental right to engage in homosexual sodomy” since it would theoretically then need to protect other sexual crimes, such as adultery and incest.<sup>131</sup> This kind of reasoning is the bastard child of Krafft-Ebbing’s prose, which associated inverts with various other sexual deviants.<sup>132</sup>

Further, by using a flawed history of sodomy as the primary support for its reductionism, the Court effectively based its anti-sodomy argument on an inarticulate and incorrect narrative.<sup>133</sup> The “‘crime not fit to be named’”<sup>134</sup> was deliberately misnamed in *Hardwick*, as the Court reduced a broad understanding of sodomy (that is, acts performed by all sexual orientations) and of homosexuality (that is, an orientation that encompasses more than acts) into one simplified formula: sodomy is equal to homosexuality.<sup>135</sup> As Janet Halley argued, in *Hardwick* sodomy is the “metonym” for the homosexual.<sup>136</sup>

All of this misnaming is facilitated by the refusal to acknowledge the hidden narrative: “Obscurity is part of what sodomy is, a means by which it attains its social effects.”<sup>137</sup> The obscured and invisible narra-

130. *Id.* at 196.

131. *Id.* at 191, 195–96.

132. *See supra* notes 40–50 and accompanying text.

133. The history used in *Hardwick* was provided by the University of Miami Law Review’s Survey on the Law, which incorrectly portrayed an essential part of the history of sodomy, thus creating an unreliable narrative. *See* Halley, *supra* note 6, at 1751–53 & nn.89–91 (citing Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986)). Halley notes that this “survey” of sodomy was, in actuality, a conflation of old and new sodomy laws and accuses the Court of exploiting this problematic secondary source to bolster its “ancient roots” of sodomy argument. *See id.* at 1751–53 & n.91.

134. *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1612 (Philadelphia, Rees Welsh & Co. 1897)).

135. For example, in responding to an argument that, “[e]ven if the conduct at issue here is not a fundamental right, . . . there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable,” the Court wrote, “[I]f all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.” *Id.* at 196 (majority opinion) (emphasis added).

136. Halley, *supra* note 6, at 1737.

137. *Id.* at 1757. Critically, Halley identifies one of the key points about these sexual-legal texts when she castigates the slippery motives of the *Hardwick* Justices. She points out that “[f]ramed as a case about mere bodily acts and not messy, contested, relentlessly political identities, *Hardwick* purports to take the Justices out of politics.” *Id.* at 1767. Halley rightfully disdains the Court’s attempt to reduce multiple interpretations to a tidy act, to eliminate the “messy” and uncontrollable stories supporting contemporary gay identity.

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tive of sodomy, its refusal to tell the whole truth about homosexuality, has all the more meaning for its absence. Only when we uncover the misnamed, falsified, and truncated narratives lurking under the surface of fundamental rights rhetoric, like that articulated in *Hardwick*, will a reasoned discussion of sexual identity ever be possible.

B. *Romer v. Evans: Structuring Hardwick's Absence*

The Supreme Court's decision in *Romer v. Evans*, striking down a Colorado referendum ("Amendment 2")<sup>138</sup> that prohibited state or local governments from extending civil rights protections to persons on the basis of sexual orientation,<sup>139</sup> was a victory for gay advocacy.<sup>140</sup> But a careful look at Justice Kennedy's majority opinion shows not only a cautious avoidance of the status/conduct issues discussed above (in part to sidestep any discussion of *Hardwick*) but also the bypassing of the specifics of homosexuality.<sup>141</sup> *Romer* fits into the Wildean frame because it reduced the modalities of gay multiplicity down to a single act (sodomy)<sup>142</sup> and continued to use homosexuality to define and distinguish the parameters of heterosexuality.<sup>143</sup>

Disinclined to explore the boundaries of gay identity, the Court relied "upon the authoritative construction of Colorado's Supreme Court," which provided only "a modest reading of [Amendment 2's] implications,"<sup>144</sup> finding it "unnecessary to determine the full extent

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And if we understand "politics" to mean the body politic itself, Halley's point provides an encapsulation of the dangers hidden within the act/identity dyad and the importance of laying this architecture bare.

138. COLO. CONST. art. 2, § 30b. The constitutional amendment is commonly referred to as "Amendment 2." *Romer v. Evans*, 517 U.S. 620, 623 (1996).

139. *Romer*, 517 U.S. at 623–24, 635–36.

140. See, e.g., David W. Dunlap, *The Gay Rights Ruling: In Colorado*, N.Y. TIMES, May 21, 1996, at 21 (quoting Suzanne B. Goldberg, a member of the prevailing legal team, as saying that *Romer* "is the most important victory ever for lesbian and gay rights").

141. The Court uses the phrase "gays and lesbians" throughout its opinion, but the only plausible attempt to explicate those terms and their cognates is in the Court's citation to two Colorado municipal ordinances respectively defining "sexual orientation" as "the choice of sexual partners, i.e., bisexual, homosexual, or heterosexual" and "[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality." *Romer*, 517 U.S. at 624 (alteration in original) (quoting BOULDER, COLO., REV. CODE § 12-1-1 (1987); DENVER, COLO., REV. MUNICIPAL CODE, art. IV, § 28-92 (1991)) (internal quotation marks omitted).

142. Though the word "sodomy" does not appear in the Court's majority opinion, its invocation of "sexual partners" vis-à-vis the municipal ordinances imports the question of act into the discussion.

143. This point is implicit in the Court's repeated invocation of "gays and lesbians," which, when used to refer to a discrete group of people, necessarily stands in opposition to a discrete group of heterosexuals.

144. *Romer*, 517 U.S. at 626.

of the amendment's reach."<sup>145</sup> Although the Court strongly disapproved of the animosity-driven amendment,<sup>146</sup> it declined to extend itself to the critical issues "lurking beneath" its creation and enactment.<sup>147</sup> In this way, *Romer* also follows the Wilde script, as the Court failed to reject the old nineteenth century narratives lurking below the surface of the Colorado referendum.

The Court's refusal to engage in the more fundamental debates—for example, whether gays are a suspect class, what the legal contours of homosexuality should be, whose narratological view should triumph—is troubling, as it turns a blind eye not only to the status/conduct battle raging in the lower courts<sup>148</sup> but also to its own contrary decision eleven years prior in *Bowers v. Hardwick*.<sup>149</sup> The Court's move towards establishing a paradigm of gay rights should be commended, but at the same time it should be recognized as only a small step.

In striking down Amendment 2, the Supreme Court, like the Colorado courts, continued to use the obscuring shield of the Equal Protection Clause.<sup>150</sup> Here, however, the Court did not try to fabricate a fundamental right, nor did it designate homosexuality a suspect classification. Instead, the Court brought out the *deus ex machina*, the traditionally harmless rational basis review.<sup>151</sup> In a virtually unprecedented move, the Court front loaded the meaning of this typically deferential basis of review, using it to quash the amendment without resorting to inventing fundamental rights, involving itself in the conduct/status

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145. *Id.*

146. *Id.* at 632 ("[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . .").

147. *But see* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 207, 224–25 (1996) (arguing that Justice Kennedy identified and addressed the substantive inequality "lurking beneath" the formal inequality of Amendment 2).

148. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children and Family Servs., 358 F.3d 804, 826–27 (11th Cir. 2004) (distinguishing a prohibition of adoption by homosexuals from the amendment at issue in *Romer* on the ground that the former encompassed only conduct while the latter encompassed both conduct *and* homosexual status).

149. *See Romer*, 517 U.S. at 640 (Scalia, J., dissenting) ("The case most relevant to the issue before [the Court] today is not even mentioned in the Court's opinion: . . . *Bowers v. Hardwick* . . .").

150. *Id.* at 635–36 (majority opinion) (holding that "Amendment 2 violates the Equal Protection Clause").

151. *Id.* at 631–32.

debate, or singling out homosexuality as a class in need of protection.<sup>152</sup> This was a brilliant, although tremendously evasive, move.

In avoiding the conduct/status quagmire and its own decision in *Hardwick*, and by focusing instead on the “animus” underlying passage of Amendment 2, the Court managed to sidestep entirely any discussion of homosexuality. To put it another way, the Court’s rhetoric of avoidance allowed it to provide a negative definition of homosexuality—rendering it once again, the sin that must not be named. Furthermore, the Court’s avoidance of *Hardwick* served to broaden the gap in its jurisprudence; though the Court struck down Amendment 2 in part because the animus behind it was not rational, the Court never really attacked the sentiment that spurred the animus to begin with: the hatred of gay rights, the protection of the gay person, and the homosexual persona itself.<sup>153</sup> By carefully avoiding any specificity beyond a disapproval of “animus,” the Court fell into the old Wilde trials routine of ruling around homosexuality—just like it ruled around *Hardwick*. While Amendment 2 no longer stands, homosexuality remains a negative space.

Throughout the opinion, the Court made clear its refusal to lend a hand to the project of defining homosexuality.<sup>154</sup> As Justice Scalia pointed out in his dissent, “The case most relevant to the issue before us today is not even mentioned in the Court’s opinion.”<sup>155</sup> The Court’s discussion of the “animus” underlying the amendment’s enactment and its careful dancing around *Hardwick* ultimately illuminated the contours of gayness by highlighting its very emptiness. Once again, the Court sculpted the understanding of homosexuality by rhetorical avoidance.

The Court’s analysis of Amendment 2 identified as problematic the amendment’s use of a narrow definition of homosexuality to deny

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152. *See id.* at 632–33 (explaining that “Amendment 2 confounds this normal process of judicial review” even under “the most deferential of standards” because “[i]t identifies persons by a single trait and then denies them protection across the board”).

153. The closest the Court comes to broaching that topic is its acknowledgement that “[t]he impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities” that protected against discrimination by reason of sexual orientation. *Id.* at 623–24.

154. In other words, the Court’s rationale takes as given the class named by the amendment (homosexuals, lesbians, and bisexuals) and confines its discussion to equal protection jurisprudence. *See id.* at 624, 631 (“To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”).

155. *Id.* at 640 (Scalia, J., dissenting).

gays a spectrum of benefits.<sup>156</sup> It is this definition of homosexuality, as we have seen before, that is the contested article between battling hermeneutics: the homophobic singularity of homosexual conduct versus the efflorescence of gay multiplicity, the classification of all homosexuals as “sodomites” versus the various broadened understandings of gay identity.<sup>157</sup> By recognizing, however unknowingly, this battle over identity—a fight over the interpretation of not only Amendment 2 but of the legal understanding of homosexuality—the Court implicitly criticized the anti-gay rights crowd:

[Amendment 2] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.<sup>158</sup>

By honing in on the contradiction inherent in the language of Amendment 2—that it defines homosexuality by a single trait but does not acknowledge a multiplicity of homosexual variety—the Court, unwittingly or not, positioned itself squarely in the midst of the conduct/identity debate. While carefully striking down Amendment 2 on the basis of irrationality, the Court stumbled upon the difficult issue of defining homosexuality that has plagued the courts since the Wilde trials: the inability of containment. What the Wilde trials tried to do, what both *Hardwick* and Amendment 2 attempted, and what *Romer* inadvertently did was to collapse the nuances of homosexuality into a small box, one that can be variously referred to as “gross indecency,” “sodomy,” and in *Romer* “homosexual persons.”<sup>159</sup>

In each case, the containment failed. The *Romer* Court, though acknowledging that the amendment’s unprecedented unfairness spelled its demise, nevertheless tried to avoid stamping its imprimatur on such an indeterminate, noncontainable group by taking refuge in rational review. Unable to fit homosexuality into the box that contains other, more suspect classifications—such as race, national origin, or ethnicity<sup>160</sup>—the Court effectively gave up on homosexuality, striking down the offending amendment but refusing to grant the group

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156. *Id.* at 633 (majority opinion).

157. *See supra* notes 78, 118, 142 and accompanying text.

158. *Romer*, 517 U.S. at 633.

159. *Id.* at 625.

160. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

suspect status or even to note that homosexuals as a group deserve any sort of increased protection.<sup>161</sup>

The Court's reliance on irrationality and animus ensured that while this particular legislation was struck down, the rest of the Wilde script would remain the same. Such are the downsides of a legal system wedded to categorization: Only those groups that neatly fit into the prefitted slots merit any sort of heightened protection.<sup>162</sup> Courts have always avoided homosexuality, with its infinite varieties, precisely because of its inability to withstand social and legal control.

The Court's discussion of *Davis v. Beason*<sup>163</sup> trod nearest to the hermeneutics of conduct and status and came closest to commenting on *Hardwick*. Distinguishing polygamy from sodomy, the *Romer* Court practically suggested that sodomy should not be considered a crime, in the same way as having multiple wives:

In *Davis*, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and *justify and approve the commission of crimes forbidden by it.*" . . . To the extent [*Davis*] held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome.<sup>164</sup>

Although the Court struck down the *Davis* law insofar as it excluded from voting those who merely advocate the practice of polygamy,<sup>165</sup> it did not do the same for polygamists themselves—clearly indicating that it still considered polygamy a crime.<sup>166</sup> By distinguishing Amend-

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161. *Romer*, 517 U.S. at 635–36 (striking down the amendment, not because of anything intrinsic to homosexuals as a group, but because "Amendment 2 classifies homosexuals not to further a proper legislative end but *to make them unequal to everyone else*" (emphasis added)).

162. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . The general rule gives way, however, when a statute *classifies by race, alienage, or national origin.*" (emphasis added)).

163. 133 U.S. 333 (1890), *abrogated by Romer*, 517 U.S. at 634.

164. *Romer*, 517 U.S. at 634 (emphasis added) (citation omitted) (quoting *Davis*, 133 U.S. at 347).

165. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)).

166. See *id.* ("To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable." (citing Richard-

ment 2 from the *Davis* statute and by striking it down for its broad denial of the laws to homosexuals, the Court suggested that homosexuality—and therefore sodomy—was no longer the crime it once was.<sup>167</sup>

It is also important to note, however, that the Court never had the same problem with polygamy that it has always had with homosexuality, namely, the inability to constrain and control. While polygamy, like homosexuality, was seen as a dangerous force undermining the bonds of family, marriage, and the general structure of society,<sup>168</sup> the ability of multiple marriages to be defined meant that a successful war could be waged against this practice.<sup>169</sup> Thus, to measure homosexuality against polygamy, thereby measuring *Hardwick* against *Davis* (as Justice Scalia's dissent in *Romer* tried to do<sup>170</sup>), is ultimately a lost cause, as these two "threats" against the family are too dissimilar to offer a compelling comparison.

The *Romer* Court came quite close to commenting on the definition of homosexuality but instead took refuge in the Equal Protection Clause<sup>171</sup>: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all

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son v. Ramirez, 418 U.S. 24 (1974)); *id.* at 650 (Scalia, J., dissenting) ("But the proposition that polygamy can be criminalized, and those engaging in that crime deprived of the vote, remains good law." (citing *Richardson*, 418 U.S. at 53)). In *Richardson*, the Court upheld a state law disenfranchising felons, using the *Davis* Court's upholding of polygamist disenfranchisement as precedent for its decision. 418 U.S. at 53.

167. The use of the law to punish both polygamists and homosexuals can be traced to the Victorian need to control and contain those forces that threatened to destabilize traditional myths about marriage and family. See generally JILL L. MATUS, UNSTABLE BODIES: VICTORIAN REPRESENTATIONS OF SEXUALITY AND MATERNITY (1995). For a comprehensive look at anti-polygamy sentiment and the crusade to legally reinforce monogamy as the only form of marriage, see generally Sarah Barringer Gordon, "Our National Hearthstone": *Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 YALE J.L. & HUMAN. 295 (1996).

168. See Gordon, *supra* note 167, at 298 ("As [one anti-polygamist author] put it, polygamy threatened 'our national hearthstone,' and undermined marriage in the rest of the country, 'corrupting the very fount of virtue and purity,' thus destroying the 'home of liberty.'").

169. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164, 166 (1878) (upholding a law prohibiting polygamy and noting that "[a]t common law, the second marriage was always void" and "treated as an offence against society").

170. See *Romer*, 517 U.S. at 648–51 (Scalia, J., dissenting) ("It remains to be explained how [the Idaho statute disenfranchising polygamists] was not an 'impermissible targeting' of polygamists, but (the much more mild) Amendment 2 is an 'impermissible targeting' of homosexuals.").

171. For an analysis of the danger of overusing the Equal Protection Clause to strike down outdated or bad amendments, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 20 (1987).

who seek its assistance.”<sup>172</sup> Instead of striking down Amendment 2 for its constraint of homosexuality to a single act or for its contradictory use of breadth and narrowness of gay status, the Court found that the Amendment failed the rational basis test, a prong of equal protection analysis that rarely has bite<sup>173</sup>:

Amendment 2 fails, indeed defies, even this conventional [rational basis] inquiry.

. . . .

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.<sup>174</sup>

Although the Court considered endorsing the multiplicity of gay identity in its discussion of *Davis*, thus validating the inclusive stories told by Queer Advocacy, it drew back in the end. Striking down Amendment 2 was a step in the right direction, but it was only a beginning.

### C. *Lawrence v. Texas: Interpretative Uncertainty, Narrative Woes*

Like *Romer*, *Lawrence v. Texas* spelled a positive outcome for gay rights,<sup>175</sup> but this outcome ironically continued to perpetuate the narrative that homosexual acts denoted homosexual identity.<sup>176</sup> The *Lawrence* Court did, finally, reject some of the old, poisonous Wildean narratives,<sup>177</sup> but it continued to rely on the shrunken space that re-

172. *Romer*, 517 U.S. at 633.

173. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) (describing “ordinary rational basis review” as “tantamount to a free pass for legislation”).

174. *Romer*, 517 U.S. at 632, 635.

175. There has been great scholarly debate over the meaning of *Lawrence* and whether it qualifies as a victory for gay rights. See, e.g., Arthur S. Leonard, *Lawrence v. Texas and the New Law of Gay Rights*, 30 OHIO N.U. L. REV. 189, 189 (2004) (suggesting two alternative, conflicting ways of describing *Lawrence*); Tribe, *supra* note 87, at 1949 (opining that *Lawrence*’s principles are readily applicable to same-sex marriage and “to the entire public realm of how gays, lesbians, bisexuals, and the differently gendered are treated in housing, employment, adoption, and the like,” but also acknowledging the “abundant language in the majority’s opinion that might be taken to cut against such a reading”); Danaya C. Wright, *The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL’Y 403, 408 (2004) (“[T]o the extent the Court’s ruling [in *Lawrence*] is interpreted to protect only the privacy rights in the behavior that defines my identity, it has the potential to force me back into the closet.”).

176. 539 U.S. 558, 575 (2003) (“When *homosexual conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject *homosexual persons* to discrimination both in the public and in the private spheres.” (emphasis added)).

177. See *id.* at 567 (“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would de-

duced gay sexual identity to one narrow definition. Although *Lawrence* forbade anti-sodomy laws, it still focused on the old trope that acts—here, acts of sodomy—defined homosexuality,<sup>178</sup> just as the Texas statute struck down by the Court only forbade same-sex sodomy acts.<sup>179</sup> In this way, *Lawrence* promised much more than it delivered; it became, as one author has noted, a legal text that was “easy to read, but difficult to pin down.”<sup>180</sup>

For Texas, sodomy only mattered when performed, no matter how privately, by two members of the same sex.<sup>181</sup> For the *Lawrence* Court, striking down Texas’s statute did not mean eradicating the Court’s narrow interpretation of gay identity, for even in barring discrimination against gays and overturning *Hardwick*, the Court could not free itself from the same tired narrative of homosexual identity as reduced to a single act, a multiplicity of voices shrunken down to the consensual act of sodomy.<sup>182</sup> Like its predecessors, *Lawrence* is a gay rights case that “presents a problem of interpretation.”<sup>183</sup>

As others have argued in a slightly different context, “One cannot interpret or apply *Lawrence* without situating it in history.”<sup>184</sup> This rings particularly true when the history applied is that of the hidden narrative that structures most legal discussion of gay rights.

Examined carefully, *Lawrence* does its part to reinforce the slippage between act and identity, conduct and status, that has dominated

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mean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

178. *See id.* at 575 (stating that the continued existence of *Bowers* and its approval of laws prohibiting sodomy “demeans the lives of homosexual persons”). As Eskridge notes, “male homosexuality (and, quite irrationally, female homosexuality as well) is deeply associated with anal sex.” Eskridge, *Body Politics*, *supra* note 56, at 1023.

179. The statute read in relevant part: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Lawrence*, 539 U.S. at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)). Under the statute, “‘deviate sexual intercourse’” refers to “‘(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.’” *Id.* (quoting TEX. PENAL CODE ANN. § 21.01(1)).

180. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1103 (2004).

181. *See supra* note 179.

182. One example of the Court’s reliance on a heteronormative narrative is its discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): “The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” *Lawrence*, 539 U.S. at 573–74.

183. Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1312 (2004).

184. Eskridge, *Body Politics*, *supra* note 56, at 1012–13 (discussing *Lawrence* in the context of “traditionalist and religious responses to the lesbian and gay rights movement”).

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virtually every sexual-orientation case since *Hardwick*.<sup>185</sup> In other words, although the criminalizing statutes may have been struck down, many Wildean narratives still complicate and pervade legal thinking about gay rights.<sup>186</sup> As Eskridge argues, “[T]he Court has by no means rejected the general idea that the Constitution at least tolerates a body politics that trades on appeals to disgust and contagion.”<sup>187</sup>

*Lawrence* was intentionally “written narrowly to avoid resolving the whole range of issues regarding classifications based on . . . sexual orientation,”<sup>188</sup> and this narrow construction complicated matters further. The politics of avoidance and evasion can be traced directly to the tactics used in Wilde’s trials.<sup>189</sup> In other words, law alone cannot fully interpret the path taken by the Court in *Lawrence*.<sup>190</sup>

In *Lawrence*, the Court signaled its intent to follow the traditional understanding of homosexuality as sexual conduct early in the opinion by invoking the *Griswold v. Connecticut*<sup>191</sup> line of cases.<sup>192</sup> To get to this stage, the *Lawrence* Court re-interpreted *Griswold*, *Eisenstadt v. Baird*,<sup>193</sup> *Carey v. Population Services International*,<sup>194</sup> and *Roe v. Wade*,<sup>195</sup> assuming, without explaining, these cases concerned sexual conduct rather than a more traditional understanding as cases concerning procreation.<sup>196</sup> This unarticulated shift in interpretation was necessary to continue the artificial divide between same-sex acts and gay identity—with unspoken narratives mediating the space in between.

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185. As Danaya Wright has noted, historically, states have been allowed to criminalize a particular act (homosexual intimacy) and then define people based on their desires to so act. Wright, *supra* note 175, at 404–05. By doing this, she argues, “the state makes a person’s very identity a legitimate reason for discrimination.” *Id.*

186. *Cf.* Cahill, *supra* note 84, at 1192 (arguing that nominal separation between heterosexuality and homosexuality, such as allowing same-sex relationships to have the substance of marriage without its name, “points back to homosexuality’s rhetorical past in a number of ways”).

187. Eskridge, *Body Politics*, *supra* note 56, at 1014.

188. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 446 (2005).

189. *See supra* Part II.

190. Hunter, *supra* note 180, at 1103–04.

191. 381 U.S. 479 (1965).

192. *See Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (“[T]he most pertinent beginning point is our decision in *Griswold v. Connecticut*.” (citation omitted)).

193. 405 U.S. 438 (1972).

194. 431 U.S. 678 (1977).

195. 410 U.S. 113 (1973).

196. As Hunter points out, “the *Lawrence* Court modified the meaning of those cases to focus more on sexual conduct” and in doing so “readjusted [their] interpretation” to “de-link[ ] . . . sex and marriage.” Hunter, *supra* note 180, at 1110.

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The Court noted that “[a]fter *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”<sup>197</sup> With this sentence, the Court imported the nineteenth century narrative that reduces homosexual identity to sexual conduct into its twenty-first century jurisprudence.<sup>198</sup>

To give it credit, the *Lawrence* majority does at least try to expand the narrative by which it interprets same-sex relationships.<sup>199</sup> In criticizing *Hardwick*’s reduction of all forms of gay identity to acts of sodomy, the Court pointed out the “far-reaching consequences” of antisodomy statutes and noted that such statutes attempt “to control a personal relationship that . . . is within the liberty of persons to choose.”<sup>200</sup> The very use of the word *relationship* to describe a same-sex couple, as opposed to simple reliance on their sexual acts as the defining characteristic, is certainly a step forward in the legal narrative of gays and lesbians. The expansion of the narrative is at its greatest when Justice Kennedy, writing for the majority, acknowledges the narrowness of the act-as-identity trope, noting that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”<sup>201</sup>

Even more promising, the *Lawrence* Court touches on one of the lodestones of an expanded homosexual narrative by briefly discussing the history of homosexual conduct in the United States.<sup>202</sup> Specifically, the Court points out that the historical absence of legal prohibitions focusing on homosexual conduct can be partially explained by the fact that “the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.”<sup>203</sup> By considering the roots of the law’s limited interpretation of gay identity, the Court finally seemed to understand that the multiplicity of gay identity longs to burst out of the singularity of legal interpretation.<sup>204</sup> Finally, the

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197. *Lawrence*, 539 U.S. at 565.

198. *See supra* Part II.

199. *See supra* note 177 and accompanying text.

200. *Lawrence*, 539 U.S. at 567.

201. *Id.*

202. *Id.* at 567–70.

203. *Id.* at 568. The Court continued, “Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.” *Id.*

204. *See, e.g., id.* at 567 (advising “against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects”).

Court seemed to hint at the possibility of separating sex from procreation and heterosexual marriage.<sup>205</sup>

Alas, it was not to be. The Court's brief dalliance with the possibility of a multifaceted view of homosexuality soon dissipated in the majority's overruling of *Hardwick*, in which it allowed the lone act of sodomy to be the primary, if not exclusive, signal for homosexuality as a whole.<sup>206</sup> If "the Court has only recognized and protected those groups whose common conduct it considers worth protecting,"<sup>207</sup> then its relatively new protection of gays and lesbians comes at the cost of defining them solely by conduct.<sup>208</sup> Indeed, the Court plainly declared that certain forms of "conduct"—specifically, oral and anal sex—essentially characterized the "homosexual lifestyle."<sup>209</sup> This point was taken for granted despite the fact that scientific studies of sexuality in the United States show that "twenty-five to fifty percent of people having sex with members of the same gender concurrently have sex with members of the opposite gender."<sup>210</sup> In other words, the Court's simplification therefore fails to clarify the rights of people who have homosexual sex "but maintain a heterosexual identity."<sup>211</sup>

The Court's recognition and legitimization of gays and lesbians in *Lawrence* thus continued to construct them as a singularity of identity, failing to recognize that not only are gays and lesbians defined by more than one sexual act,<sup>212</sup> but also that many others who may not define themselves as gay or lesbian also participate in the same con-

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205. See *id.* at 565 ("[T]he right to make certain decisions regarding sexual conduct extends beyond the marital relationship."). For a more detailed discussion about the Court's history of linking sex and procreation, see James Allon Garland, *Sex as a Form of Gender and Expression After Lawrence v. Texas*, 15 COLUM. J. GENDER & L. 297, 297, 300–03 (2006) (arguing that aside from the Court's recognition of "a constitutionally protected interest in same-sex intimacy," *Lawrence* carries "even more signific[ance] as the first opinion from the Court to speak positively about sex without reference to procreation").

206. See *Lawrence*, 539 U.S. at 578 ("The State cannot demean [the petitioners'] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

207. McGowan, *supra* note 183, at 1314.

208. See Wright, *supra* note 175, at 407–08 (noting that "being gay is defined in our society as an identity based on acts that take place in private" and arguing that *Lawrence* could only "redefine gay life in this country" if it "protects public as well as private rights").

209. See *Lawrence*, 539 U.S. at 573, 578 (describing the petitioners' sexual practices, namely anal sex, as "common to a homosexual lifestyle").

210. Garland, *supra* note 205, at 312.

211. *Id.* at 312–13 & n.97.

212. See, e.g., Richard D. Mohr, *The Shag-a-delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 365, 375 (2004) (discussing a range of sexual activities available to homosexuals not prohibited by the Texas statute in *Lawrence*).

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duct.<sup>213</sup> In this way, the *Lawrence* Court reinforced the same box the group has been attempting to expand since the days of Wilde.

After questioning the historical grounds relied upon in *Hardwick*,<sup>214</sup> the Court paused to acknowledge that strong voices have long condemned homosexual conduct as immoral<sup>215</sup>—“conduct” being the key word in the Court’s acknowledgment. In doing so, the Court continued to conflate the act of same-sex sodomy with gay identity,<sup>216</sup> relying on the limited narrative that continues to freeze the legal narrative of gays and lesbians to their sexual acts:

[C]ondemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.<sup>217</sup>

Although the Court did not overtly use these considerations to decide the fate of the Texas anti-sodomy statute,<sup>218</sup> they seep insidiously into the rest of the majority opinion as the narrative underlying homosexual conduct-as-status. If prior cases relied upon the “gay stock characters” described above,<sup>219</sup> *Lawrence* shed most of the old stock character stories promoting discrimination against gays and lesbians but never really condemned a particularly pernicious stock character, the “Morally Corrupt” practitioner of sodomy.<sup>220</sup> By attempting to please, or at least placate, all interest groups,<sup>221</sup> the *Lawrence* Court, unwittingly or not, permitted an ancient story about gays and lesbians—that their

213. See *supra* text accompanying notes 210–11.

214. See *supra* note 203 and accompanying text.

215. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

216. See Libby Adler, *The Future of Sodomy*, 32 *FORDHAM URB. L.J.* 197, 225 (2005) (observing that “[c]ritics who targeted the conflation of sodomy and gay identity are not cited by the *Lawrence* Court” in its criticism of *Hardwick*).

217. *Lawrence*, 539 U.S. at 571.

218. *Id.*

219. See *supra* notes 99–105 and accompanying text.

220. See McGowan, *supra* note 183, at 1313 (“*Lawrence* has not ruled out moral distaste as a rational basis for state regulation.”). But see Adler, *supra* note 216, at 210 (discussing one post-*Lawrence* Eleventh Circuit case that may have been motivated by “the specter of the homosexual pedophile [that] lingers between [the] lines of text” in *Lawrence*).

221. For example, the Court arguably limited *Lawrence*’s reach by noting that the case did not involve minors or persons who might be coerced or might not easily refuse consent, public conduct, prostitution, or government recognition of homosexual relationships. *Lawrence*, 539 U.S. at 578.

behavior and thus their whole identity “is immoral and unacceptable”<sup>222</sup>—to remain embedded in the narrative text.

If *Lawrence*, like *Romer* and *Hardwick*, “is a multilayered story,” then “[o]nly on its surface is it a story about removing the sanction of criminal punishment from those who commit sodomy.”<sup>223</sup> Ultimately, Justice Kennedy’s sweeping statement rejecting the animus underlying the Texas sodomy law still relied on sodomy-related acts to define gays and lesbians: “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>224</sup> Although *Lawrence* removed the word “outlawed” from the standard “reductionist conflation of ostracized identity with outlawed act,”<sup>225</sup> the shrunken legal space in which to enact homosexual identity has remained.

#### D. *The Armed Forces: Fraternalization and Contagion*

Recent Supreme Court developments seem to have had little effect on the United States Armed Forces, where, until very recently, gay men, bisexuals, and lesbians could be separated from military service for engaging in any sort of “homosexual act.”<sup>226</sup> Several cases over the past twenty years have made this point crystal clear, illustrating the extent to which Wildean narratives furthered in *Hardwick* retain meaning and power. For the Armed Forces and other quasi-military operations, simply engaging in same-sex sexual acts was enough to “stain” your sexual identity as gay or lesbian.<sup>227</sup> In contexts like these, the Wildean narratives were only thinly hidden, like landmines that explode without warning.

For example, litigation in *Padula v. Webster*<sup>228</sup> arose out of the FBI’s refusal to hire people who engage in “homosexual conduct.”<sup>229</sup> The FBI was purportedly concerned about the susceptibility of homo-

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222. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. at 578.

223. Tribe, *supra* note 87, at 1896.

224. *Lawrence*, 539 U.S. at 575.

225. Tribe, *supra* note 87, at 1896.

226. 10 U.S.C. § 654 (2006), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. On December 18, 2010, the Senate repealed its “Don’t Ask, Don’t Tell” ban on homosexuals openly serving in the military. Carl Hulse, *Senate Ends Military Ban On Gays Serving Openly*, N.Y. TIMES, Dec. 19, 2010, at A1.

227. *But see* 10 U.S.C. § 654(b)(1)(A)–(E) (excepting from the law’s reach instances where the homosexual “conduct is a departure from the member’s usual and customary behavior” and “unlikely to recur,” and “the member does not have a propensity or intent to engage in homosexual acts”).

228. 822 F.2d 97 (D.C. Cir. 1987).

229. *Id.* at 102.

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sexuals to “compromise or breach of trust.”<sup>230</sup> Yet the FBI’s standard of homosexual identification was a double one and inherently contradictory: While gays were to be found out by their homosexuals *acts*, it was their entire *identity* as homosexuals—and therefore as insecure, neurotic, unstable, inverted creatures—that provided the justification for the ban.<sup>231</sup> This contradictory standard echoes the initial confusion born out of the nineteenth century and the Wilde trials.

The slippery narratives concocted in the Wilde trials are recycled in *Padula*, as the homosexual is portrayed as an untrustworthy “other” who constantly performs a Dorian Gray-like betrayal upon everyone with whom he or she interacts. It is, in fact, precisely this ambiguity—this slipperiness—of the homosexual that so galvanizes the FBI and the court: The very indeterminacy that marks the contours of gay life is the very thing about which the FBI feels most threatened.

To put it another way, the Wildean idea of the homosexual has floated in a sea of obscurity and uncertainty since the time of its “creation.” Much of the incessant harping on an acts-based definition of homosexuality can be seen as a way to give the term some specificity, some hard edges. Combined with the historical tradition of not naming—*non nominandum*<sup>232</sup>—which until recently has scourged and obscured the homosexual, the indeterminacy of homosexuality was a swamp that those in power found easier to avoid entirely.<sup>233</sup> Add this to the fear and loathing traditionally inspired by homosexuals, and it is no surprise that the FBI felt the simplest approach to homosexuality would be to effectively apply a blanket refusal.

Thus, the FBI and the *Padula* court carried on the tradition of litigating and ruling around homosexuality. Further, this acts-based divide only serves to illustrate the false division between heterosexuality and homosexuality.<sup>234</sup> While the nineteenth century did forge a distinction between the two sexual identities, framing one as normal

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230. *Id.* at 101 (internal quotation marks omitted).

231. The FBI’s legal counsel recently declared that “administrative action is taken not ‘simply because of . . . sexual *orientation*’ but [that] homosexual *conduct* is a significant factor.” *Id.* at 99 (first alteration in original) (emphasis added). He further explained that “in fairness . . . based upon experience, I can offer no specific encouragement that a homosexual applicant will be found who satisfies all of the requirements.” *Id.* (alteration in original). In explaining its decision, however, the court focused on the fact that homosexual conduct is “criminalized in roughly one-half of the states,” as well as the “general public opprobrium toward homosexuality.” *Id.* at 104.

232. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215 & n.16 (19th ed. 1836) (translating “peccatum illud horribile, inter Christianos non nominandum” as “That horrible sin, not to be named among Christians”).

233. See *supra* Part III.

234. See *supra* text accompanying note 210.

and the other as abnormal,<sup>235</sup> it is equally true that the one cannot exist without the other. Our current sociological understanding of heterosexuality cannot survive without its opposite. And just as heterosexual conduct cannot survive without its opposite, the trustworthy (as defined negatively by the FBI<sup>236</sup>) cannot survive without the untrustworthy. Like all such divisions, this too is constructed. It is the frailty of this barrier that the FBI and the *Padula* court tried so hard to reinforce.

This fear of obscured, ambiguous narratives is omnipresent even in opinions that are ostensibly supportive of gay rights. In *Watkins v. United States Army*,<sup>237</sup> the plaintiff challenged an Army policy disqualifying homosexuals, but not heterosexuals, from service for engaging in homosexual conduct.<sup>238</sup> After being enjoined by a federal district court from discharging the petitioner because of his affidavit that he was a homosexual and had engaged in homosexual conduct, the Army rejected his reenlistment application.<sup>239</sup> Notably, the Army's policy did not bar service by heterosexuals who performed the very same acts.<sup>240</sup> Thus, the Army essentially upheld a code under which acts of sodomy can only occur in the context of homosexual orientation.<sup>241</sup> At the same time, however, the Army refused to define gays by anything but sodomy.<sup>242</sup>

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235. See *supra* Part II.

236. See *supra* text accompanying note 230.

237. 847 F.2d 1329 (9th Cir. 1988), *withdrawn*, *Watkins v. U.S. Army*, 875 F.2d 699, 711 (9th Cir. 1989).

238. *Id.* at 1331, 1334.

239. *Id.* at 1333.

240. *Id.* at 1338–39.

241. See *id.* (noting that “[t]he regulations make any act or statement that might conceivably indicate a homosexual orientation evidence of homosexuality,” while allowing such evidence to be weighed against evidence of a heterosexual orientation).

242. This is so despite the fact that “the regulations ban homosexuals who have done nothing more than acknowledge their homosexual orientation even in the absence of evidence that the persons ever engaged in any form of sexual conduct.” *Id.* at 1337. The regulations define “‘homosexual’” as “‘a person, regardless of sex, who *desires* bodily contact between persons of the same sex . . . with the intent to obtain or give sexual gratification.’” *Id.* For a decision by former-Judge Robert Bork upholding the discharge of a Navy cryptographer for engaging in a consensual relationship with another Navy man, see *Dronenberg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984). Bork rejected Dronenberg’s claimed right to engage in what Judge Bork deemed “homosexual conduct”; for Bork, such conduct was enough to define his identity and legal status. See *id.* at 1397–98 (noting that there is no constitutional right to engage in homosexual conduct and that the Navy’s policy of requiring discharge of those who do “is a rational means of achieving . . . legitimate [state] interests,” such as by maintaining “‘mutual trust and confidence among service members’” and “‘prevent[ing] breaches of security’” (second alteration in original)).

The Army justified this circular standard by maintaining that sodomy only occurs in the context of homosexual orientation. Desperately trying to erase the slippage between homosexual and heterosexual identities, and thus crystallizing their polarities, the Army excused those heterosexual sodomites by blaming their behavior on “immaturity, curiosity [sic], or intoxication.”<sup>243</sup> This is a tactic we saw in the Wilde trials and *Hardwick*: Not only is the heterosexual history of sodomy obscured and designified, but the two identities are frantically reified by an act that can only have significance in one body. While heterosexual men can be young, curious, or drunken sodomites,<sup>244</sup> homosexual men can only be wily or frightening to others. The Army’s heterosexual narrative can only be whitewashed through the narrative of homosexual vilification.

More recent cases and policies follow the same paths. The Clinton-era “Don’t Ask, Don’t Tell” (“the Act”)<sup>245</sup> was merely a more modern version of *non nominandum*—what is not articulated need not be acknowledged. The Act requires the separation from the armed forces of members of the military who engage, attempt to engage, intend to engage, or have a propensity to engage in a homosexual act.<sup>246</sup> Although the Act was repealed by the Senate in December 2010,<sup>247</sup> there was instant backlash from opponents arguing that allowing gays and lesbians to serve openly would injure “unit cohesion.”<sup>248</sup>

Simply put, the military is unerringly two-faced in a particularly late nineteenth century way in its policy towards homosexuals. On the one hand, anyone who articulates even the most general of thoughts about engaging in “homosexual acts” is to be removed from the Armed Forces.<sup>249</sup> On the other hand, as long as these thoughts, feelings, propensities, and presumably acts remain out of sight—the pro-

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243. *Watkins*, 847 F.2d at 1336 (alteration in original) (quoting the Army’s reenlistment regulation “that bars homosexuals from reenlisting”).

244. The court explained: “If a straight soldier and a gay soldier of the same sex engage in homosexual acts because they are drunk, immature or curious, the straight soldier may remain in the Army while the gay soldier is automatically terminated.” *Id.* at 1339.

245. 10 U.S.C. § 654 (2006), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. “Don’t Ask, Don’t Tell” has worked better in theory than in practice. As Judge Canby wryly noted in his partial dissent in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), the Act’s name was a misnomer in the case of the plaintiff: “She did not tell, but the Air Force asked.” *Id.* at 822 n.1 (Canby, J., concurring in part and dissenting in part).

246. 10 U.S.C. § 654(b), (f).

247. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

248. Hulse, *supra* note 226.

249. *See* 10 U.S.C. § 654(b)(1) (listing the solicitation of a homosexual act as grounds for separation).

totypical hidden narrative—the member of the Armed Services may continue to serve.<sup>250</sup>

The importance of the missing narrative's role in current Armed Forces policy was made clear in the discussion of the Act in *Cook v. Gates*.<sup>251</sup> In *Cook*, former members of the U.S. Armed Services alleged that “Don't Ask, Don't Tell” violated the Due Process, Equal Protection, and Free Speech Clauses of the Constitution.<sup>252</sup> The United States Court of Appeals for the First Circuit held that despite the Supreme Court's 2003 opinion in *Lawrence v. Texas*, the Act did not violate any of the above-named clauses, and the First Circuit dismissed the former military members' claims.<sup>253</sup>

In dismissing the service members' claims, however, the First Circuit discussed not only the terms of the Act but also its legislative history.<sup>254</sup> The court cited in full the statement of then-Chairman of the Joint Chiefs of Staff, Colin Powell, who explained the rationale for the policy of removing homosexual military members from service:

It is very difficult in a military setting . . . to introduce a group of individuals who . . . favor a homosexual lifestyle, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive . . . . [I]t would be prejudicial to good order and discipline to try to integrate that in the current military structure.<sup>255</sup>

The Act itself is similarly crafted, stating that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>256</sup> Even at the end of the twentieth century, the unspoken narrative of the homosexual as a deviant, uncontrollable sexual predator still held sway.

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250. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(d), 107 Stat. 1547, 1673 (1993) (“It is the sense of Congress that—(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces . . . should be continued, but the Secretary of Defense may reinstate that questioning . . . if . . . it is necessary to do so in order to effectuate the policy set forth in [10 U.S.C. § 654] . . .”).

251. 528 F.3d 42 (1st Cir. 2008).

252. *Id.* at 47.

253. *Id.* at 45, 65.

254. *Id.* at 45–47.

255. *Id.* at 45–46 (quoting S. REP. NO. 103-112, at 283 (1993)).

256. 10 U.S.C. § 654(a)(15) (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

Also paralleling the rise of the “invert” in the late nineteenth century, the Act defined homosexuality as purely act-based<sup>257</sup> and focused on homosexual acts, a member’s statement that he or she is gay or bisexual, or that he or she is in a same-sex marriage<sup>258</sup>—three unmistakable outward signifiers, in other words, of the hidden deviancy lurking inside. This view is taken to such a degree that the Act even permitted a service member to remain in the Armed Forces despite his or her homosexuality if the member would show that he or she does not plan to perform such acts in the future.<sup>259</sup> Put another way, the Act ensured that as long as a service member is able to camouflage his or her nonheterosexual narrative—obfuscating that forbidden, unarticulated persona—then the dominant narrative may proceed untrammelled. Only by fostering namelessness can the belief in a simplistic heterosexuality continue.

This work of unnameing was not the only Wildean leftover fostered by the Act. The Act’s rigidity in defining homosexuality—reducing it to “any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires” and “any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in [homosexual acts]”<sup>260</sup>—tidily erased the multiplicity of today’s lesbian, gay, bisexual, transgender, or questioning (“LGBTQ”) identities, shrinking it to a manageable, easily definable rubric. In the words of Judge Saris, who authored a separate opinion in *Cook v. Gates*, “the line between ‘propensity’ and ‘orientation’ is razor-thin at best.”<sup>261</sup> For the Armed Services, an act of sodomy is the shrink-to-fit tarnish that defines homosexuality.

Moreover, the Act not only allowed those who are LGBTQ to be neatly lumped into one indistinguishable stew, but it also provided a means to define and differentiate the dominant heterosexual narrative. This “taxonomic freeze-framing”<sup>262</sup> of heterosexual versus nonheterosexual is particularly valuable in addressing the startling anxiety emanating from the Act, which reflects the Armed Services’s

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257. *Id.* § 654(f)(1) (defining “homosexual” around an interest in engaging in “homosexual acts”).

258. *Id.* § 654(b).

259. *Id.* § 654(b)(1). This is merely one of a few requirements, all of which must be shown. *Id.*

260. *Id.* § 654(f)(3).

261. 528 F.3d 42, 70 (1st Cir. 2008) (Saris, J., concurring in part and dissenting in part).

262. CRAFT, *supra* note 11, at 5.

fear that barely contained transgression is lurking under the skin of the average military member.<sup>263</sup>

Ironically enough, heterosexuality, in the eyes of the Armed Services, is a terribly fragile state, something that can be easily breached by even a mere *propensity* for homosexual activity. This is evidenced by the plaintiff's case in *Witt v. Department of the Air Force*,<sup>264</sup> where the Air Force had such concern over Witt's propensity for homosexual acts that it discharged her for having a partner off base, even though she followed the dictates of the Act while in service or on base.<sup>265</sup> Such fear of cross-contamination, of homosexual leakage, is itself the primary narrative hidden under the plain language of the Act. Like the sorry spectacle of the Wilde trials, these conflicting and fearful narratives have inscribed their meaning on the law, projecting definitional incoherence and confusion into the lives of gay and lesbian service members. For the military, the shadow of the Wilde trials always follows closely behind.

#### IV. AMBIGUOUS, FLICKERING TEXTS: DECODING THE NARRATIVE OF SAME-SEX MARRIAGE CASES

The strength of the Wilde narratives and the way they constructed a small box for the legal understanding of LGBTQ identity has continued to endure. These narratives "are universal and aterritorial, occurring at diffuse, often media-based levels of scale" and "involve the discursive spaces within which we produce and reproduce tradition and identity."<sup>266</sup> Although some of the most damaging hidden stories no longer take prominence, and it is no longer a crime in civilian life to engage in gay sex, the narrow legal space in which to cast homosexual identity has remained.

This is true even in the most recent determination of sexual identity and mores: the same-sex marriage debate. In opinions both supportive and dismissive of gay rights—including *Goodridge v. Department of Public Health*, *Lewis v. Harris*, *In re Marriage Cases*, and *Varnum v. Brien*—state courts have created a definition for gay identity that is

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263. Despite the recent repeal of the Act, there is still tremendous concern over having openly gay and lesbian members of the military serve. See Kevin Baron, *Marine Commandant Concluded DADT Repeal May Risk Lives*, STARS & STRIPES (Dec. 14, 2010), <http://www.stripes.com/news/marine-commandant-concluded-dadt-repeal-may-risk-lives-1.128737> (quoting Marine Corps Commandant General James Amos's assertion that he opposed the repeal because "[m]istakes and inattention or distractions cost Marines lives").

264. 527 F.3d 806 (9th Cir. 2008).

265. *Id.* at 809–10.

266. Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. 387, 391 (2008).

ultimately just as narrow, if not toxic, as the more familiar act-equals-identity. In the fulcrum of the same-sex marriage debates, gay and lesbian relationships have been retold as a simulacrum of heterosexual relationships based on a narrow platform of procreation and family.

A. *Twenty-First Century Marriage Laws*

The fight for same-sex marriage in state courts has not escaped the strong polarizing power of old narratives. Where courts have decided the issue, they have fallen prey to the inexorable pull of traditional stories about sexuality, even when upholding the right to same-sex marriage. In these cases, homosexuality is inevitably recast as heterosexuality, with narrow parameters and a carefully constructed wholesomeness that excludes many aspects of LGBTQ life.

1. *Goodridge v. Department of Public Health*

In *Goodridge*,<sup>267</sup> the Supreme Judicial Court of Massachusetts recognized a right of gay marriage in the Commonwealth, but in doing so, the court ended up relying on acts—this time, procreation and child rearing—to define homosexuality. Unlike *Lawrence v. Texas*, which, as one scholar has noted, was “the first opinion from the Court to speak positively about sex without reference to procreation,”<sup>268</sup> the *Goodridge* court relied extensively on the relative insignificance of procreative sex in heterosexual marriages to underline its reasoning as to why same-sex couples should be allowed to marry.<sup>269</sup> In a similar way, the court also rejected a fixed conception of “‘optimal’ child rearing.”<sup>270</sup>

Although the decision in *Goodridge* was undeniably a good thing for gay couples, its reliance on procreation and child rearing has its dangers. As Nancy Polikoff has contended, lesbian and gay parents’ embrace of a privileged position for marriage has in some ways undermined the larger movement for respect, diversity, and nondiscrimina-

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267. The *Goodridge* court rejected three interests proffered by the state to justify denying marriage to same-sex couples: (1) creating a favorable setting for procreation; (2) ensuring that child rearing takes place in “optimal” settings; (3) saving state resources by limiting the scope of public marital benefits. 798 N.E.2d 941, 961–64 (Mass. 2003).

268. Garland, *supra* note 205, at 297.

269. See *Goodridge*, 798 N.E.2d at 961–62 (“[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”).

270. *Id.* at 963.

tion for nontraditional family units.<sup>271</sup> In other words, it is possible that the push for gay marriage has derailed the greater project of getting society to accept all forms of LGBTQ relationships, including those that do not fit into the comfortable dyad-marriage classification. Similarly, Katherine Franke has argued that with the current tactics used in the fight for same-sex marriage has come “a radical substitution or transformation of the nature of homosexual desire.”<sup>272</sup> Thus the legal tactic of casting same-sex couples as fundamentally similar to opposite-sex couples, by means of heteronormative acts, has in some ways diminished the multiplicity of personae that LGBTQ individuals can don. It diminishes their ability to explore a “lawless homosexuality,”<sup>273</sup> a homosexuality not regulated or defined by law. At the beginning of the twenty-first century, “the dangers inherent in this particular paradigm shift”<sup>274</sup> differ from those manifested in Wilde’s trials, yet they still harken back to a similar theme: shrinking definitions of gay identity in the law.<sup>275</sup>

The relentless process of normalizing gay actions, same-sex couples, and LGBTQ lifestyle is evident in the text of the most recent state same-sex marriage opinions.<sup>276</sup> However beneficial to norms of equality, the intellectual and legal process through which same-sex couples are provided marriage rights also requires conformity to the heterosexual regime.<sup>277</sup> This required conformity ultimately results in

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271. Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 585–86 (2005).

272. Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 240 (2006).

273. *Id.* at 244 (internal quotation marks omitted). As Franke ruminates,

What have been the costs of refusing the political and psychic uncertainty of refusing to immediately articulate and legally nail down what it means to be gay? What will happen to homo desire and homo sex when they run through the particular circuitry of fantasy sutured to marriage? . . . [W]hat kind of sexual publics and what forms of sociability might be made possible by a homosexuality that strategically sidesteps robust legal recognition and regulation?

*Id.* at 244–45.

274. *Id.* at 238.

275. Franke goes on to argue that this legal reductionism carries an emotional reductionism as well: “As lesbigay people are herded into a particular form of sociability—a narrow conception of family—we have lost an interest in, if not now disavow, other forms of sociality that a generation ago we celebrated.” *Id.* at 246.

276. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (characterizing plaintiffs as “families” and “parents”).

277. *See, e.g., id.* at 965 (“If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”).

a type of marriage “equality in which cultural differences are perceived as threatening and the existence of dominant group superiority and privilege is viewed as the norm.”<sup>278</sup>

Through the same-sex marriage opinions, the multivalence of gay identity is forced into the conventional roles granted to heterosexual couples wishing to marry and become parents. Reframing gay couples as “just like” heterosexual couples seems to be the only way that courts can possibly imagine expanding the marriage franchise to nonheterosexuals. Indeed, this erasure of difference and multiplicity has led some commentators to urge caution when considering same-sex marriage, preferring domestic partnership instead because only the latter “will promote the cultural integrity, autonomy, and self-determination of queer cultures and communities.”<sup>279</sup>

A careful look at the language in some recent same-sex marriage cases illustrates the danger of reductionist defining. In all these cases, heterosexuality remains the “guiding paradigm”<sup>280</sup> for marriage, and same-sex couples must fit themselves into its norms to be granted its accompanying rights. The LGBTQ couple wishing to marry will have to “shed[ ] any methodologies, practices, and values indigenous to the minority group.”<sup>281</sup> This is in part because same-sex marriage advocates have carefully chosen their plaintiffs to “embrace the values of the repro-normative domestic, preferring nice-looking couples with children who, like ‘regular’ people, take their kids to little league and school plays.”<sup>282</sup> Embracing the heterosexual norm, however, has made “the viability of counterpublics that lie beyond the social field of marriage all the more difficult to imagine.”<sup>283</sup>

## 2. *Lewis v. Harris*

The importance of recreating same-sex couples in a conventional, heterosexual role is also widely evident throughout *Lewis v. Harris*, the New Jersey same-sex marriage case that granted same-sex couples the same rights and benefits of marriage that heterosexuals

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278. Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 364 (1998).

279. *Id.* at 365.

280. *Id.* at 369.

281. *Id.* at 370. Pouncy elaborates the potential dangers of recognizing same-sex marriage: “The extension of same-sex marriage will cloak gay and lesbian couples in the traditions of patriarchy and heterosexism. Heterosexual norms will become the standards applied to lesbian and gay relationships, and the development of queer cultural constructions of intimate relationships will be stunted.” *Id.* (footnote omitted).

282. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2704 (2008).

283. *Id.* at 2701.

possess while denying them the actual nomenclature of the term “marriage.”<sup>284</sup> The Supreme Court of New Jersey began its opinion by emphasizing the settled, long-term, and monogamous nature of the seven plaintiff same-sex couples.<sup>285</sup> Indeed, the court was remarkably frank about its recasting of same-sex couples as heterosexual couples: “In terms of the value they place on family, career, and community service, plaintiffs lead lives that are remarkably similar to those of opposite-sex couples.”<sup>286</sup> In case that statement did not do its transformative work effectively enough, the New Jersey court spent considerable ink explaining precisely how normal, committed, wholesome, civic, family minded, and virtuously heterosexual each same-sex plaintiff couple was.<sup>287</sup>

The *Lewis* court then upped the ante by discussing, at length, the progeny of these same-sex couples and the similarity (and normalcy) of same-sex families to opposite-sex families.<sup>288</sup> Although the Supreme Court’s argument is unquestionably true—denying marriage benefits to same-sex couples injures the children as much as the parents<sup>289</sup>—the way the court went about establishing this fact further shrinks a gay multiplicity of identity into bland, safe, heterosexual-like exemplars.

As admirable as the *Lewis* court’s attempt to demystify and destigmatize same-sex couples is, the court’s heavy hand leaves LGBTQ individuals little choice but to follow precisely in the traditional marital mold if they wish to obtain any rights. In fact, the *Lewis* court not only seemed to require a couple or family structure almost precisely like a standard heterosexual one in order to receive the rights and benefits of marriage; the court also required the two members of the same-sex couple to be *committed*—an additional requirement that is certainly not required for heterosexual couples wishing state-sanctioned marriage rights in New Jersey.<sup>290</sup>

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284. See 908 A.2d 196, 200 (N.J. 2006) (holding that the legislature might either “amend the marriage statutes to include same-sex couples or create a parallel statutory structure” that provides the same rights though it “uses a title other than marriage”).

285. *Id.*

286. *Id.* at 201.

287. *Id.* at 201–02.

288. *Id.* at 218.

289. As the *Lewis* court noted, “There is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households.” *Id.*

290. The *Lewis* court spelled it plainly: “We conclude that denying to *committed* same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose.” *Id.*

Granted, the New Jersey legislature and many of its courts have been “at the forefront of combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians.”<sup>291</sup> But this does not change the transformative work these bodies do, however unconsciously, to recast same-sex couples, in all their edgy multiplicity, into minimally threatening heterosexual simulacrum.

### 3. *Varnum v. Brien*

In holding that the Iowa statute limiting civil marriage to unions between men and women is unconstitutional, the Supreme Court of Iowa followed much the same path as the *Lewis* court. In *Varnum v. Brien*, the Iowa court almost immediately reframed the same-sex plaintiff couples into safe, familiar normalcy, characterizing them as “responsible, caring, and productive individuals” who “maintain important jobs, or are retired, and are contributing, benevolent members of their communities.”<sup>292</sup> In a vein parallel to *Lewis*, the *Varnum* court pointed out that all six plaintiff couples were in “committed relationships”<sup>293</sup>—presumably in order to establish their worthiness and similarity to heterosexual couples. In fact, the *Varnum* court took care to establish the “committed and loving” relationships of the plaintiff couples and their raising of families, “just like heterosexual couples.”<sup>294</sup> In this way, the court (re)categorized Iowa’s same-sex couples as simulacrum of the most traditional of heterosexual married couples, wiping out their differences with a broad brush.

Moreover, the Iowa Supreme Court fell back on the old idea that sexual acts define identity, although presumably with the best of intentions. In declaring that Iowa’s marriage statute targeted gays and lesbians, the *Varnum* court cited *Romer*, noting *Romer*’s implication that “sexual orientation is a trait that defines an individual.”<sup>295</sup> Interpreting *Romer* in this way, well-meaning as it may be, reinforces the troubling belief that the performance of or desire to perform nontraditional sexual acts is the preeminent defining characteristic of LGBTQ individuals, instead of just an aspect of their personae—as is assumed for heterosexual individuals. This version of “sexual act as identity” harkens back to Krafft-Ebing and the early defining of the

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at 220 (emphasis added). The *Lewis* court did not, however, explain the test for a committed same-sex relationship.

291. *Id.* at 213–14 (discussing judicial and legislative actions benefitting homosexuals).

292. 763 N.W.2d 862, 872 (Iowa 2009).

293. *Id.*

294. *Id.* at 883.

295. *Id.* at 885 (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

“invert”<sup>296</sup> and, as discussed in Part II, is both reductionist and discriminatory.

#### 4. *In re Marriage Cases*

Similarly, the Supreme Court of California, in *In re Marriage Cases*, framed its decision to extend to same-sex couples the constitutional right to marry as a matter of their equal capacity to establish “loving and long-term committed relationship[s] with another person and responsibly to care for and raise children.”<sup>297</sup> Thus, within the first few pages of the opinion, the court cast the family relationships as traditional heterosexual ones.<sup>298</sup>

Although the California court laudably noted how same-sex couples and families deserve the same dignity and respect as opposite sex ones,<sup>299</sup> its argument explaining why excluding same-sex couples from the designation of marriage is unconstitutional relied heavily on the *similarity* of same-sex and opposite-sex couples—making the subtle point that only families approximating the heterosexual ideal would truly be acceptable candidates for marriage. For example, in fleshing out the constitutional right to marriage, the court relied on prior California decisions recognizing “the linkage between marriage, establishing a home, and raising children in identifying civil marriage as the means available to an individual to establish, with a loved one of his or her choice, an officially recognized *family* relationship.”<sup>300</sup> This kind of statement might exclude from the possibility of civil marriage those who do not follow the traditional paths of relationships by creating a “home”—itself a term freighted with images of Kirche, Kueche, Kinder<sup>301</sup>—and raising children. Put another way, the California court so tightly linked a same-sex couple’s ability to marry with the creation of a very conventional family structure that it placed a delicate, but nonetheless real, question mark on whether a nonconform-

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296. See *supra* notes 40–50 and accompanying text.

297. 183 P.3d 384, 400 (Cal. 2008).

298. See *id.* at 399 (recognizing the “substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own—and, if the couple chooses, to raise children within that family”). For a different, but related, discussion about child custody and visitation disputes, see Rachel Simonsen, *Legislating After Janice M.: The Constitutionality of Recognizing De Facto Parenthood in Maryland*, 70 MD. L. REV. 525 (2011).

299. *In re Marriage Cases*, 183 P.3d at 400.

300. *Id.* at 422.

301. Kirche, Kueche, Kinder is a German saying translated as “Church, Kitchen, Children” that denotes the role of women in society. See Thomas J. Scheff, *The Emotional Relational World: Shame and the Social Bond*, in HANDBOOK OF SOCIOLOGICAL THEORY 255, 261 (Jonathan H. Turner ed., 2001).

ing same-sex couple would be able to retain the marriage franchise in the future.

Likewise, the court's emphasis that "the right to marry represents the right of an individual to establish a legally recognized *family* with the person of one's choice"<sup>302</sup> was undoubtedly meant to be inclusive, but it mapped same-sex marriage onto children and procreation. This was made clear when the court supported its statement with a variety of U.S. Supreme Court opinions, all of which tightly linked the significance of the right to marry to the creation of a family and, specifically, to the production of children.<sup>303</sup> By relying on these cases, the most recent of which is over thirty-years-old (the oldest is over 120-years-old), the court unwittingly shackled same-sex couples' ability to attain legal marriage to a heteronormative version of relationships and marriage.

Certainly there are (and continue to be) many same-sex couples who wish to marry in part to give legitimacy and normalcy to their children and families.<sup>304</sup> But to frame the legal ability to marry on a base of nuclear families, child rearing, and wholesome community lives—as the Supreme Court of California does—is to create a right of marriage potentially exclusionary to the same-sex community.<sup>305</sup> In this way, the Supreme Court of California, like so many well-meaning courts before it, provided a much narrower space for LGBTQ families than might have been created without the pressure of the unarticulated narratives hiding beneath the surface of the opinion.

Like *Varnum*, the California court also fell back onto the old trope of act-is-identity, defining and categorizing LGBTQ individuals by their sexual acts. Immediately prior to its discussion of whether sexual orientation should be considered a suspect classification, the

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302. *In re Marriage Cases*, 183 P.3d at 423 (emphasis added).

303. In a footnote, the Court quoted from, for example, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."), and *Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."). *In re Marriage Cases*, 183 P.3d at 423 n.35. (alteration in original).

304. Cf. Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 56 (2008) (discussing same-sex couples seeking to celebrate "their civil union ceremony in a traditional place for weddings [in order to] bolster the legitimacy and normalcy of the identity claim being performed and secured through the ceremony").

305. Ironically, the California court devoted part of its opinion to why the right to marry should *not* be limited to couples who can procreate naturally. See *In re Marriage Cases*, 183 P.3d at 430–34 (denying that the constitutional right to marry necessarily is delimited by procreation).

court first classified “gay individuals” as those people who are “sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender.”<sup>306</sup> Then, in the accompanying footnote, the court quoted the amicus curiae brief filed by various mental health organizations, which defined homosexuality in very narrow terms: “Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them, relative to each other. Indeed, it is by acting—or desiring to act—with another person that individuals express their heterosexuality, homosexuality, or bisexuality.”<sup>307</sup> By relying on this type of definition, one delineated by sexual feelings and acts, the California court once again delimited a small space for the gay or lesbian identity. This shrunken space for the nonheterosexual persona has a direct link to the early definition of the homosexual male as an “invert”—both times, the work of the psychiatric community and their reductionist views contributed to such a definition.<sup>308</sup>

##### 5. *Chambers v. Ormiston*

Despite the increasing number of states that grant recognition to same-sex marriage,<sup>309</sup> there are still many more that deny recognition not only to same-sex marriage but also to its closely related cousin, same-sex divorce. In *Chambers v. Ormiston*, the Supreme Court of Rhode Island refused to recognize the divorce of a same-sex couple

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306. *Id.* at 441.

307. *Id.* at 441 n.59 (quoting Brief Amici Curiae of the American Psychological Ass’n et al. at 33, *In re Marriage Cases*, 183 P.3d 384 (No. 4365) [Hereinafter *In re Marriage Cases* Amicus Brief]) (internal quotation marks omitted). Granted, the brief goes on to explain that sexual orientation includes not just sexual behavior but also “‘bonds’” that “‘encompass nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment.’” *Id.* (quoting *In re Marriage Cases* Amicus Brief, *supra*, at 33–34). But these additional definitional criteria are, notably, *additional*; they do not offer an alternative understanding but an expanded one. See *id.* (quoting *In re Marriage Cases* Amicus Brief, *supra*, at 33–34) (describing nonsexual bonds as “‘[i]n addition to sexual behavior’”).

308. This is not terribly surprising, of course, as the American Psychiatric Association is the same organization that originally classified homosexuality as a mental disorder in the first version of the Diagnostic and Statistical Manual. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38–39 (1952), available at <http://www.psychiatryonline.com/DSMPDF/dsm-i.pdf> (including “homosexuality” in the category of mental disorders titled “Sexual deviation”).

309. See *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last updated Feb. 2011) (“Since 1996, many states have enacted legislation prohibiting same-sex marriages or the recognition of same-sex marriages formed in another jurisdiction.”).

married elsewhere,<sup>310</sup> leaving the couple in legal purgatory. The Court reached this result by holding that it was without subject-matter jurisdiction to entertain the petition.<sup>311</sup> One of the reasons for the court's ruling was the absence of statutory language encompassing same-sex divorce.<sup>312</sup> This legal inability to articulate same-sex divorce led to a curtailment of legal rights in a way reminiscent of the inability to articulate, legally or otherwise, Oscar Wilde's alleged acts in the late nineteenth century.<sup>313</sup>

#### 6. *Breaking the Same-Sex Marriage Mold*

In part, same-sex marriage “cases articulate a yearning to be governed by and within the surveillance of the state.”<sup>314</sup> But as Katherine Franke has argued, what would happen if the LGBTQ couple took its position outside the web of legal regulation as a positive, not a negative?<sup>315</sup> In other words, since the identities of the individuals in same-sex relationships are currently neither criminal nor recognized under the law, could this be seen as an open space allowing for growth instead of a lacuna that must be filled with regulation? Recall that as Anglo-American law has formally recognized relations that are not strictly heterosexual, it has imposed more and more rigid definitions on those it chooses to define.<sup>316</sup> It is all too possible that the narratives constructed by formal recognition of same-sex marriage might be as restrictive and shrunken as those conflating act and identity over one hundred years prior. Queer narratives may be best served by attempts to stay out of the law's shadow.<sup>317</sup>

Ultimately, although the ability to marry should be extended to everyone, gay or straight, queer or transgendered, the way state courts are permitting same-sex couples to access this right is dependent on heterosexual mores that are heavily reliant on limited, carefully con-

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310. 935 A.2d 956, 967 (R.I. 2007).

311. *Id.*

312. *See id.* at 963 (“As we understand the language of the existing divorce statute, it does not constitute ‘express language conferring subject-matter jurisdiction upon the Family Court’ whereby it could entertain a divorce petition involving two persons of the same sex.”).

313. As Megan Cahill notes, “The [Rhode Island] Court also continued a deeply-rooted legal and cultural tradition of talking about same-sex intimacy by, well, not talking about it.” Megan Cahill, *Same-Sex Marriage: The Relationship That Dare Not Speak Its Name?*, R.I. B.J., May–June 2008, at 35, 35.

314. Franke, *supra* note 272, at 246.

315. Franke, *supra* note 282, at 2687–88.

316. *See*, for example, the cases cited in Part IV.A.1–5.

317. This is partially because “law's shadow threatens to regulate as much of social life as it can plausibly extend its reach.” Franke, *supra* note 282, at 2699.

scribed narratives and potentially marginalizing and harmful to queer culture. The true challenge, as Franke notes, is how to “craft[ ] arguments that support the extension of marriage rights to same-sex couples who want them, while not doing so at the price of denigrating or shrinking an affective sexual liberty outside of marriage.”<sup>318</sup> Put another way, how do we free LGBTQ narratives from their gendered prisons and allow a more nuanced, pluralistic understanding of sexuality and legal relationships?

The recent same-sex marriage cases also reflect the late nineteenth century Wildean difficulty with and hesitancy over naming. Although gays and lesbians now have proper names and enter into common discourse, the squeamishness over clearly and cleanly declaring gayness continues. The convention of namelessness, of refusing to officially name and delineate homosexuality, still holds in the twenty-first century.

The continuation of this convention is nicely illustrated in *Lewis*, in which the Supreme Court of New Jersey could not quite bring itself to allow same-sex couples to use the term “marriage” to describe their partnerships.<sup>319</sup> Despite the *Lewis* court’s emphasis that the New Jersey Constitution grants to disadvantaged groups “a fair opportunity ‘of pursuing and obtaining safety and happiness,’”<sup>320</sup> the court declined to grant same-sex couples use of the term “marriage” for their long-term commitment.<sup>321</sup> The *Lewis* court rejected the plaintiff’s argument that a parallel legal structure, called by a name other than marriage, consigns them to second-class citizenship,<sup>322</sup> responding that as long as same-sex couples received the same rights as heterosexual marital couples, the use of the word “marriage” is unimportant.<sup>323</sup>

But despite the court’s breezy dismissal of the plaintiff’s argument, the refusal to allow same-sex couples the sobriquet of marriage is a distinction with a difference. Given the long and infamous history of the law’s—and society’s—skittishness about naming those who

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318. *Id.* at 2688. As Franke argues,

The reach and insistence of marriage’s shadow teach us how difficult it will be to pull off the twin tasks of securing marriage rights for same-sex couples while seeking to shrink or hem in the shadow that marriage casts more structurally over those people who desire to have their sexual and affective lives and attachments take place in a social terrain that they intend to occupy ground outside of governance of marriage.

*Id.* at 2699.

319. *See supra* text accompanying note 284.

320. *Lewis v. Harris*, 908 A.2d 196, 220 (N.J. 2006) (quoting N.J. CONST. art. I, ¶ 1).

321. *Id.* at 222–23.

322. *Id.* at 221.

323. *Id.* at 221–22.

identify themselves as LGBTQ, the resurgence of *non nominandum*—the disinclination to define and delineate the variety of homosexual identities and activities, to reserve naming only for normalcy—is a resurgence of the same insidiousness that led the *London Times* to refer to the charges against Oscar Wilde in his second and third trials as simply “gross indecency.”<sup>324</sup> The *Lewis* court’s conclusion—“a difference in name”<sup>325</sup>—is of great magnitude, perhaps more than the court realized.

In its judicial punt of the issue, the *Lewis* court failed to realize that official, legal nomenclature *matters*. It is not enough to say, as the majority did, that “same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship.”<sup>326</sup> If same-sex couples whose relationships are mirror images of heterosexual marriage are deserving enough to be granted the same rights and responsibilities as marital couples, then they should also be included in the terminology.<sup>327</sup> Otherwise, we continue to follow the same tarnished path set at the end of the nineteenth century.

#### B. California’s Proposition 8: New Wine, Old Bottles

The political backlash sparked by decisions like *Lawrence*, *Goodridge*, *Lewis*, *Varnum*, and *In re Marriage Cases* has had some very real consequences. Thirteen states added language to their constitutions defining marriage as a union between a man and a woman.<sup>328</sup> Indeed, an important (though unfortunate) short-term consequence of *Goodridge* and other same-sex marriage opinions may be the counterattack they have inspired.<sup>329</sup>

This battle has been most recently fought in California, where Proposition 8, a constitutional amendment banning same-sex marriage, recently passed as a public initiative with over fifty percent of the vote.<sup>330</sup> In response, a consortium of same-sex couples and other

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324. See *supra* text accompanying notes 61–64.

325. *Lewis*, 908 A.2d at 222.

326. *Id.* at 223.

327. This point is hammered home by the partial dissent of Chief Judge Poritz, who, in declaring that the nomenclature of marriage should also be extended to same-sex couples, argued that “[w]e must not underestimate the power of language.” *Id.* at 226 (Poritz, C.J., concurring in part and dissenting in part).

328. Klarman, *supra* note 188, at 466. Before 2004, only four state constitutions had such provisions. *Id.*

329. See *id.* at 482 (“[T]he most significant short-term consequence of *Goodridge* . . . may have been the political backlash that it inspired.”).

330. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

gay marriage supporters filed suit in the Supreme Court of California, asking that Proposition 8 be overturned as an illegal revision of the California Constitution.<sup>331</sup> The Supreme Court of California, in *Strauss v. Horton*,<sup>332</sup> declined to overturn the initiative, declaring it narrow enough to pass constitutional muster.<sup>333</sup>

In a move that many found confusing,<sup>334</sup> however, the Supreme Court of California also held that Proposition 8 applied only prospectively, leaving intact the roughly 18,000 same-sex marriages that occurred before November 5, 2008, when the proposition was enacted.<sup>335</sup> Moreover, the California court held that Proposition 8 did not entirely abrogate the constitutional right of same-sex couples to “‘establish . . . an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.’”<sup>336</sup> Finally, like the New Jersey court in *Lewis*, the California court reluctantly—and in apparent opposition to its previous opinion<sup>337</sup>—attempted a sleight of hand with the use of the word “marriage,” contending that although Proposition 8 reserved the designation of “marriage” for heterosexual couples, same-sex couples had virtually equal protection under California law and could obtain marriage-like benefits.<sup>338</sup>

The California court’s majority opinion travels down many of the familiar paths blazed by the late nineteenth century Wilde trials and the legal definition and identity shrinkage that followed. What the *Strauss* court tried to minimize and dismiss as negligible—the designation of “marriage”—goes to the very heart of the legal definition/

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331. See *Strauss v. Horton*, 207 P.3d 48, 59, 68–69 (Cal. 2009). For more on the California Supreme Court’s holding in *Strauss*, see Adam Farra, Comment, *Theories of Discrimination and Gay Marriage*, 69 MD. L. REV. ENDNOTES 1, 14–16 (2010).

332. 207 P.3d 48.

333. See *id.* at 116, 122 (interpreting Proposition 8 “as simply carving out a limited exception to the reach of the constitutional rights of privacy and due process as explicated in the majority opinion in the *Marriage Cases*”).

334. See, e.g., *Legal Analysis of Strauss v. Horton: California’s Proposition 8 Challenge*, FAMILY FAIRNESS (May 27, 2009), <http://familyfairness.org/blog/marriage/legal-analysis-strauss-v-horton-california-proposition-8/> (finding the court’s reasoning behind not applying Proposition 8 retroactively to be troubling, and arguing that it reflects a misinterpretation of the pertinent statutory language and raises a “host of unanswered questions”).

335. *Strauss*, 207 P.3d at 119–22.

336. *Id.* at 77 (quoting *In re Marriage Cases*, 183 P.3d 384, 399 (2008)).

337. In *In re Marriage Cases*, the court described with much detail the importance of marriage to the individual, but it made no distinction between the substantive relationship and its name. See 183 P.3d at 424–28.

338. *Strauss*, 207 P.3d at 61–62.

identity problem. As I have discussed extensively above,<sup>339</sup> the questions of naming and of granting proper rights of recognition, are crucial to up-ending the punishing, limiting narratives that plague the legal rights of LGBTQ individuals.<sup>340</sup>

The California same-sex marriage debate possesses other similarities to the Wilde trials, as well. Like Wilde's legal travails, the fate of same-sex marriage in California has also garnered national attention with a trial of its own, this time a federal trial initiated by a same-sex couple challenging the constitutionality of Proposition 8 under the Federal Constitution, known as *Perry v. Schwarzenegger*.<sup>341</sup> With prominent counsel,<sup>342</sup> extensive witness testimony from same-sex plaintiffs,<sup>343</sup> a location in San Francisco (the home base of the Ninth Circuit), and heavy press coverage,<sup>344</sup> it is possible that the *Perry* trial has garnered as much, if not more, attention as the original scandal of the Wilde trials.

Intriguingly, opposition to the filing of *Perry* did not come solely from supporters of Proposition 8. Soon after the case was filed, a variety of civil-rights groups issued statements condemning the trial. Lambda Legal Defense and Education Fund, the American Civil Liberties Union, and the National Center for Lesbian Rights all opposed the filing of the federal suit, noting that a federal challenge could potentially do more harm than good at the present time.<sup>345</sup> Later,

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339. See *supra* Parts II–III.

340. The *Strauss* court seems to have a vague realization of the stakes involved with the “naming” question, as it does note that “we by no means diminish or minimize the significance that the official designation of ‘marriage’ holds for both the proponents and opponents of Proposition 8.” *Strauss*, 207 P.3d at 61. But this realization is contradicted by the court's many later references to the relatively minimal import on same-sex couples of losing the marriage designation. See, e.g., *id.* at 116 (“Same-sex couples retain all of the fundamental substantive components encompassed within the constitutional rights of privacy and due process, with the sole (albeit significant) exception of the right to equal access to the designation ‘marriage’ . . . . Although Proposition 8 does diminish the rights of same-sex couples . . . in this one respect, it does not have the sweeping constitutional effect suggested by [an argument opposing the amendment].”).

341. See 704 F. Supp. 2d 921, 927, 1003 (N.D. Cal. 2010) (holding Proposition 8 unconstitutional).

342. Theodore Olson and David Boies represented the plaintiffs. Jesse McKinley, Bush v. Gore *Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1.

343. See Lisa Leff & Paul Elias, *Calif. Couples Tell of Gay Marriage Ban Toll*, CHARLESTOWN GAZETTE & DAILY MAIL, Jan. 12, 2010, at 11A (describing testimony given at trial).

344. See, e.g., *id.* (reporting on the *Perry* trial); McKinley, *supra* note 342; Jesse McKinley, *Personal Focus as Same-Sex-Marriage Trial Opens in California*, N.Y. TIMES, Jan. 12, 2010, at A12.

345. See Mike McKee, *Infighting Roils Prop 8 Challenge*, RECORDER (S.F.), July 21, 2009, at 1 (noting that the three civil rights groups had initially “bad-mouth[ed] the suit as too risky”). One concern was that “a loss before the Supreme Court could spoil the chances of future lawsuits on behalf of same-sex marriage.” McKinley, *supra* note 342.

however, the groups applied as plaintiff-intervenors in the federal case<sup>346</sup> after filing an amicus curiae brief that sought to narrow the issue explored in *Perry*.<sup>347</sup> The three groups believed in a very different strategy for gaining acceptance for same-sex marriage than did the plaintiffs' counsel, who supported a more cautious approach based on the specific circumstances of California's same-sex marriage debate.<sup>348</sup> In contrast, the plaintiffs' counsel wished to litigate a broader case predicated on the Federal Constitution.<sup>349</sup> And what was this struggle but a struggle over control of the LGBTQ narrative, in law and in life?

In this age of Internet and video streaming, the public performative aspects of the *Perry* trial contain tremendous potential. First, the trial court planned to broadcast videos of the trial on YouTube to open the proceedings to a larger audience.<sup>350</sup> Former-Chief United States District Judge for the Northern District of California Vaughn Walker approved the plan, in large part due to his belief that the issue of same-sex marriage "was appropriate for wide dissemination because it dealt with an issue of wide interest and importance."<sup>351</sup> The Ninth Circuit agreed to live-stream the video of the trial to federal courthouses in California, Oregon, Washington, and New York City.<sup>352</sup>

The *Perry* defendants, however, were concerned that they would be "harassed or intimidated" if the trial was taped and disseminated over the video-sharing site.<sup>353</sup> Accordingly, the defendants filed a motion requesting a stay of the district court's order with the Supreme Court.<sup>354</sup> Two hours before the trial was to start, the Court temporarily blocked any videos of the trial from being posted, explaining that the Justices needed more time to review the issue.<sup>355</sup> The Justices also

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346. See Notice of Motion and Motion to Intervene as Party Plaintiffs; Memorandum of Points and Authorities, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292).

347. McKee, *supra* note 345.

348. *Id.*

349. *Id.*

350. Bob Egelko, *Prop. 8 Courtroom Videos Get Support*, S.F. CHRON., Apr. 16, 2011, at C1.

351. Leff & Elias, *supra* note 343.

352. News Release, Pub. Info. Office: U.S. Courts for the Ninth Circuit, Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010), [http://www.ca9.uscourts.gov/datastore/general/2010/01/08/Prop8\\_Remote\\_Viewing\\_Locations.pdf](http://www.ca9.uscourts.gov/datastore/general/2010/01/08/Prop8_Remote_Viewing_Locations.pdf).

353. Carol J. Williams, *Supreme Court Bars Video of Prop. 8 Trial*, L.A. TIMES, Jan. 12, 2010, at 9.

354. Application for the Immediate Stay of the District Court's Order Permitting Public Broadcast of Trial Proceedings, *Hollingsworth v. Perry*, 130 S. Ct. 1132 92010) (mem.) (No. 09A648).

355. *Hollingsworth*, 130 S. Ct. 1132 (staying video streaming of the trial until Wednesday, January 13, 2010, at 4:00 PM eastern time); see also Leff & Elias, *supra* note 343. Two days later, the Supreme Court granted the application for a stay of the District Court's order

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said they would not permit live-time streaming of the trial at other Ninth Circuit courthouses.<sup>356</sup> Thus, even the concern and fear over who would control the national narratives about same-sex marriage was played out on the national stage.

Even without an expansive national audience, however, the plaintiff same-sex couples' extensive testimony has already proved persuasive in reframing a narrative rife with troubles. After testimony ended, one of the lawyers for the plaintiffs claimed that proceedings showed how "the marriage ban was irrational and that the November 2008 vote was tainted by prejudice and 'hateful and erroneous messages.'"<sup>357</sup> And indeed, after vigorous cross-examination, defense witnesses conceded that studies show that "children reared from birth by same-sex couples fare as well as those raised by opposite-sex parents, and marriage would benefit same-sex families."<sup>358</sup>

As in Oscar Wilde's 1895 trials, the federal Proposition 8 trial also provided a remarkable intersection of law, narrative, and sexual orientation. First, the trial was a headline-grabbing event from the moment the case was first filed: from the high-profile counsel, to the opposition from pro-gay rights groups, to the outcry over video streaming. Like the Wilde trials, the participants in *Perry*—both lawyers and plaintiffs—are out to make news and invite all sorts of media coverage.<sup>359</sup> When Judge Walker ruled that Proposition 8 violated the plaintiffs' constitutional rights to equal protection and due process in August 2010,<sup>360</sup> both sides immediately went to the media to air their conclusions and emotions.<sup>361</sup>

Additionally, the personal lives of all the participants in the *Perry* trial—not just the plaintiff couples—have attracted significant scru-

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permitting the broadcast of the trial. *Hollingsworth v. Perry*, 130 S. Ct. 705, 714–15 (2010) (per curiam).

356. *Hollingsworth*, 130 S. Ct. at 1132.

357. Maura Dolan, *Testimony Ends in Same-Sex Marriage Trial*, L.A. TIMES, Jan. 28, 2010.

358. *Id.*

359. *Courting Attention: Covering California's Marriage Trial* (NPR Radio Broadcast Jan. 20, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=122763122> (noting that attorney Ted Olson asked David Boies to be his partner in part to "make a more powerful case, a case that would get certainly more coverage").

360. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995, 1003 (N.D. Cal. 2010).

361. This process continues. Since the *Perry* court overturned Proposition 8, every step of the case has been in the news, including the appeal to the Ninth Circuit and its subsequent certification of the standing question to the California Supreme Court. See, e.g., Jesse McKinley, *California: Judges Ask for Clarity on Same-Sex Marriage Measure*, N.Y. TIMES, Jan. 5, 2011, at A13 (noting the Ninth Circuit's certification of a question of state law to the Supreme Court of California).

tiny.<sup>362</sup> Just as in the Wilde trials, scrutiny has fallen upon the personal lives of the supporting actors, including the judge. The media has seized on the open secret that Chief Judge Walker is gay,<sup>363</sup> even though litigants on both sides claim Judge Walker's sexuality makes no difference.<sup>364</sup>

And yet the fact that this non-news merited such attention illustrates that when dealing with the legacy of the Wilde narratives, the boundaries are fluid and difficult to enforce. As in the Wilde trials, where Wilde's personal life and actual written narratives not only seeped into the first libel trial but became the basis for his two gross indecency trials, sexual identity remains hard to box in, limit, or define, particularly in the legal context. Contain it as you might, narrative always breaks through.

## V. CONCLUSION

In reviewing how the law has structured sexual identity, from the Wilde trials to the federal Proposition 8 trial, we cannot help but recognize that narrative has always undergirded that frame. From the beginning, laws aimed at acts were in fact aimed at actors—acts quickly became a proxy for identity, and identities have too often been reduced to acts—and the limited range of tropes has been repeatedly invoked to reach legal outcomes. Even today, the license we grant LGBTQ couples is limited by our heteronormative constraints. We have taken small but important steps towards opening up the still-bounded story of gay and lesbian identity into a wider, richer narrative, a narrative that views same-sex relationships as more than conduct, the LGBTQ community as more than sexual actors, and LGBTQ relationships as broader than just same-sex marriage. How we continue down this path, however, is a story yet untold.

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362. See, e.g., *Courting Attention*, *supra* note 359 (discussing two couples' witness testimony).

363. See, e.g., Phillip Matier & Andrew Ross, *Judge Being Gay a Nonissue During Prop. 8 Trial*, S.F. CHRON., Feb. 7, 2010, at C1.

364. *Id.* (noting comments by opponents of Proposition 8 to the effect that Judge Walker's background is a "nonissue" and comments by proponents of Proposition 8 that they will "not . . . say anything about that" should they appeal an adverse decision).