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# From Wilde to Obergefell: Gay Legal Theatre, 1895-2015

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From Wilde to Obergefell:  
Gay Legal Theatre, 1895-2015

Todd Barry, PhD  
University of Connecticut, 2016

This dissertation examines how theatre and law have worked together to produce and regulate gay male lives since the 1895 Oscar Wilde trials. I use the term “gay legal theatre” to label an interdisciplinary body of texts and performances that include legal trials and theatrical productions. Since the Wilde trials, gay legal theatre has entrenched conceptions of gay men in transatlantic culture and influenced the laws governing gay lives and same-sex activity. I explore crucial moments in the history of this unique genre: the Wilde trials; the British theatrical productions performed on the cusp of the 1967 Sexual Offences Act; mainstream gay American theatre in the period preceding the Stonewall Riots and during the AIDS crisis; and finally, the contemporary same-sex marriage debate and the landmark U.S. Supreme Court case *Obergefell v. Hodges* (2015). The study shows that gay drama has always been in part a legal drama, and legal trials involving gay and lesbian lives have often been infused with crucial theatrical elements in order to legitimize legal gains for LGBT people.

From Wilde to Obergefell:  
Gay Legal Theatre, 1895-2015

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2016

APPROVAL PAGE

Doctor of Philosophy Dissertation

From Wilde to Obergefell: Gay Legal Theatre, 1895-2015

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# **From Wilde to Obergefell: Gay Legal Theatre, 1895-2015**

## **Introduction**

Since the trials of Oscar Wilde, how have theatre and law worked together to shape constructions and regulations of gay men? This interdisciplinary study attempts to provide some answers to that central question. As they have emerged over the last several hundred years, sexual minorities have had a substantial relationship with legal and theatrical stages.<sup>1</sup> Specifically, the representation of gay male lives has often been through a hybrid genre, legal theatre. Gay legal theatre has a hybrid composition that potentially includes dramatic texts, theatrical performances, and legal texts and trials that involve representations of gay characters. Since at least 1895, dramatizations of gay characters have been inevitably enmeshed in legal regulations or implications; such dramatizations have also potentially shaped laws related to homosexuality and gay lives. Moreover, gay men have been performing in a theatrical history of legal trials that began with seventeenth-century sodomy trials. This multi-faceted, legal-theatrical tradition has evolved and culminated in the recent legalization of same-sex marriage in the United Kingdom, the Republic of Ireland, and the United States.

On an abstract level, law and theatre perform essential rituals that are collective acts of judgment within a community: punishing criminality; demanding atonement; granting absolution; allowing forgiveness. These are the rituals that bestow or withhold

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<sup>1</sup> Alan Sinfield claims, "Theatre has been a particular site for the formation of dissident sexual identities" (*Out on Stage* 1).



humanity from individuals and groups. Legally, these rituals can encompass simply written language, such as statutes, a judicial opinion, or a Constitutional Amendment; but legal rituals also rise to the level of performative ceremony in the courtroom, ranging from lawyers arguing motions in front of a judge, to the full-blown theatrical spectacle of a trial performed for a community of spectators. The structure and function of theatre in many ways mirror the rituals of a trial. Theatre also consistently capitalizes on emotions that arise only in a small number of legal trials: imagination, compassion, and empathy. Gay legal theatre consistently presents gay characters and issues in an inextricable and culturally captivating web of legal and theatrical discourse.

In *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (2002), Shoshana Felman presents an interdisciplinary study of law and literature that has opened up scholarly possibilities in the field of LGBT dramatic criticism. This dissertation was inspired by Felman's book because I saw how her approach could be productively applied to gay drama, something she did not specifically address. When Felman interpreted moments in twentieth-century trials as a form of literature, I felt liberated to explore the interdisciplinary paths of this dissertation. Felman's categorization of what law and literature try respectively to accomplish is also helpful for my purposes in this dissertation. She argues that law, especially significant trials, works to "bridge over" and resolve the "abyss," as she calls it—irresolvable conflicts and traumas of race, gender, and sexuality—while literature revels in and exploits those conflicts that ultimately have no certain solutions (95).

If, according to Felman, law attempts closure and literature exploits indeterminacy, I am claiming that gay drama, because it is often obsessed with and

infiltrated by the law, achieves status as a hybrid discourse. It is also *queer* in its dynamic orientation toward the law: potentially reinforcing, potentially destabilizing. Thus, gay drama has always been a form of legal theatre that can be performed in theaters or courtrooms, but it is never wholly within or outside of legal and theatrical discourse. Even when performed in a theater, these texts function in certain ways as authoritative discourse, especially with regard to delimiting the cultural parameters of sexual minorities. In turn, many of the contemporary trials involving gay and lesbian lives, as I argue in Chapter Four on the same-sex marriage cases, utilize theatricality to compel cultural attention and justify the law's authority.

In this sense, I am exploring a particular genre that circulated most powerfully in the period between the Wilde trials and the contemporary transatlantic legalization of same-sex marriage. Most of my analysis focuses on gay male playwrights and dramatic representations of gay men. The selected texts share important commonalities related to the production, representation, and regulation of mainly gay male lives. LGBT, the contemporary acronym meaning lesbian, gay, bisexual, transgender, is an admirably inclusive term, and I use variants of the term strategically when I think they can apply, but I try to be as specific as possible in every instance. I undertake a brief reading of a lesbian drama, *The Children's Hour* (1934), and in the final chapter my analysis focuses on the gay and lesbian movement for marriage equality in the United States, reading the landmark marriage equality case *Obergefell v. Hodges* (2015) as a form of gay and lesbian theatre. To this extent, "gay and lesbian legal theatre" might also be an appropriate title for this dissertation, but I think the specific history of lesbian theatre and law deserves development in a future study. Bisexual characters do not play a large role

in the study, except I suppose for some of the characters in Joe Orton's plays, but there is nothing in my analysis that would exclude bisexuals or bisexuality. Although I do not engage with any plays that address transgender issues or represent transgender characters, much of my analysis could very well be applied to transgender texts, characters, and legal trials. Developing the ideas in my dissertation to include transgender history, drama, and law could be a fruitful line of inquiry. I utilize the word "queer" throughout, especially when I describe certain functions of a dramatic text or character; for example, I argue that Mart Crowley's play *The Boys in the Band* (1968) and Tony Kushner's *Angels in America* (1992) queer spaces (theatrical, national, and Constitutional). In that sense, I mainly employ "queer" as a verb, as when I argue that Joe Orton's plays queer the cultural conception of the family.

A serious investigation of the relationship between gay drama and the law concerns itself with four main modes of inquiry: 1) laws governing the representation of gay desire, acts, and identities on the stage; 2) laws regulating homosexuality in the wider culture; 3) theatre's engagement with laws governing gay male sexuality in the culture and on the stage; 4) the theatrical properties of legal performances that adjudicate gay lives and rights. I address all four of these areas at some point in the following study.

I consider the Wilde trials as the beginning of the modern gay legal-theatrical tradition; the trials are dramas that have always fascinated the transatlantic stage, precipitating many later theatrical versions of and responses to them. However, the close, sometimes inextricable, relationship between law and gay drama precedes Wilde, beginning in earnest in the early modern period with Thomas Middleton's play *Michaelmas Term* (1605), in which legal language and metaphor serve as the container

and representation of male homosexual desire.<sup>2</sup> Capital sodomy trials echoed within the cultural consciousness for generations, culminating most spectacularly in the trials of Oscar Wilde. By the time Wilde was tried, the crime was no longer capital death, but still required a punishment of hard labor. The Wilde trials were a particularly resonant kind of social drama, a performative blend of legal procedure and theatrical self-presentation.

Since the Wilde trials, the law has always been a specter in the wings of gay stages. The twentieth century began with strict legal controls on male homosexual activity represented on the stage and practiced in the wider transatlantic culture. Nicholas de Jongh's pair of studies, *Not in Front of the Audience: Homosexuality on Stage* (1992) and *Politics, Prudery and Perversions: The Censoring of the English Stage 1901-1968* (2000) provide an invaluable companion for anyone attempting to navigate the maze of laws governing modern theatrical censorship in the United States and the United Kingdom. *Not in Front of the Audience* traces a transatlantic history of twentieth-century gay male dramatic representations, charting how those representations were shaped by and in response to the particular censorship laws governing stage portrayals of male homosexuality. The book is a mixture of critical interpretations of gay male drama and a

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<sup>2</sup> Legal and homosexual dynamics are brought into prominent tension in Thomas Middleton's play *Michaelmas Term* (1605). The play involves the conflict between Master Richard Easy, a landowning gentleman from Essex, and the merchant Quomodo who tries to trick Easy into giving up his land. In the face of male homosociality morphing into homosexuality, Middleton erects an opposing dynamic of legality. Law is used to police, contain, and potentially quash homosexual desire and expression. These themes come into direct relief in the interpretation of the relationship between Easy, Quomodo, and the merchant's henchman Shortyard. Specifically, we can read Easy's homosexual desire as being first exploited and then contained in the play, in terms of a budding romance with Shortyard that is halted through the use of legal discourse and practice. *Michaelmas Term* is a play about how sodomitical desire is managed and contained through the linguistic and practical realm of law. For an analysis of law and sexuality in the play, see W. Nicholas Knight, "Sex and Law Language in Middleton's *Michaelmas Term*" in *Accompanying the players': Essays Celebrating Thomas Middleton, 1580-1980*. Ed. Kenneth Friedenreich (New York: AMS Press, 1983): 89-108.

legal-cultural history of the censorship laws as they changed over the years. It lays out several major phases to the history of gay drama, the first being 1925-1958, the period in which gay characters met with “[s]uicide, alcoholism, murder, mental breakdown, death, imprisonment, ostracism, blackmail or mere misery...” (3). De Jongh demarcates 1958-1967 as the transitional stage: in 1958 the Lord Chamberlain in Britain allowed discreet, “serious references” and representations on stage; the actual practice of male homosexuality in private was eventually allowed with the Sexual Offences Act of 1967.

The 1967 Act marks the watershed moment in England and Wales for decriminalizing private male homosexual activity.<sup>3</sup> The Republic of Ireland would not decriminalize homosexual activity until 1993,<sup>4</sup> and the U.S. not until 2003<sup>5</sup>. The Sexual Offences Act was followed in 1968 by the Theatres Act, which abolished the Lord Chamberlain’s censorship powers. It is interesting to note the close proximity of the 1967 Sexual Offences Act and the Theatres Act passed the next year. As soon as it relaxed its regulation of private sexuality in the Sexual Offences Act, the state relaxed its control over public performances, although they were still subject to existing obscenity laws. The timing here shows the close relationship between the two sets of laws governing the stage and wider culture.

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<sup>3</sup> The 1967 Sexual Offences Act did not extend to Scotland and Northern Ireland. In addition, the statute did not apply to the merchant navy and the armed forces. See Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet, 1990), 176. Scotland did not see homosexual decriminalization until The Criminal Justice Act of 1980. See Roger Davidson, “Sexuality and the State: the Campaign for Scottish Homosexual Law Reform, 1967-80,” *Contemporary British History* 20.4 (2006): 533-558. Northern Ireland did not decriminalize private homosexuality until the Homosexual Offences Order of 1982 as a result of the case *Dudgeon v. United Kingdom* (1981) in the European Court of Human Rights.

<sup>4</sup> The laws in the Republic of Ireland were changed in 1993 as a result of the 1988 case *Norris v. Ireland* (European Court of Human Rights).

<sup>5</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

According to de Jongh, during the period 1958-1967, some dramas began to question the conventional treatment of gay and lesbian individuals: “Plays about homosexuality no longer accepted the notion of the homosexual as archetypically evil or dangerous. As the first tentative steps toward gay identity and community were taken, the stage began to depict the homosexual as the model of the pathetic-unfortunate” (5). De Jongh labels 1968-1985 as the period when gay male drama saw the greatest change and the previous “negative myths, by which homosexuals were judged, began to be eroded. Gay dramatists and gay or gay-sympathising actors were reluctant to represent homosexuals in terms of the old stereotypes. ... The gay hero was born...” (5). De Jongh’s 1992 book ends with the AIDS crisis, in which de Jongh sees a potential return to the old representations of gay and lesbian characters as sinful and sick.

In addition to de Jongh’s work, I admire and consistently cite two book-length studies tracing the history and exploring the implications of homosexuality in modern drama: Alan Sinfield’s study *Out on Stage: Lesbian and Gay Theatre in the Twentieth Century* (1999) and John Clum’s *Still Acting Gay: Male Homosexuality in Modern Drama* (2000). Sinfield and Clum appeal to me because they chart gay and lesbian theatre as a transatlantic history, and an important one at that. Clum claims, “the tradition of what can be called gay drama has been central to twentieth-century theater, though critics once called it ‘superficial’” (xiii). In turn, Sinfield’s book begins with the assertion that “theatre and theatricality have been experienced throughout the twentieth century as queer” (1). Clum and Sinfield analyze gay and lesbian theatre as a canon that developed throughout the twentieth century, partly in response to historical and cultural changes. Sinfield thinks that historical “changes in theatre as an institution interact with

shifts in ideologies of gender and sexuality” (1). Similar to de Jongh, Clum views the history of gay male drama as one that moves toward greater visibility on the stage.<sup>6</sup>

Although Sinfield and Clum provide some analysis of legal regulations and themes, only de Jongh’s studies provide a sustained analysis of the law’s integral role in gay drama. The purpose of my dissertation is to strengthen and clarify the productive connections that seem to have always existed between theatre and law, in particular those between specifically gay drama and the laws surrounding gay lives.<sup>7</sup>

I seek to explore how theatrical representations of sexual minorities influence relevant laws; how laws affect representations of sexual minorities; and how legal trials employ theatricality to attract cultural attention and authority in an attempt to resolve the social drama of gay and lesbian lives. Law and theatre, working together, have consistently shaped the emergence and representational circulation of gays and lesbians and hence the visibility of certain kinds of lives and the erasure of others. David Savran argues in *A Queer Sort of Materialism: Recontextualizing American Theatre* (2003) that much of the recent, supposedly “queer” American theatre actually indicates “that lesbian

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<sup>6</sup> “The history of the representation of homosexual desire onstage is a series of moves from nothing, to innuendo and gesture, to discussion without any physical signs of attraction or affection, to, finally, showing” (Clum 7).

<sup>7</sup> For other book-length studies of homosexuality in modern and contemporary drama, see Kaeier Curtin, *We Can Always Call them Bulgarians: the Emergence of Gays and Lesbians on the American Stage* (Boston: Alyson Pub, 1987); James Fisher, ed., *“We Will Be Citizens”: New Essays on Gay and Lesbian Theatre* (Jefferson: McFarland & Co, 2008); Kim Marra, *Staging Desire: Queer Readings of American Theater History* (Ann Arbor: U of Mich P, 1992); Sean O’Connor, *Straight Acting: Popular Gay Drama from Wilde to Rattigan* (Washington: Cassell, 1998); Michael Paller, *Gentlemen Callers: Tennessee Williams, Homosexuality, and Mid-Twentieth-Century Broadway Drama* (New York: Palgrave, 2005); David Roman, *Acts of Intervention: Performance, Gay Culture, and AIDS* (Bloomington: Indiana UP, 1998); Sarah Schulman, *Stage Struck: Theater, AIDS, and the Marketing of Gay America* (Durham: Duke UP, 1998); David Savran, *A Queer Sort of Materialism: Recontextualizing American Theater* (Ann Arbor: U Mich P, 2003); Savran, *Communists, Cowboys, and Queers: The Politics of Masculinity in the Work of Arthur Miller and Tennessee Williams* (Minneapolis: U of Minn P, 1992); Alisa Solomon and Framji Minwalla, eds., *The Queerest Art: Essays on Gay and Lesbian Theater* (New York: NYU P, 2002); Sara Warner, *Acts of Gaiety: LGBT Performance and the Politics of Pleasure* (Ann Arbor: U of Mich P, 2014).

and gay politics have become increasingly assimilationist,” and such theatre “tends to privilege and appeal to white, middle-class subjects, producing them as the axis from which to universalize” (76). Savran’s critique reveals what may be a problematic function of gay legal theatre’s central texts. Originally produced in mainstream spaces to mostly white, middle- or upper-middle class audiences, these commercially successful theatrical performances, while working to change the laws surrounding male homosexuality and improve the social conditions of mainly gay men, also potentially efface queer lives, women, lesbians, bisexuals, trans people, people of color, and the working-class and poor.<sup>8</sup>

Similar exclusionary effects can be seen in the performance of recent landmark gay rights cases, as I investigate in my analysis of *Obergefell*. The plaintiffs were carefully chosen as a legal strategy to portray gays and lesbians as “unthreatening”: white, middle-class, and de-sexualized. The social drama of *Obergefell* ended with cultural celebrations, but also several unresolved elements for the LGBTQ community. I use Andrew Sullivan’s *Virtually Normal: An Argument about Homosexuality* (1995) and Michael Warner’s *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (1999) to illustrate the tension in the LGBTQ community surrounding the politics of same-sex marriage, and how that tension manifests in *Obergefell*. Savran, Warner, and Judith Butler serve to articulate the queer critique of what I see as the normalizing, assimilationist impulse in gay legal theatre. Margaret Sönsen Breen’s *Narratives of*

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<sup>8</sup> See David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke UP, 2010). Eng argues that recent political and legal victories for gays and lesbians come at the cost of ignoring racial oppression. See Chapter 1, “The Law of Kinship: *Lawrence v. Texas* and the Emergence of Queer Liberalism,” 23-57.



*Queer Desire: Deserts of the Heart* (2009) also helped me to contextualize the cultural debates over same-sex marriage.

Although this dissertation is presented chronologically from the Wilde trials to the present day, I do not envision it as an exhaustive historical study; in a sense, de Jongh has already undertaken such work. Rather, I will explore crucial historical eruptions when my ideas come most starkly to light. Specifically, these are the 1895 Wilde trials; the 1960s in Britain; the roughly twenty-five year period in the United States between the Stonewall riots and the end of the Cold War, 1968-1992 (I actually start a year before the 1969 Stonewall Riots with the premiere of Mart Crowley's play *The Boys in the Band*); and the contemporary transatlantic debates over same-sex marriage. The methodology is interdisciplinary: I utilize literary criticism, historical scholarship, queer theory, gender studies, sociology, anthropology, psychology, and legal sources and scholarship. All source material will be transatlantic in scope, encompassing the United States, the Republic of Ireland, and the United Kingdom (the Republic of Ireland seems to get short shrift in this study until one remembers that Wilde was in fact Irish).

Chapter one examines the 1895 Oscar Wilde trials alongside two theatrical texts, Wilde's *The Importance of Being Earnest* (1895) and Moisés Kaufman's dramatization of the Wilde trial, *Gross Indecency: The Three Trials of Oscar Wilde* (1998). I apply Shoshana Felman's conceptualization of the modern trauma trial to the Wilde trials; in doing so, I work to situate the trials as part of a larger history of the sodomy trial reaching back to the 1600's. This particular form of the trauma trial was repeated for hundreds of years, often resulting in the execution of the offending man, but I position the Wilde trials as a crucial tipping point. I agree with Alan Sinfield's claim

that the trials helped to crystallize the image of the modern gay man in the cultural consciousness, but I extend his point and contextualize it within the movement toward transatlantic legalization of same-sex marriage.

The Wilde trials, I argue, represent a legal-theatrical eruption in gay history, through which the ritual of the sodomy trial began to transform into the contemporary same-sex wedding ritual. This transformation was gradual, but it only occurred through law and theatre working together to change, for gay lives, what sociologist Jeffery Alexander terms the “master narratives” of traumatized groups.<sup>9</sup> Beginning with crucial textual and performative moments in the trials, as described in various published accounts, I also analyze Wilde’s comedy *The Importance of Being Earnest* (1895) and Kaufman’s contemporary play *Gross Indecency* (1998). These plays attest to both the ability of literature to transcend legal traumas and the inherently theatrical nature of the law.

Chapter two moves forward to the second major eruption in gay legal-dramatic history: specifically the time period 1958-1968 in Britain. In 1958, the Lord Chamberlain relaxed the prohibition on all representations of homosexuality on stage, allowing for “serious” references only. The 1967 Sexual Offences Act finally overhauled the Wilde-era Criminal Law Amendment and allowed for male homosexual acts in private. The following year, the Theatres Act of 1968 abolished the Lord Chamberlain’s power to censor theatre. This chapter examines two British dramatists, Noël Coward and Joe Orton, who were highly cognizant of the changing legal regimes in that decade, as reflected in their work. Using strategies of close reading, alongside legal and

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<sup>9</sup> Jeffrey Alexander, *Cultural Trauma and Collective Identity* (Berkeley: U of California P, 2004), 12-15.

biographical contextualization, I first analyze Coward's last play *Song at Twilight* (1966) as a political play that was a thinly veiled champion of the following year's passage of the Sexual Offences Act. I read *Twilight* as an early work of Gay Liberation because it eschews the politics of assimilation and, as Coward himself performed the role of Hugh Latymer, makes a didactic plea for social tolerance and legal change.

In sharp contrast to Coward's Lord Chamberlain-sanctioned "seriousness" on the subject of homosexuality, Joe Orton's plays are deeply skeptical of law's promise with regard to liberating anyone, gay or otherwise. *Entertaining Mr. Sloane* presents a queer, presciently contemporary legal theory of family and marriage, in which individuals are free to enter into relationships based on theories of contract, not status. I read *Sloane* as a radical, queer vision of family, as well as a libertarian view of contractual marriage, a view that would actually help engender the contemporary same-sex marriage movement. *Loot*, I argue, questions law's ability to effect social change, and basically views law as a form of state control and surveillance.

The second half of the dissertation moves to the United States, as I chart the movement from the year before the Stonewall riots, with the premiere of Mart Crowley's *The Boys in the Band* (1968), to the present day, ending with an analysis of the Supreme Court's landmark same-sex marriage decision *Obergefell v. Hodges* (2015). Chapter Three examines popular gay American drama from 1968-1992. Although England and Wales decriminalized homosexuality statutorily in the 1967 Sexual Offences Act, Federal decriminalization in the United States did not occur until the Supreme Court *Lawrence v. Texas* case in 2003. Accordingly, the crucial context in Chapter Three is the emerging and contested Supreme Court jurisprudence over sexual privacy and gay and lesbian

rights. I situate two popular gay American dramas, Mart Crowley's *The Boys in the Band* (1968) and Tony Kushner's *Angels in America* (1992), not only within the context of gay history, but also within their jurisprudential context. Specifically, I chart connections in the spatial rhetoric deployed by those gay playwrights and liberal Supreme Court Justices' "living Constitution" method of Constitutional interpretation. Crowley's use of queer space, as I define the term, echoed and anticipated the emerging jurisprudence of sexual privacy being recognized in cases like *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), and ultimately *Romer v. Evans* (1996), *Lawrence v. Texas* (2003), *U.S. v. Windsor* (2013), and *Obergefell v. Hodges* (2015). Kushner's epic is partly a response to *Bowers v. Hardwick* (1986), the case that temporarily restricted sexual privacy rights until it was overruled by *Lawrence*. *Angels in America* is also, in its legal themes, a cultural precursor to the contemporary genealogy of gay rights jurisprudence: *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.

The dissertation concludes in Chapter Four with a case study of same-sex marriage, the contested contemporary ritual that encompasses both legal and dramatic components. I explore same-sex marriage as the potential culmination of early modern sodomy trials, the Wilde trials, and twentieth-century assimilation and normalization of gay and lesbian characters and desire onto cultural stages. This final chapter is a "Case study" that tests the strength of my original claim that gay drama is inevitably a hybrid, interdisciplinary discourse. Using anthropologist Victor Turner's theory, I analyze the "social drama" of gay and lesbian lives in its most recent manifestation, the Supreme Court case *Obergefell v. Hodges* (2015). Using a strategy promoted by the Law and

Literature movement, I read law *as* literature and so interpret *Obergefell* as a theatrical performance.

*Obergefell* ends triumphantly, and the genre of gay legal theatre comes to an ostensible culmination. However, legal theatre will continue to serve cultural purposes. Continued discrimination in employment and persistent violence towards LGBT people, as well as the uncertain ideological makeup of the United States Supreme Court and conservative backlash against recent legal decisions, indicate that legal theatre will still influence cultural attitudes and legal regulations. It will be interesting to observe future legal challenges brought by and against LGBT people in the courts, and to what extent those challenges fit into theatrical terms that capture the public imagination. Such legal and cultural development may very well be mirrored and contested on stage as well. Until then, the following chapters illustrate a current history of the intense, inextricable relationship between law and theatre as both discourses worked together to produce and change gay lives.

## Chapter 1

### Transcending the Trauma: Literary Interventions in the Wilde Trials

Jack. Oh, that's nonsense, Algy. You never talk anything but nonsense.  
Algernon. Nobody ever does.

--*The Importance of Being Earnest* (1895)

Carson: Did you ever kiss him?

Wilde: Oh, no, never in my life; he was a peculiarly plain boy.

Carson: He was what?

--*Regina v. John Douglas*, 4 April 1895

#### Introduction

In *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (2002), Shoshana Felman claims “that trauma—individual as well as social—is the basic underlying reality of the law” (172). How does this claim inform our reading of the Oscar Wilde trials? Can it inform our reading of Wilde’s own literature and other literary production related to the trials? How can literature, specifically dramatic literature and performance, allow us a space to contemplate, resolve, or transcend legal trauma? Moreover, when we analyze the theatrical nature of trials, can we evaluate legal performance in order to achieve the healing closure of social justice? These are the questions that inform this chapter, and indeed much of this dissertation.

I read the Wilde trials as an example of what Felman terms a trauma trial: a riveting spectacle when seemingly irresolvable cultural conflicts are played out in a courtroom. Consequently, we can see that trauma trials expose the inextricable links

between law and theatre. The cultural import of the Wilde trials can only fully be understood by examining their inherently theatrical elements; legal analysis does not adequately capture the dynamic social drama at work. In addition, I will read the trials against two literary works, Wilde's own *The Importance of Being Earnest* (1895) and Moisés Kaufman's recent play about the trials, *Gross Indecency* (1998). These theatrical texts expose the trials to help us better understand the nature of the trauma inflicted on Wilde and the gay men in his historical wake. Theatre—whether it is discerned on a stage or in a courtroom—allows for a healing transcendence of legal trauma. The transcripts and performative rituals of the actual trials, Wilde's dramatic masterpiece *Earnest*, and Kaufman's contemporary play, which attempts to make sense of what happened, speak to one another in ways that can help us more fully understand the cultural significance and legacies of the trials.

Like Felman, I will investigate the trials for resonant moments that provide interpretive challenges: moments that require dramatic criticism for full understanding. In addition, I will “compare a trial to a text” (55) by comparing the Wilde trials with theatrical productions related or applicable to them. Such strategies offer an excellent method for synthesizing the two disciplines of literature and law, and more specifically, for comprehending how literary and legal theatres work and sometimes blend together to create and control sexual minorities.

I will be synthesizing Felman's and Jeffrey Alexander's work in trauma theory with those of scholars who claim that the Wilde trials produced a definitive modern gay identity. Alan Sinfield, in his book *The Wilde Century* (1994), was the first to argue that the Wilde trials crystallized the cultural image of the modern gay man:

the trials helped to produce a major shift in perceptions of the scope of same-sex passions. At that point, the entire, vaguely disconcerting nexus of effeminacy, leisure, idleness, immorality, luxury, insouciance, decadence and aestheticism, which Wilde was perceived, variously, as instantiating, was transformed into a brilliantly precise image. . . . The principle twentieth-century stereotype entered our cultures: not just the homosexual, as the lawyers and medics would have it, but the queer. (3)

Sinfield's argument is convincing because it allows us to make sense of the Wilde trials in a modern context, and to re-evaluate their significance in terms of larger historical trends. But I would like to deepen Sinfield's assertion by showing the Wilde trials as just one, admittedly spectacular, repetition in a particular history of trauma trials involving male homosexuality.

The power and significance of the Wilde trials can only be fully understood when we analyze the trials as a form of theatre. These trials theatricalized the traumatic tradition of sodomy trials that preceded them. Reading the trials as a form of legal theatre exposes law's performative nature, especially as revealed in the procedures of trials. Witnesses and attorneys perform dialogue to convince various audiences of truth (judge, jury, the spectators in the courtroom, the larger culture reading press accounts). These performances influence and potentially undermine final judgments. Legal trials are inevitably theatrical in their production; fluid, sometimes ambiguous dynamics of performance and spectatorship produce verdicts. In this sense, legal reality is produced through actors performing and audiences interpreting those performances. Legal results may seem to be naturally determined from the application of legal language to factual



patterns, but in the context of especially criminal trials the determination of guilt and innocence proceeds from rhetorical influence and theatrical effects.<sup>10</sup>

Because theatre provides law with so much of its power and intelligibility, the Wilde trials are further illuminated through the lens of a seemingly distinct text like *The Importance of Being Earnest*, or by witnessing dramatizations of speeches and moments from the trials in a production like *Gross Indecency*. *Earnest* playfully suggests that gender identity is performative, in stark contrast to the legal conviction of Wilde that equated the emerging gay identity with sexual criminality. *Earnest* comedically works to transcend the trauma normally necessary for the creation of a sexual cultural minority because the play denies the possibility of a stable identity. Wilde reveals the inevitably reductive fictions of gender identity that were produced in part as a response to legal discourse. In contrast, Kaufman's play accepts the practical reality of gay identity as it was traumatically produced in the Wilde trials. *Gross Indecency* has the hindsight of history and can more directly evaluate the past. The play attempts to heal the repetition of trauma that the Wilde trials enacted within the history of sodomy trials; it does this by sympathetically refiguring Wilde as a modern gay martyr sacrificed at the beginning of a

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<sup>10</sup> In claiming that law is performative, I am drawing on Judith Butler's theory of gender performativity, that "Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being." Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 33. Legal trials operate in a similar fashion because their entrenched physical procedures can give the illusion of a predetermined legal result to a conflict, a capital L "**Law**" that can be discoverable in any given instance. This is similar to Butler's idea that "gender" and "identity" are not actually predetermined essences, but are rather produced from actions. In legal practice, rhetorical strategies and interpretive ambiguities subvert the hope of logical legal truth and conclusions. For a discussion of the performativity of legal trials, see Martha Umphrey, "Law in Drag: Trials and Legal Performativity," 21 *Colum. J. Gender & L.* 114 (2012): "trials are law-making (not just law-applying or law-interpreting) events *because of their performativity*. They are performative in two senses: they not only enact law, both theatrically and linguistically, in their very doing, but also performatively constitute the law they enact. By that I mean that, paradoxically, though they are discrete and singular events, trials also proceed reiteratively, drawing upon and repeating particular discursive formations and invoking conceptions of cultural and legal subjectivity whose sedimented meanings have no final, non-contingent ground or origin" (120).

political struggle for recognition and equality. These two dramatic texts provide theatres of aesthetic and political justice amidst and against legal traumas.

### **A Brief Overview of the Trials**

Before examining certain moments in the trials and analyzing them as theatrical texts, I find it helpful to briefly rehearse the trajectory of Wilde's foray into the legal universe. Many people do not know that Wilde himself instigated the legal machinery that began moving toward his own imprisonment. He brought a criminal libel charge against the Marquess of Queensberry, father of Wilde's lover Lord Alfred Douglas. There had been animosity between Wilde and Queensberry for some time because the latter was incensed that Wilde and Bosie (Lord Alfred's nickname) publicly displayed an appearance of sexual intimacy. Queensberry had intended to disrupt the opening night of *The Importance of Being Earnest* on February 14, 1895, in fact, but was stopped because Wilde cancelled his ticket and notified the police (Foldy 4). The libel materialized in the form of a card that Queensberry left at Wilde's club The Albermale on February 18, 1895. Queensberry wrote "For Oscar Wilde, posing as a sodomite" [sic]. This libelous statement did not accuse Wilde of actually committing sodomy, but rather "posing" as the kind of person who might engage in such activity.<sup>11</sup>

The common law defense for a libel is the justification of truth; the only way that Queensberry could avoid criminal penalty was to establish for a jury that in fact the

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<sup>11</sup> From Queensberry's letter to Lord Alfred, dated a year earlier, 1 April 1894: "...I come to the more painful part of this letter—your intimacy with this man Wilde. It must either cease or I will disown you and stop all money supplies. I am not going to try and analyse this intimacy, and I make no charge; but to my mind to pose as a thing is as bad as to be it. With my own eyes I saw you both in the most loathsome and disgusting relationship as expressed by your manner and expression. Never in my experience have I ever seen such a sight as that in your horrible features." Signed "Your disgusted so-called father." (qtd. in Ellman 417-418)

evidence showed that Wilde *was* posing as a sodomite—not that the act of sodomy was actually occurring, which would have been more difficult to prove, but merely that there was the appearance of such activity in Wilde’s behavior. During the libel trial, Queensberry was represented by Edward Carson, who first used Wilde’s literature, including his novel *The Picture of Dorian Gray* (1891), as evidence of such immoral proclivities, and then introduced actual witnesses who would deliver oral evidence of having improper relationships with Wilde. Wilde and his attorney, Sir Edward Clarke, did not know that these rent boy witnesses had been brought to the courthouse. Carson “knew that the physical evidence and the testimony of the defense witnesses would be truly damning” (Foldy 6). These witnesses proved to be the turning point for Wilde’s fortunes. The young men were prepared to give live testimony in the courtroom to not only acquit Queensberry of libelous wrongdoing, but provide the Crown with enough substantial evidence to bring a new criminal prosecution against Wilde for violating the law against “gross indecency” between men. The men had apparently been promised immunity in exchange for their testimony (Foldy 16).

In order to prevent the embarrassment of the rent boys’ testimony, Wilde withdrew the charge of libel, but it was too late. Justice Collins ruled that the defense had proven its justification for publishing the written accusation against Wilde. That legal victory for Queensberry put Wilde in the defensive posture, because it provided *prima facie* evidence that he had broken the law prohibiting “gross indecency” between men. The law prohibited “any male person” engaging in or soliciting “in public or in private [...] any act of gross indecency with another male person.” Wilde and Alfred Taylor, the head of the brothel that Wilde frequented, were put into prison to await trial

and were charged with twenty-five counts of violating the Criminal Law Amendment Act. The different counts were attributed to acts of gross indecency between the men and the various working-class youth.

Wilde's first criminal trial featured testimony from the young men, who admitted in open court that they had engaged in homosexual activity with Wilde. The testimony was at times graphic and salacious, and it all pointed toward Wilde's legal guilt. However, due to some legal confusion regarding Wilde's joint trial with Taylor, as well as the inadmissibility of some of the evidence from the libel trial, there was a hung jury and Wilde was re-tried separately from Taylor. The second criminal trial involved much the same testimony from the same witnesses; this time it resulted in Wilde's conviction, and he was sentenced to two years' imprisonment.

### **Theoretical Context**

Wilde's trials had moments of compelling theatricality, whether it was Carson's riveting cross-examination of Wilde, Wilde's famous speech from the dock, or the dramatic sentencing by the judge. Popular press accounts were widely sold that described the events in the Old Bailey.<sup>12</sup> The Wilde trials were especially captivating, although the setting and procedures of all English and American trials have always been inherently theatrical. In his history of the trial, Sadakat Kadri describes the "judicial theatricality" that has always pervaded English courts:

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<sup>12</sup> For analysis of the press accounts, see Ed Cohen, *Talk on the Wilde Side: Toward a Genealogy of a Discourse on Male Sexualities* (New York: Routledge, 1993).

The jury trial has been a drama for centuries, and no nation has clung to the paraphernalia and props more tenaciously than England. . . . Judges survey their domains from on high, clad in sashes of scarlet and purple, watching over corralled defendants, boxed jurors, and counsel who remain confined behind long wooden benches. Punctilious dress codes meanwhile identify who may and may not speak. Colours, collars, and waistcoats all have their significance, and the thrall of the horsehair wig remains so potent that any barrister who pleads without hairpiece in place still courts career meltdown. (289)

Trials are complex performative rituals with very real consequences. They have an inherent theatricality thanks to the way they have been constructed over the course of centuries in England and the United States. A trial is in many ways set up as a theatre—from the Greek *theatron*, or the “seeing place” where the audience sat in ancient Greek theatres. Facts and their significance are contested; attorneys use rhetorical strategies to extract valuable testimony from witnesses; and a judge, jury, and the assembled spectators watch the events transpire, always evaluating the sincerity and significance of every moment and utterance. A trial is, in many ways, a play.

The Wilde trials are an excellent opportunity for the interdisciplinary field of “Law and Literature” to show its relevancy, but the trials have had little explicit treatment under the theoretical frameworks that Law and Literature has provided. This is not to say that Wilde’s trials have not been extensively analyzed in myriad contexts.<sup>13</sup> Normally,

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<sup>13</sup> For a recent historico-cultural study, see Michael S. Foldy, *The Trials of Oscar Wilde: Deviance, Morality, and Late-Victorian Society* (New Haven: Yale UP, 1997). Ed Cohen is the only recent book-length “literary” analysis of the trials, at least in terms of theorizing its cultural implications for male sexuality. See *Talk on the Wilde Side: Toward a Genealogy of a Discourse on Male Sexualities* (New York: Routledge, 1993). All scholars of the Wilde trials must live in the long shadow of H. Montgomery Hyde and the different editions he published on the trials, the standard being *The Trials of Oscar Wilde* (London: William Hodge, 1948). Until recently, Hyde’s account was the official narrative of the trials, being pieced

however, the legal issues are analyzed separately from the literary and cultural theorizing that occurs around them.<sup>14</sup> Law and Literature has primarily been concerned with 1) analyzing legal themes of law and justice in literature, and 2) reading law *as* literature, or applying rhetorical and literary analysis to legal texts; i.e., common law (judge's written opinions) and statutes, as well as the testimony of lawyers and witnesses in a trial.<sup>15</sup>

I will be employing both of these approaches throughout this dissertation, but I also want to make it clear in my methodology that because I consider it reductive to insist on a neat dichotomy between "law" and "literature," any strategy that acknowledges the two discourses can *blend* is appealing to me; accordingly, reading law as literature, literature as law, or comparing the effects of law and literature is more the spirit of this project. Both genres blend into one another consistently; especially, I will demonstrate, when it comes to representations of homosexuality and gay men since the Wilde trials and up to the present day.

Shoshana Felman's recent work has added new possibilities to how one approaches the field of Law and Literature. In *The Juridical Unconscious* (2002), she

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together from shorthand notes, court reports, and newspaper articles. Wilde's grandson Merlin Holland recently published the "real" trial transcript from the first trial, based on newly discovered trial transcripts: *The Real Trial of Oscar Wilde* (New York: Fourth Estate, 2003). Holland's edition is almost twice as long as Hyde's, and is undoubtedly more accurate. It is also more explicitly laid out in dialogue as a play is written, moving away from the more "shorthand" impression that Hyde's edition gives. However, see Leslie Moran, "Transcripts and Truth: Writing the Trials of Oscar Wilde" for the problematic history of supposedly "genuine" transcripts of the trials, even the supposedly "Real Trial" of Oscar Wilde recently published by Merlin Holland in 2003.

<sup>14</sup> For a legal analysis of the trials from an English lawyer, see "The Tragedy of Being Earnest: Some Legal Aspects," in *Wildean* 19 (2001): 35-42. An interesting article that deals with legal themes in Wilde's art and life is Angela Kingston, "The Law According to Oscar Wilde," in *Wildean* 22 (2003): 46-54. One article that lays claim to a "law and literature" approach to the trials succeeds only in making a strained argument about privacy, "The Trials of Oscar Wilde: The Intersection Between Law and Literature," in *The Importance of Reinventing Oscar: Versions of Wilde During the Last 100 Years* (New York: Rodopi, 2002), 57-66.

<sup>15</sup> Ian Ward makes this helpful, although necessarily reductive, breakdown into the two major fields of inquiry, law *in* literature and law *as* literature, in his helpful introduction to the field, *Law and Literature: Possibilities and Perspectives* (Cambridge: Cambridge UP, 1995). See also Kieran Dolin, *Law and Literature: A Critical Introduction*. (Cambridge: Cambridge UP, 2007).

applies trauma theory to law in a comparative study of twentieth-century trials and literary texts. Felman reads seemingly disparate trials and literary texts against and into one other, in the assumption that undertaking such synthesis can greater elucidate the cultural contestations of a particular historical moment.

Felman provides a helpful definition of “trauma,” one that is adopted in some sense by most contemporary trauma theorists:

The word *trauma* means wound, especially one produced by sudden physical injury. The original use of the term derives from medicine; it has later been borrowed by psychoanalysis and by psychiatry to designate a blow to the self (and to the tissues of the mind), a shock that creates a psychological split or rupture, an emotional injury that leaves lasting damage to the psyche. Psychological trauma occurs as a result of an overwhelming, uncontrollable and terrifying experience, usually a violent event or events or the prolonged exposure to such events. . . . Oppressed groups that have been persistently subject to abuse, injustice, or violence suffer collective trauma, much like soldiers who have been exposed to war atrocities. The twentieth century can be defined as a century of trauma.

(171)

Felman and Cathy Caruth often work with the Holocaust in their applications of trauma theory, but these ideas can be fruitfully applied to other contexts. It is not my intention to draw a comparison in the kinds or magnitude of trauma inflicted in the Holocaust with violence, bodily or psychical, experienced by sexual minorities. (Although homosexuals were among those persecuted by the Nazis and were included in the Holocaust’s trauma,

so there is some overlap.) The kind of trauma at issue in this dissertation is the collective trauma experienced by “[o]ppressed groups that have been persistently subject to abuse, injustice, or violence.” There are some similarities among the traumas experienced by racial, ethnic, religious, and sexual minorities, but what specifically interests me here is to what extent trauma formed the basis of modern gay identity. Specifically, to what extent did legal trauma precipitate the forming of this sexual minority and its collective understanding of itself?

Jeffrey Alexander’s sociological approach to cultural trauma is also helpful for my purposes in this chapter. Alexander constructs a theory of trauma based on the processes by which a group establishes its identity in response to perceived trauma. This theory can be used to illuminate the cultural significance of the Wilde trials in interesting ways, especially when we see the trials as part of a larger history of cultural trauma extending back to early sodomy trials. The Wilde trials are a tipping point; they can be symbolically conceptualized as part of the beginning of a history of identity formation and political mobilization that would evolve through gay and lesbian liberation, culminating most recently in the contemporary transatlantic movement towards legalization and widespread acceptance of same-sex marriage. In 1895, men who engaged in homosexual activity were *ipso facto* criminals. One-hundred-twenty years later, in 2015, the United States, Republic of Ireland, and the United Kingdom (except Northern Ireland) now sanction male-male sexual intimacy with the legal title and benefits of marriage. That movement, that transatlantic trajectory, from gay men as criminals to gay men as inter-marriageable, provides a set of historical and cultural bookends worthy of investigative demarcation.



Sociologist Kai Erikson investigates how communities can be formed from trauma, which indicates how we might perceive the after-effects of the Wilde trials: “traumatic wounds inflicted in individuals can combine to create a mood, an ethos—a group culture, almost—that is different from (and more than) the sum of the private wounds that make it up. Trauma, that is, has a social dimension” (185). Alexander develops Erikson’s work by developing a specific theory of identity-group cultural trauma:

Cultural trauma occurs when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways. ... [C]ultural trauma suggest[s] new meaningful and causal relationships between previously unrelated events, structures, perceptions, and actions. (1)

Alexander extends Erikson’s idea by suggesting that the processes of cultural trauma not only allow for groups to form various kinds of identity, but also enable other members of a society to acknowledge the traumas suffered and identities thereby formed; this promotes successful political movements that can rectify perceived injustices, through which “societies expand the circle of the we” (Alexander 1). In other words, if traumatized collectivities can successfully persuade other members of a society to understand and sympathize with them, the persecuted group will be able to more successfully assimilate into mainstream culture. Not all members of the collectivity may want to assimilate, as we can see from feminist and queer critiques of gay marriage, for

example.<sup>16</sup> However, the option becomes available because a narrative of the group's trauma has been accepted by the larger society.

Alexander's theory of the "social process of cultural trauma," synthesized with Felman's work in trauma theory, allows us to complicate Alan Sinfield's claim that the Wilde trials catalyzed the emergence of a modern gay identity. Sinfield's argument is convincing, and even more so when we realize to what extent the Wilde trials were the galvanizing moment in a larger historical process of cultural trauma, and hence identity formation, for the class of men who would later come to identify as homosexual and then gay.

According to Alexander, the processes through which cultural identities are formed require efforts of imagination and representation (9-10). His sociological methodology departs from Felman's literary and psychoanalytical approach when he contends that events themselves are not inherently traumatic; rather, he argues, trauma is only produced as a sociological response to events. This response comes in the form of "representations" by the group in response to the event(s), and they can come in the form of aesthetic, legal, religious, scientific, mass media, or state bureaucracy discourses (15-19). I will be focusing on the legal and aesthetic discourses that become intertwined in many of the texts within and surrounding the Wilde trials. Trauma is only recognized, internalized, and evaluated, Alexander claims, through cultural representations of that emerging group identity. That group is often depicted as being persecuted in an unjust

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<sup>16</sup> See Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: Free Press, 1999). See also Judith Butler, *Undoing Gender* (New York and London: Routledge, 2004), 26-7: "[T]hose who live outside the conjugal frame or maintain modes of social organization for sexuality that are neither monogamous nor quasi-marital are more and more considered unreal, and their loves and losses less than 'true' loves and 'true' losses. The derealization of this domain of human intimacy and sociality works by denying reality and truth to the relations at issue."

way, or as being inherently similar to other members of the society so as to prevent the dehumanization that justifies discrimination.

Trauma is thus created, Alexander suggests, through various discourses of art, law, science, and government working cumulatively to make sense of a group's treatment at the hands of a larger society. These representations create a "new master narrative" that makes sense of the group's place in the larger society, and perhaps prompts political compensation for injuries. Creating a "new master narrative" of trauma involves storytelling: "this storytelling is ... a complex and multivalent symbolic process that is contingent, highly contested, and sometimes highly polarizing" (Alexander 12). Alexander suggests there are "four critical representations" required for a master narrative of group trauma to be successfully formed in a culture: 1) The injury must be sufficiently articulated; 2) The "nature of the victim" must be expressed; 3) The "Relation of the trauma victim to the wider audience" must be clarified; and 4) "Attribution of responsibility," or the presentation of an "antagonist" must be offered. This antagonist "is always a matter of symbolic and social construction" (15).

To a large extent, gay legal theatre is the body of legal, literary, and legal-literary discourses that work toward promoting Alexander's "master narrative" in transatlantic culture. Of course, I hasten to add there have been many unsympathetic productions about homosexuality, ones that attempt to usurp the effectiveness of a sympathetic master narrative. Unsympathetic texts belong in the canon of gay legal theatre as well, as they reflect the highly contested nature of what is ultimately a political storytelling. But since the Wilde trials, gradually gay legal theatre's master narrative worked toward cultural acceptance of gay identity because a significant number of productions adhered to

Alexander's criteria: the productions successfully portrayed an injury and the "nature of the victim"; they indicated how the audience of the dramas connected with the characters and events on the stage; and they suggested who was to blame (often implied as the audience members themselves, or the larger society).<sup>17</sup>

The Wilde trials were undoubtedly a traumatic event, consciously or unconsciously, for those spectators of the trials and readers of their press coverage who shared Wilde's proclivities towards same-sex desire. Whether that event was inherently traumatic, as Felman and Caruth would argue, or was traumatic in how people began to respond to it, as Alexander theorizes about how trauma is understood, does not ultimately matter for my present analysis. I agree with Sinfield's claim for the emergence of a gay identity in the wake of the trial, but would like to add that this new identity was only able to form so forcefully because the trial was implicated in a larger history of traumatic experiences, and responses to those experiences, involving this particular class of men. Alexander suggests we look for "new meaningful and causal relationships between

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<sup>17</sup> Alexander's sociological theory in this chapter is echoed in Victor Turner's anthropological theory of "social drama" utilized in Chapter Four on contemporary same-sex marriage. Although I mainly use Turner to understand the significance of American gay rights jurisprudence and same-sex wedding rituals, Alexander's theory could also be used in profitable ways to understand how the master narrative of "gay rights" culminated in the U.S. Supreme Court. For example, in the oral argument of *U.S. v. Windsor* (2013), Chief Justice Roberts, who would eventually dissent on the losing side of the case, wanted to stress that the cultural acceptance of homosexuality and gay rights had become more widespread, probably in order to make a legal ruling against Edith Windsor, the lesbian plaintiff, more justified because Windsor would not seem like a sympathetic victim of discrimination:

JUSTICE GINSBERG: How many states have Civil Unions now? ... And how many had it in 1996?

MS. KAPLAN: I -- yes, it was much, much fewer at the time. I don't have that number, Justice Ginsburg; I apologize.

CHIEF JUSTICE ROBERTS: I suppose the sea change has a lot to do with the political force and effectiveness of people representing, supporting your side of the case? ... You don't doubt that the lobby supporting the enactment of same sex-marriage laws in different States is politically powerful, do you? ... As far as I can tell, political figures are falling over themselves to endorse your side of the case. (107-108)

In other words, Roberts was suggesting, there was no need to find a constitutional basis for protection of gays and lesbians because politically speaking, they had already won control of the "master narrative" of their collective identity, ensuring wider acceptance of them by the wider community.

previously unrelated events, structures, perceptions, and actions” (1). Indeed, Felman’s work with the “trauma trial” allows us to open up and contemplate a larger history of the Wilde trials, as I will show in the next section.

This trauma trial had been evolving for hundreds of years, and would continue to change in the future over the course of the twentieth and beginning of the twenty-first century. The Wilde trials were repeated with different defendants in different legal venues, but they also echoed in theatrical spaces as well, which in turn affected the development of the laws related to homosexuality. Ultimately, the justice of the Wilde trials was challenged by gay dramatists and later LGBT activists, thus gradually transforming the sodomy trial ritual into the same-sex wedding rituals of the twenty-first century (which in turn have been highly contested). Gay male identity tragically began in criminalizing legal trauma; however, the overarching cultural narrative of gay men, as it was produced through gay legal theatre, had an ostensibly comedic arc when we consider the recent transatlantic events legalizing same-sex marriage.<sup>18</sup> This cultural narrative played out through the dialectical tensions and occasional blending between legal and theatrical discourses.

### **Contextualizing Wilde’s Trials within a History of Traumatic Sodomy Trials**

According to Felman, a culturally resonant trauma trial, a “trial of the century,” has “three profound features: (1) its complex traumatic structure; (2) its cross-legal nature, or the repetition it enacts of another trial; and (3) its attempt to define legally something that is not reducible to legal concepts” (59). Felman analyzes what factors

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<sup>18</sup> I closely analyze the “social drama” of same-sex marriage in Chapter Four.

constitute a “trial of the century” in the twentieth century, focusing on the 1961 Eichmann trial in Jerusalem and O.J. Simpson’s 1995 trial. Her theory reveals that the Wilde trials were so captivating in part because they were a traumatic repetition of the English sodomy trials.

### **1. *The Complex Traumatic Structure of the Wilde Trials***

Wilde’s trials fit into the larger archetype of trauma trial as Felman describes it. In the Simpson trial, the private trauma of a murder became—in a court of law under intense observation—a culturally resonant moment of two collective traumas, gender and race: Nicole Brown became the image of the battered wife, O.J. Simpson became the image of racial injustice, and what started out as a simple murder case became a cultural contestation over “the two cardinal societal traumas of race persecution and gender persecution” (Felman 6).<sup>19</sup>

Similarly, Wilde’s trials involved a complex traumatic structure, in which two opposing private traumas morphed into opposing collective traumas. Wilde started the legal process by suing the Marquess of Queensberry for criminal libel. Libel is a minor type of psychological “blow to the self”; Wilde indicated in a court of law that his reputation was being injured, displaced. Queensberry’s subsequent arrest and defense constituted an opposing individual trauma: if Queensberry lost the case, his identity would be re-labeled as criminal, not upper-class. However, these individual private traumas became culturally resonant because they came to symbolize larger, unresolved

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<sup>19</sup> Felman’s paradigm does not address the intersectional nature of minority trauma. In her conceptualization, gender trauma is implicitly white trauma and race trauma is implicitly male. This may be a weakness in her argument, but it also might simply capture the ways that culture erases intersectional understandings of trauma and identity.

cultural traumas that had never been fully understood, let alone healed. On the one hand we have the injury and threat to the hetero-patriarchy that Wilde posed by sleeping with Queensberry's son, and the injury and threat that Wilde posed to class distinctions himself and by his intimate treatment of the rent boys<sup>20</sup>; on the other hand, we have the trauma inflicted on the body of gay men who began to emerge as an endangered sexual class in the wake of the guilty verdict.

Also, if we agree with Alan Sinfield's argument about modern gay identity emerging in the wake of the trials, what can we make of the fact that this "identity" was based on a highly traumatic ritual at the end of which that newly (re?)-discovered identity was imprisoned, punished, and expelled? This phenomenon is not unique to gay identity. Ron Eyerman persuasively argues in "Cultural Trauma: Slavery and the Formation of African American Identity" that African Americans developed their group identity through a collective traumatic memory of slavery. Legally, I would add, we can trace the modern African-American identity to Supreme Court cases that categorized black identity as a marginal and inferior status.<sup>21</sup> In *Dred Scott v. Sandford* (1856), which was later overturned by the 13<sup>th</sup> and 14<sup>th</sup> Amendments, blacks were denied U.S. citizenship, held to be private property and therefore would have no individual access to courts of law.

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<sup>20</sup> David Schulz makes the argument that Wilde, in his trials, challenged the performative constructions of the patriarchy, class boundaries, and gender. "Redressing Oscar: Performance and the Trials of Oscar Wilde." *The Drama Review* 40.2 (Summer 1996): 37-59.

<sup>21</sup> Gay and African-American identity of course intersect in certain individuals, although historically these intersections have been effaced. See David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke UP, 2010). Eng argues that recent political and legal victories for gays and lesbians come at the cost of ignoring racial oppression. In the landmark case *Lawrence v. Texas* (2003) that eventually led to the decriminalization of same-sex activity in the United States, the illegal same-sex activity was also inter-racial in nature. Police were initially called to the scene in order to investigate claims of an armed black man. See Dale Carpenter, "The Unknown Past of *Lawrence v. Texas*," *Michigan Law Review* 102 (2004): 1464-1527; Eng, Chapter 1, "The Law of Kinship: *Lawrence v. Texas* and the Emergence of Queer Liberalism," 23-57, 35.

Later, in *Plessy v. Ferguson* (1896), racial segregation was held constitutional under the “separate but equal” doctrine; the case was eventually overturned by *Brown v. Board of Education* (1954).

What is it about minority identity, and the way we construct and understand identity, that lends itself to emerging through sites and processes of cultural trauma? Further, why have traumatic constructions of identity often erased the intersections of race, class, gender, and sexuality within individuals? Trauma narratives surrounding one aspect of identity often neglect other traumatized aspects, and indicate further areas of cultural prejudice that remain within the minorities involved and the culture at large. Wilde himself has an answer, of course: as he writes in *De Profundis*: “Suffering—curious as it may sound to you—is the means by which we exist, because it is the only means by which we become conscious of existing; and the remembrance of suffering in the past is necessary to us as the warrant, the evidence, of our continued identity” (884). The Wilde trials served as a vehicle for an emerging class of gay men to “become conscious of existing” because the trials catalyzed “the remembrance of suffering in the past,” particularly the suffering endured in the sodomy trials.

## ***2. A Traumatic Repetition of Earlier Trials***

Felman writes about the cultural significance of the trauma trial: “What the trial does, is, therefore, to repeat and to awaken, to *reopen* a traumatic history of trials” (63). Unconscious repetition is a key aspect of trauma. Cathy Caruth claims, “What seems to be suggested by Freud in *Beyond the Pleasure Principle* is that the wound of the mind—the breach in the mind’s experience of time, self, and the world—is not, like the wound



of the body, a simple and healable event, but rather an event that ... is experienced too soon, too unexpectedly to be fully known..." (3-4). Therefore, psychological trauma is experienced as a way for the psyche to re-visit the event in order to more fully experience and understand it.

For example, Felman posits that the O.J. Simpson trial evoked "echoes" of the Rodney King trial, which in turn evoked a distant memory of *Dred Scott* (63). The Wilde trials have deep echoes as well and reopen the traumatic history of sodomy trials. The sodomy trial was a kind of trauma trial that British and American culture practiced in various permutations for hundreds of years. The Wilde trial, although it began as a trial for libel and ended with conviction of the crime of gross indecency, is just such a permutation, and it contains the traumatic cultural repetitions of past sodomy trials that had been enacted for centuries. It was a way for the culture to revisit those old wounds, and because the dramatist Oscar Wilde was the focal point, he more fully opened up the legal discourse of the trial, allowing it to become a richer cultural event that blended legal and literary languages.

In this respect, Alan Sinfield's popularized claim that the Wilde trials crystallized in the public mind the image of the modern gay man is rendered more complex when we see the trials in the tradition from which they come. In 1534, Henry VIII's Parliament made a capital felony the "detestable and abominable Vice of Buggery, committed with mankind or beast (25 *Hen. 8, c. 6*)" (qtd. in Gorton 24). In 1631, the Earl of Castlehaven was infamously tried for rape and sodomy, the first recorded trial under Henry VIII's sodomy statute (Gorton 25). The earl was tried for raping his wife, committing sodomy

with male servants, having them rape his wife, and several other sexual crimes. He was executed.<sup>22</sup>

The culmination of early sodomy trials was death if the man was convicted. I am claiming that a cultural trauma was gradually widened over the course of these trials and executions. The trauma involved the complex relationship of the sexual activities of these men, the legal categorization of those activities as immoral and worthy of death, cultural condemnation of homosexuality, and the growing self-consciousness of these men coming to realize that the desires of their body implied aspects of their identity.

The execution ritual for sodomy was repeated for hundreds of years. As a key example, the Earl of Castlehaven's execution was witnessed and described in this way to the public:

Then he bowed himself, and went to the middle of the scaffold, kneeling down and lifting up his hands and eyes to heaven ... he prayed to God; which prayer being ended ... with a smiling countenance he took his leave of all men, and desired their prayers to Almighty God for him; and then tying a handkerchief about his face, most willingly and patiently laid down his body, submitting himself to the power of the executioner, who with one small blow severed his head from his body... (McCormick 62)

When Wilde stood in the dock and received his sentence, echoes of the above trauma attached themselves to the scene at the Old Bailey. Although Wilde was not allowed to be put to death, and was instead sentenced to two years of hard labor, the Judge's

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<sup>22</sup> The salacious and disturbing details from the trial transcript can be found in Ian McCormick's valuable compilation *Secret Sexualities: A Sourcebook of 17<sup>th</sup> and 18<sup>th</sup> Century Writing* (New York: Routledge, 1997), 53-62.

language implied that death would have been a fitting consequence. The *Star* newspaper recorded the judge's speech at the sentencing as follows:

Oscar Wilde and Alfred Taylor, it has never been my lot to try a case of this kind before which has been so bad. One has to put a stern constraint upon oneself to prevent oneself from describing in language I ought not to use the sentiments which must arise in the breast of every man who has a spark of decent feeling in him, and who has heard of details of these two terrible trials. ... People who can do these things must be deaf to every sense of decency which can influence conduct. It is the worst case I have ever tried. ... I shall, under the circumstances, be expected to pass the severest sentence that the law allows. In my judgment, it is utterly inadequate for such cases. The sentence upon each of you is imprisonment with hard labor for two years. (Foldy 46-7)<sup>23</sup>

This moment in the trial, recorded in popular press accounts and in various legal transcripts, certainly has dramatic power in addition to the simple legal procedure of sentencing. Such dramatic moment in the trials blend law and drama into a hybrid ritual of trauma. The Judge is a symbol for God the Father, and in physically delivering the sentence—the Word—and its attendant moral disapproval, the scene becomes archetypal in its cultural resonance. By indicating the sentence “is utterly inadequate for such cases,” he suggests the penalty of death as in the earlier sodomy trials would have been more appropriate. For the Judge and those supporting his moral disapproval, the law inadequately dealt with the facts of the case. The letter of the law was insufficient to fully contain the problem of male homosexuality.

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<sup>23</sup> The *Star*'s recording of the Judge's speech is almost identical to Hyde's account of the trials. See Hyde, 242.

Sodomy trials, including their graphic testimony and the potential for execution if convicted, were part of the cultural consciousness, although they were probably interpreted/internalized differently depending on one's relationship with the idea and/or practice of homosexuality. Rictor Norton's book *Mother Clap's Molly House* (1992) makes it clear that there was a thriving gay subculture in England long before the Wilde trials. Ian McCormick has edited a compilation of sodomy trial transcripts in the eighteenth century, most famously regarding the raids surrounding Mother Clap's Molly House and the ensuing trials of 1725-26. The men in the molly houses were rounded up, tried, and executed (McCormick 72-82). Surely those men shared a similar self-consciousness about their identity, but that consciousness could not be articulated publicly in any way.

In 1836, the last execution for sodomy was performed in England; by 1861, sodomy was no longer a capital offense (Cohen 118), but it was still a crime, and those who transgressed against the law had to undergo some sort of public shaming. H.G. Cocks has uncovered the statistics of British sex crime arrests and indictments in the nineteenth century. More than 8,000 men were put on trial in the course of the century for crimes involving sodomy and later gross indecency (Cocks 24-25).

Three important trials served as precursors to the Wilde trials: the trial of "Fanny and Stella" in 1871, the 1884 Dublin Castle Scandal, and the 1890 Cleveland Street Affair. As Morris Kaplan has shown, these scandalous trials were definitely in the cultural consciousness during the Wilde trials. Ernest Boulton and Frederick Park, "Fanny and Stella" as they called themselves when in drag, participated in a key cultural precursor to the Wilde trials. The trial of Fanny and Stella highlighted in interesting

ways the links between theatre and courtroom proceedings, as well the performative nature of law and gender. Boulton and Park were involved in amateur theatricals and enjoyed cross-dressing and parading about the West End, attracting many male admirers, some of whom thought they were prostitutes. The public was intrigued by the pair when they were charged with conspiracy to commit sodomy, and press accounts were fixated by the notion of cross-dressing. The two of them were eventually acquitted by a jury, in part because, as Kaplan argues, nineteenth-century Britain did not equate cross-dressing with homosexuality, and the men's theatrical background proved a convincing defense. They were actors who simply loved the artifice of performance and playing this joke on the public, the defense successfully argued (Kaplan 77).

In the Dublin Castle Scandal, which erupted in 1884, an Irish Nationalist newspaper editor was sued for uncovering homosexual activities among Crown officials working at Dublin Castle. In an uncanny precursor to the Wilde trials' fact pattern, the officials sued the editor and lost because men came forward and testified that they had indeed had sexual relations with them. The officials were then tried: some were acquitted, one was sentenced two years imprisonment, and one received "twenty years of penal servitude" (Kaplan 176-78).

The next year, in 1885, the Labouchère Amendment to the Criminal Law Amendment Act was passed, probably as a result of the Dublin Castle Scandal; this was the "gross indecency" statute that would govern the Wilde trial (Kaplan 178). Although sodomy was no longer a capital offense, David Schulz points to the fact that the Labouchère Amendment simultaneously focused and widened the scope of same-sex criminality, enlarging it from the original crime of sodomy—which had originally not

been confined to male homosexual sodomy—to “any male person” engaging in or soliciting “in public or in private [...] any act of gross indecency with another male person.” Schulz writes,

The language of the amendment shifted the focus of the law from the crime of sodomy—a crime based on a specific act—to a crime against gender. The vague phrasing, then, is not wholly an example of Victorian prudery, but rather a general attempt to regulate male behavior. In short, this amendment effectively fosters the legal institutionalization of masculinity through the articulation in the courts of decent and indecent behavior between men. (47)

The language of the Labouchère Amendment, according to Schulz, not only regulated homosexuality, but also attempted to regulate appropriate masculine behavior. The law also infiltrated private spaces and merely soliciting such acts, which extended the law from one prohibited sexual act to broad codes of behavior and mannerisms. Fanny and Stella would have been charged under the Gross Indecency statute because their performance in drag might be considered within the wider scope of the statute and its prohibitions. Cross-dressing was certainly not conventionally masculine behavior; under the new statute, Queensberry was right: to pose as a thing *was* as bad as to be it. Fanny and Stella were therefore not just posing as women; in doing so, they would also have been transgressing against what was now “the legal institutionalization of masculinity.”

The Cleveland Street Affair of 1890 was the first homosexual scandal that erupted after the Labouchère Amendment was passed. Post office boys were found to have been serving as male prostitutes for certain noblemen and high officials. The aristocrats fled the country (Kaplan 166-171). That year, a critical review of Wilde’s *The Picture of*

*Dorian Grey* criticized the novel as meant for “outlawed noblemen and perverted delivery boys” (qtd. in Kaplan 225). In doing so, the reviewer indicated there was a specific, albeit depraved, audience for homosexual-themed texts.

The historical context of sodomy trials and nineteenth-century sex scandals deepens Sinfield’s popular line of argument that the Wilde trials crystallized a modern gay identity. As we can see, similar rituals and punishments had been meted out for centuries. There is a high probability that many of the spectators at the Wilde trials, and the readership of its press coverage, had some sense of the history of the sex-crime trial that they had come to witness. There is also a probability that some came, perhaps unconsciously, to watch a repetition of the historic traumas of old sodomy trials, or more recent sex scandals, be enacted again in the form of Wilde’s shame and punishment.

### 3. The Abyss of the Wilde Trials

Felman uses the metaphor of “the abyss” to describe seemingly un-resolvable conflicts between human beings: “The expressionless, I argue, grounds both the legal meaning of the trial and its inadvertent literary and dramatic power” (165). She argues that law, especially significant trials, attempts “*to throw a bridge over the abyss*” while “the purpose of the literary text is, on the contrary, to show or to expose again the severance and the schism, to reveal once more the opening, the hollowness of the abyss, *to wrench apart what was precisely covered over, closed or covered up by the legal trial*” (95, emphasis in original). As a result of a comparative analysis of Tolstoy’s story “The Kreutzer Sonata” and the O.J. Simpson trial, she is able to more fully capture the cultural implications of the Simpson trial. Tolstoy’s fiction provides a closer look at the abyss of trauma that the Simpsons trial tried to bridge. Felman works to “*draw out Tolstoy’s*

*insight*, so to speak, *into* the O.J. Simpson case in order to illuminate legal obscurities with literary insights and to reflect on ambiguities the trial has left by using textual issues that will turn out (surprisingly) to be quite relevant to them” (55, emphasis in original). In doing so, Felman uses Tolstoy’s literature to understand the true stakes of the Simpson trial, and draws the following conclusions:

What was finally revealed at the trial’s end was . . . not the curtain’s fall, not the closure of the case or a catharsis finally obtained by a legal resolution, but here again only the terrifying opening, only the emptiness of an ungraspable abyss: an abyss between the sexes; an abyss between the races; an abyss between legality and justice; a gap in perception between blacks and whites; . . . an abyss between conflicting views of the significance or insignificance of domestic violence; an abyss between the rich, who can buy justice, and the poor, who cannot afford to pay its price; an abyss between conflicting views or contradictory emotional perceptions of the verdict as a victory or as an absolute defeat. (Felman 90)

What is “the abyss” that the Wilde trials inadvertently open up? What abysses do the trials try to avoid opening? What do they attempt to legally define that cannot be reducible to legal concepts? Modern gay identity? Perhaps Sinfield is right after all. Using Felman’s interpretive strategy as a guide, I will now analyze how *The Importance of Being Earnest* may help to answer these questions.

### ***The Importance of Being Earnest: A Comedic Jump into the Abyss***



*Earnest* opened on February 14, 1895, a month before Wilde brought his libel action against Queensberry. The play continued to run until Wilde's disgrace first forced his name from the front of the theatre, and then finally resulted in the play being cancelled altogether (Ellman 458). In the same city, performed in a legal and a commercial theatre, two dramas played out that involved the crisis and anxieties surrounding the production of a new identity; in fact, the crisis was over the nature and possibility of any kind of substantial identity, but specifically a gay male identity.

I consider *The Importance of Being Earnest* the most perfect comedy in the English language. Perhaps the key to its comedy is its treatment of nonsense and nothingness. The irony in *Earnest* is that this "nonsense," as Algernon states in this chapter's epigraph, suffuses the dialogue and plotline of a play that focuses on a man's search for his identity. Searching for one's identity is supposedly an important undertaking. What could be more important than discovering one's own story, the secret to one's personality and destiny? Jack/Ernest politely asks, "I hate to seem inquisitive, but would you kindly inform me who I am?" (53). Wilde's play is supposedly centered on the nature of identity, yet it consistently refuses to name names and articulate essences and realities; even at the end when Jack's identity as Ernest is revealed, things still retain the air of affectation.

Recall that Felman uses the metaphor of the abyss to show how law and literature attempt to address great issues of cultural concern. Law attempts "*to throw a bridge over the abyss*" while "the purpose of the literary text is, on the contrary, to show or to expose again the severance and the schism, to reveal once more the opening, the hollowness of the abyss, *to wrench apart what was precisely covered over, closed or covered up by the*

*legal trial*” (95). Felman is suggesting that law tries to cover the wounds of trauma, but the nature of trauma defies legal compartmentalization.

In the context of dramatic literature, theatre provides a literal and figurative space for a community to safely enter into the abyss and examine what is really there. A theater is a cavernous space,<sup>24</sup> dark and uncertain, but it is not an abyss, not a bottomless chasm. The trauma leaves the unconscious and enters into the deliberate theatrical and cultural consciousness. Theaters provide a seeing place in which to view, contemplate, understand, and heal the larger cultural trauma at issue. Wilde’s masterwork confronts the same abyss that in some respects was avoided in Wilde’s trial. This abyss involves the cultural anxiety surrounding the emergence of the modern gay male identity. The abyss of gay identity emerged through the site of culturally contested traumas in the courtroom. Nearby, within the proscenium arch at The St. James Theatre, the same abyss was being comedically exploited and widened in *The Importance of Being Earnest*. The play exuberantly contended then, and continues to contend now over a century later, that *all* identities are reductive fictions. In this sense, the play presciently captures queer theorist Judith Butler’s critical insight, that “*gender is a kind of imitation for which there is no original.*”<sup>25</sup>

Within the context of the trials, the legal system’s demand for sincerity, or earnestness, was the method by which the truth of Wilde’s innocence or guilt would be found. The trials worked to crystallize an aspect of Wilde’s identity by legally stabilizing his theretofore aesthetic and ironic discourse. Mr. Gill concluded his opening speech for

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<sup>24</sup> Thank you to Professor Margaret Breen for suggesting this term.

<sup>25</sup> Judith Butler, “Imitation and Gender Insubordination” in *Inside/Out: Lesbian Theories, Gay Theories*, ed. D. Fuss (London: Routledge, 1991), 13-31, 21 (emphasis in original).

the prosecution in the second trial, “I ask you gentlemen, to give this case, painful as it must necessarily be, your most *earnest* and careful consideration” (Hyde 191, emphasis added). The legal system in Wilde’s trials, according to the scholarship of Cohen and Salamensky, attempted to create this new identity by fixating on the male homosexual body; by anchoring meaning in Wilde’s body, the law was able to produce the justification of guilt, and thus metonymically the guilt of all homosexual bodies in the larger society. In this sense, the Criminal Law Amendment Act functioned as what Judith Butler terms a “regulatory regime” that produced “identity categories.” Butler asserts, “identity categories tend to be instruments of regulatory regimes, whether as normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression” (13-14). Wilde as sexual criminal was a “normalizing” identity label for the “regulatory regime” of compulsory heterosexuality. However, those who saw this legal disposition as unjust began conceptualizing a more positive gay identity in lieu of sexual criminal, as a “rallying” cry “for a liberatory contestation of that very oppression.”

*The Importance of Being Earnest* utilizes rhetorical strategies that are anathema to legal discourse and “regulatory regimes”: irony, punning, and paradox. The play ironically prevents the self from achieving semantic or physical stability by deconstructing it through language. In turn, language is figured as the vehicle for transcending the reductive categorizations of identity. In the play, ironic language and performance prohibit the physical body from holding precedence over language’s meaning, because the play contends that meaning must be unstable when it arises from language. *Earnest* counteracts the stabilizing trajectory of the trials’ discourse by

exploding the very notion of a fixed identity to be discovered. In this sense, *Earnest* is a queer play while the trials' discourse generated a gay identity.

This queerness of identity is at the heart of Wilde's philosophy, but is also potentially his self-protective strategy of the closet. In other words, *Earnest* may only be philosophically "queer" in its theorization about identity because Wilde works to mask a very real gay desire. It is fairly easy to read *Earnest* as a closet drama, easy to analyze the dialogue as straining against the closet, akin to what occurs in Tennessee Williams's *A Streetcar Named Desire*, in which Blanche Dubois can easily be read as a gay man. Bunburyism and all of the talk about double lives make the "closet drama" reading a persuasive interpretation of *Earnest*.<sup>26</sup> Bunbury is Algernon's fictional invalid friend who serves as an excuse for missing social functions, but this kind of secret life also becomes an activity, Bunburying: "I may mention that I have always suspected you of being a confirmed and secret Bunburyist" (5); "Besides, now that I know you to be a confirmed Bunburyist I naturally want to talk to you about Bunburying. I want to tell you the rules" (7); "A man who marries without knowing Bunbury has a very tedious time of it" (7). As Joel Fineman has observed, the word bunbury is one of the only earnest terms in the entire play, indicating "a collection of signifiers that straightforwardly express their desire to bury in the bun" (113).

David Parker's work on identity in *Earnest* helps clarify how the play can be profitably interpreted alongside the trial. Parker argues that *Earnest* is an investigation of

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<sup>26</sup> For readings that connect *Earnest*'s deconstructive language with gay identity, see Jonathan Dollimore, "Different Desires: Subjectivity and Transgression in Wilde and Gide," in *Genders* 2 (1988): 24-41; Christopher Craft, "Alias Bunbury: Desire and Termination in *The Importance of Being Earnest*," in *Critical Essays on Oscar Wilde* (New York: G.K. Hall, 1991): 119-137. Craft claims that the use of puns like Ernest/earnest "becomes homoerotic because homophonic. Aurally enacting a drive toward the same, the pun's sound cunningly erases, or momentarily suspends the semantic differences by which the hetero is both made to appear and made to appear natural, lucid, self-evident" (131).

identity's insubstantiality: "Neither being earnest nor being Ernest is of much help when confidence is lost in the substantiality of human identity. The concern with identity is repeatedly underlined in the text of the play..." (176). Parker goes on:

Lurking always in the depths of the play is a steady contemplation of Nothingness, of *le néant*, which is all the more effective for its being, in contrast to most of its manifestations, comic in mode. Instead of making Nothingness a pretext for despair, Wilde finds in it a challenge to the imagination. For him, Nothingness in human identity, in human claims to knowledge, in the organization of society, becomes a field to be tilled by the artist—by the artist in each of us. (176)

As Lady Bracknell notes, "Until yesterday I had no idea that there were any families or persons whose origin was a Terminus" (46). Wilde is playing with the idea of inversion here, noting that his particular aesthetic is based on style trumping content. "He has nothing, but he looks everything. What more can one desire?" (48). Underneath all of the poses lies nothing; there is no essential self that the mask hides because the mask is the entirety of identity (a point that sounds very much like Judith Butler's idea of gender performativity). As Wilde writes in "The Decay of Lying," "Truth is entirely and absolutely a matter of style" (CW 981). Truth is simply the pose one takes; there is nothing substantial and "real" there. Identity is always a mask one wears, according to Wilde, and underneath the mask is nothing, not an essential something.

Later deconstructionist readings of *Ernest* have supported and clarified Parker's earlier criticism. Christopher Craft's analysis focuses on the deconstructively queer work

of punning in the play, and what implications therefore arise in terms of identity. Craft notes,

Wilde stated with a parodist's clarity and a criminal's obscurity that the importance of being was neither X nor Y, male nor female, homosexual nor heterosexual, Parker nor Grigsby, Jack nor Ernest. Being will not be disclosed by the descent of an apt and singular signifier, a proper name naturally congruent with the object it seeks to denominate. . . . Belying such notions of true being, Wilde suggests instead that identity has always already been mislaid somewhere between such culturally 'productive' binarisms as those listed above. (126)

Craft is investigating the slippage that occurs in *Earnest* and in much of Wilde's literary writing. Through the use of paradox and irony, Wilde is often able to have two seemingly opposing things be true at the same time, or the truth shifts between the opposing poles. The truth of his artistry lies in the oscillations between different binarisms and a refusal to settle at one pole.

The role of tone is crucial in understanding the relationship between Wilde's trials and his masterpiece. Irony suffuses *Earnest*, and even at the end when irony seems to collapse as a strategy, we are to understand that the collapse itself is ironic. The play's final line, "I've now realized for the first time in my life the vital Importance of Being Earnest," is so effective because it is simultaneously true and ironic. It is true in terms of the pun of Earnest/Ernest because Jack realizes that is his name; it is ironic because the discourse of the play has been so successfully and comedically ironic throughout, and Jack only found his true identity by donning another one and being deceptive, thereby showing Wilde's and the play's commitment to frivolity and irony as the prized mode of

discourse. There is nothing authentic about any of the dialogue or characters in the play, and the final scene mocks the very idea of heteronormative couplings and romantic love. The three couplings at the play's end, with everyone shouting "At last!" as they embrace, ironize heterosexual romance not to reveal homosexual identity, but to ironize gender itself as a performative process. The end of *Earnest* positions Jack as having located a stable identity, but ironically undercuts this identity because he was only successful at becoming earnest/Ernest by practicing deception throughout the play. All of the characters have located their identities through Wilde's parodic positioning of those identities as hollow affectations. Jack discovers his identity by the play's end, but the audience knows he has found nothing more than the pleasures of irony, paradox, and the pose.

Part of what cannot (or should not) be known, as Wilde implies through the paradox and ironies of *Earnest*, is identity itself. Cathy Caruth observes that trauma must be articulated in literary language, "a language that defies, even as it claims, our understanding" (5). This idea comes into better focus through a close look at the language in Wilde's play. Caruth argues that "literature ... is interested in the complex relation between knowing and not knowing" (3). She suggests it takes time and repetition to understand trauma's significance. Trauma, she writes, "is always the story of a wound that cries out, that addresses us in the attempt to tell us of a reality or truth that is not otherwise available. This truth, in its delayed appearance and its belated address, cannot be linked only to what is known, but also to what remains unknown in our very actions and language" (4). There was something else unknown in the play *Earnest* and in the discourse of the Wilde trials: that there was a political solution to this

repeated cultural trauma. A gay identity, reductive though it may be, was beginning to be fashioned. This sexual minority was coming to recognize itself as a distinct cultural group, not as “sodomite[s]” [sic], as Queensberry would vilify them, but whatever that identity classification would prove to be without the connotation of guilt.

### **“Earnestness” on Trial**

*Earnest* serves as Wilde’s preferred mode of discourse, one that he was completely able to control in the confines of his own work of art. Wilde’s most successful literary technique is the epigram, which he often injects with irony, puns, and paradox. He tried to employ paradox and irony as rhetorical strategies in his first trial, but Edward Carson used the literal discourse required of law in order to make Wilde’s ironic discourse unsuccessful. Carson began by cross-examining Wilde about his epigrams, in particular the “Phrases and Philosophies for the Use of the Young.” Carson wanted the epigrams to be used as evidence for Wilde’s immorality:

Carson: Listen, sir. Here is one of your ‘Phrases and Philosophies for the Use of the Young’: ‘Wickedness is a myth invented by good people to account for the curious attractiveness of others.’ (*Laughter.*)

Wilde: Yes.

Carson: Do you think that is true?

Wilde: I rarely think that anything I write is true. (*Laughter.*) (Holland 74)

At another moment, Wilde disclosed an important aspect of his philosophy:

Carson: Listen to this: ‘Pleasure is the only thing one should live for, nothing ages like happiness.’ Do you think pleasure is the only thing that one should live for?



Wilde: I think self-realisation—realisation of one's self—is the primal aim of life. I think that to realise one's self through pleasure is finer than to realise one's self through pain. That is the pagan ideal of man realizing himself by happiness as opposed to the later and perhaps grander idea of man realising himself by suffering. (Holland 75)

Within the context of the trial, Wilde's "essential" self was realized only through the legal discourse of sexual crime. This realization of self is comedically ironized in *Earnest*, which is perhaps Wilde's artistic expression of "the pagan ideal of man realizing himself by happiness." The play is about one man's search for identity, although he does not realize that until the final scene, and that identity is never securely attained or articulated.

Although Wilde had enjoyed some of his trademark witticisms early on in the cross-examination, the tone of the trial pivoted, and Wilde's fortunes soured, when Wilde was asked about his possibly homosexual relationship with Walter Grainger (Holland xli). In the dialogue below, notice how Carson relentlessly uncovers the truth lying within Wilde's supposed irony. I quote the entire section because this moment in the trials is one of the center points of Wilde's trauma. This excerpt is taken from Holland's version of the trial transcript. The cross-examination is presented in the form of a theatrical dialogue:

Carson: Did you ever kiss him?

Wilde: Oh no, never in my life, he was a peculiarly plain boy.

Carson: He was what?

Wilde: I said I thought him unfortunately—his appearance was so very unfortunate—very ugly—I mean—I pitied him for it.

Carson: Very ugly?

Wilde: Yes.

Carson: Do you say that in support of your statement that you never kissed him?

Wilde: No, I don't; it is like asking me if I kissed a doorpost; it is childish.

Carson: Did you give me as the reason that you never kissed him that he was too ugly?

Wilde: (*warmly*): No.

Carson: Why did you mention his ugliness?

Wilde: No, I said the question seemed to me like—your asking me whether I ever had him to dinner, and then whether I had kissed him—seemed to me merely an intentional insult on your part, which I have been going through the whole of this morning.

Carson: Because he was ugly?

Wilde: No.

Carson: Why did you mention the ugliness? I have to ask these questions.

Wilde unsuccessfully attempted to utilize irony at this point, but the strategy failed because he was in fact being serious: he was not attracted to Grainger and was employing a truthful homosexual logic, unsuccessfully masked in a heterosexual irony, which in turn conflicted with the heterosexist logic of the criminal law. Wilde is also unsuccessful here because there actually is a physical truth underneath his logic, and it is not based on pure imagination, nonsense, and nothingness.

Wilde: Pardon me, you sting me, insult me and try to unnerve me in every way.

At times one says things flippantly when one should speak more seriously, I admit that—I cannot help it. That is what you are doing to me.

Carson: You said it flippantly? You mentioned his ugliness flippantly; that is what you wish to convey now?

Wilde: Oh, I don't say what I wish to convey. I have given you my answer.

Carson: Is that it, that there was a flippant answer?

Wilde: Oh, it was a flippant answer, yes; I will say it was certainly a flippant answer.

Carson: Did ever any indecencies take place between you and Grainger?

Wilde: No, sir, none at all. (207-9)

I quote from this excerpt from the trial at such length to show Carson's skillful use of cross-examination. Michael Foldy observes that "[t]his exchange represented both the dramatic climax and the endpoint of Carson's cross-examination. Heretofore an endless fount of cleverness and brilliant repartee, Wilde had been reduced to silence" (18). The legal machinery of the trials had produced a bridge that attempted to cover one form of trauma represented by Wilde: his threat to the hetero-patriarchy and class distinctions. In that sense, it had resolved the issue and prevented injury and threat to the wider public. From Wilde's perspective, however, and the class of men that identified with him, nothing had been bridged at all, and in fact the abyss had been widened by the trials' end to produce a second kind of trauma. This group of men needed more opportunities to revisit the scene and contemplate the trauma in different ways in the future. Their gay identity had been formed in a traumatic crucible of criminality. Opportunities for

traumatic repetition would materialize in future theatricalizations of the trial, as well as the development of twentieth-century gay drama and its dynamic treatment of an emerging “master narrative” surrounding gay male oppression.

Wilde’s trials required a desiring subject who would fit neatly within the language of the law. Wilde committed acts that fell within the criminal law’s reach, and therefore his actions resulted in the neat correlation between legal language and embodied desire: the criminal, the homosexual, the modern gay subject could be classified and punished. *The Importance of Being Earnest* uncovers the abyss that the Wilde trials tried to bridge. That is, the play revels in that (always failed) attempt to accurately locate an identity in language in general, and through the lens of sexuality in particular. *Earnest* comedically illuminates Wilde’s philosophical stance that there is no essential self, gay or otherwise. In actuality, by the end of the trials, Wilde was reduced to silence and his identity was reduced and revealed to be that of a sexual criminal. The traumas of the trials lie in the conflicts inherent in the cultural process of recognizing a necessarily fictive identity—the gay subject—in order to accommodate a growing body of self-conscious men and their political aims. These traumas could not be fully understood without the blending of legal and theatrical discourses.

*Earnest* comedically inverts the trauma that would attend Wilde at his trial, and allows a space to more fully contemplate and re-visit past wounds. When the play is read and performed in the historical wake of the trials, it serves to raise the specter of the abyss and the philosophical ideas at the heart of the trials, but it does so without any attendant trauma. That is what makes it such a perfect comedy: it reaches sublimity without the need of suffering. Nevertheless, the play’s ultimate sublimity is only

achieved by looking through its artistic lens, from the safety of a theater, into the abyss exposed by the Wilde trials themselves. The play transcends the trials' traumas, but first makes us contemplate them once again. As for identity, *Earnest's* queer vision of the instability of identity categories allows us to better understand the modern gay identity forged in the Wilde trials. We come to view the ascendant identity of the "gay man" with suspicion, as a necessary fiction resulting from law's limited discourse.

### ***Gross Indecency: Witnessing as the Key to Justice***

Sodomy trials are no longer enacted in England or the United States, but they are still replicated in various permutations. The old trials can be re-surface with actual violence, extending to murder and executions like the young gay American Matthew Shepard in Laramie, Wyoming in 1998 at the hands of homophobic citizens. Kaufman's *The Laramie Project* (2000) serves as a cathartic re-visitation of that particular trauma involving Shepard; the play transforms Shepard into a gay martyr, and gay people by extension are portrayed as the sympathetic victims of homophobia.

Similarly, Kaufman presents Wilde as a heroic gay martyr in *Gross Indecency* (1997) as a means of revising cultural understanding of the trials. In doing so, Kaufman utilizes theatre to influence the "master narrative" surrounding gay male lives. This begins with the play's title, which obviously refers to the gross indecency statute that ensnared Wilde, but also doubles as a condemnation of the grossly indecent homophobic culture that would prosecute such a man. The play is a theatrical presentation of excerpts from the actual trial transcripts and press accounts. The Wilde trials deserve the title "trial of the century" because they worked "to repeat and to awaken, to *reopen* a

traumatic history of trials” (Felman 63), namely the sodomy trials. Similarly, *Gross Indecency* theatrically “reopens” the Wilde trials, but the play works to heal the trauma of the collective gay identity that was formed in the trials. It does this by revising the terms of social justice and using the traumatic repetition as a catharsis for the audience to experience. The audience gets to experience and witness the Wilde trials as an unjust tragedy, and through experiencing the catharsis of the performance, the play works as a collective ritual of healing and transformation. Jeffrey Alexander views aesthetic representations as a key “institutional arena” engaged with developing a collective identity in the wake of cultural trauma: “Insofar as meaning work takes place in the aesthetic realm, it will be channeled by specific genres and narratives that aim to produce imaginative identification and emotional catharsis” (15). Kaufman provides such aesthetic representations with his innovative approach to blending law and theatre: his project in both *The Laramie Project* and *Gross Indecency* is ultimately about gay pride and generating cultural sympathy towards gay oppression.

Theatre does work that the other genres of literature do not explicitly do: it brings communities together to watch, experience, and evaluate performance rituals. The most effective theatre infuses those rituals with cultural work of some kind. The power of these social gatherings can allow us to contemplate historical and legal events in unique ways. Through Kaufman’s play, the sodomy trial is repeated in contemporary theatres for a new jury, the theatrical spectators/witnesses. The legal result is represented in the theatre as it came down in 1895, but Kaufman’s theatre of traumatic re-witnessing actually serves to first examine, and then attempts to *close up* the wound of trauma inflicted on past victims of the injustice. In this respect, *Gross Indecency* departs from

Felman's description of literature. Felman claims that literature functions to open up the traumatic wound in order to expose the persistent abyss of trauma, an abyss that law cannot adequately bridge. Kaufman's theatre tries to open the abyss and then not just bridge it, but seal it in order to achieve some closure and an opportunity for new histories to be made.

S.I. Salamensky would disagree with me. In "Re-Presenting Oscar Wilde: Wilde's Trials, *Gross Indecency*, and Documentary Spectacle," Salamensky argues that Kaufman's play *Gross Indecency* problematically replicates the same reductive trajectory that Wilde's trials followed, that of containing Wilde's unstable artistic philosophy and discourse by legally reducing it to the body and its sex acts. Salamensky claims, "the play champions Wilde's side while re-endorsing the conceptual premises Wilde dedicated his oeuvre and life to fighting against" (575). These problematic "conceptual premises" suggest there was something about Wilde that needed to be uncovered—the naming and shaming of the sexuality that was made to solely and reductively constitute the modern homosexual—and, according to Salamensky, Kaufman's play replicates this same reductive arc instead of doing service to Wilde's more unstable queer philosophy of art and life. As I showed in the previous section, the legal discourse of the trial was built on these flawed conceptual premises.

In the trial, Salamensky argues,

Wilde attempts to relocate the discourse of the courtroom from the genital region of the physical Wilde to the linguistic faculty of a discursive Wilde-double. This shifts the dominant Victorian paradigm toward more modern notions of fractured,

decentered, multivocal identity, deconstructing notions of truth and identifiable selfhood, and of the individual body as the locus of these constructs. (580)

In the legal setting of the courtroom, Wilde failed to “relocate the discourse,” and “[w]hen finally faced with incontrovertible material evidence . . . his pose stance failed him, reducing him from highly textural, self-referential, anti-earnest salon-type talk to conciliatory, earnest speech-text discourse...” (Salamensky 582). Salamensky suggests that Kaufman’s play, in order to do a real service to Wilde, would have to break free from this discursive trajectory of aestheticized speech to earnestness, and instead celebrate the “decentered, multivocal identity” that Wilde conjured in his aesthetic discourse as, for example, in *Earnest*.

Although Kaufman may be contributing to a certain replication of the traumas inflicted in the original trials, he enacts this repetition with Wilde as the protagonist, not the criminal, as a means of putting an end to the trauma’s repetition by moving it from the legal space into the dramatic one. Salamensky argues that Kaufman’s repetition of the discursive trajectory is a weakness of *Gross Indecency*’s dramatic structure, but I would suggest that re-enacting the trauma of the Wilde trials within the theatrical space allows for not only a repetition of the traumatic experience, but also an opportunity to heal it, and invert the original trauma that presented gay identity as the homosexual criminal. In this sense, Kaufman is not reinforcing past trauma; rather, he is continuing the work of developing a sympathetic “master narrative” of gay collective identity that Wilde helped to develop in his trials. If Kaufman had completely re-worked the trials’ discursive trajectory, he might have made the trauma inherent in the trials unrecognizable, thereby preventing effective catharsis within the audience.



### Watching the Rent Boys

A crucial turning point in the trials, as well as, by extension, in *Gross Indecency*, occurs when the rent boys are called up as witnesses, in order to provide testimony about their acts of gross indecency with Wilde. This occurred at the start of the second trial, beginning the evidence for the prosecution. Kaufman in turn places this event near the beginning of the second act, using language from the Hyde transcripts, but adding theatrical staging and music to enhance the moment's effect:

GILL: I will now proceed to question the men with whom Mr. Wilde is accused to have committed the acts of gross indecency. I ask you to pay close attention to the testimony of these boys.

*(Music—"Rule Britannia" coming from a music box. Four young men enter in Victorian underwear and set up the "shameful den.")* (Kaufman 88)

In the original production of *Gross Indecency* in 1997, directed by Moisés Kaufman, the "shameful den" was indeed established through a change of lighting, from the starker colors of the brightly lit courtroom to darker reds and blues evocative of a red-light district. It was jarring and memorable because Kaufman theatricalized the fact that male bodies were sexually objectified on the witness stand; he dramatized and accentuated this by having the "young men enter in Victorian underwear." The actors playing the rent boys made seductive poses and the atmosphere became homo-eroticized, if a bit campy considering the background music, establishing the mood of a gay brothel memory/fantasy.

The testimony of the rent boys provided some of the most sensational moments in the Wilde trials. For example, Charles Parker revealed in his testimony the gender-bending that occurred behind closed doors: “I was asked by Wilde to imagine that I was a woman and that he was my lover. I had to keep up this illusion. I used to sit on his knees and he used to . . . as a man might amuse himself with a girl. Wilde insisted on this filthy make-believe being kept up” (Hyde 193). David Schulz argues that in the trials, Wilde illuminated and challenged the performative constructions of the patriarchy, race, class boundaries, and gender. According to Schulz, Wilde threatened the institution of masculinity, and that institution had been codified in the Criminal Law Amendment of 1885. Wilde’s obvious threat was showing the fluidity of gender and class boundaries (47). By dining and sleeping with working-class youth, Wilde destabilized the role of the traditional gentleman in terms of class, gender, and sexuality (even as his exploitation of the boys also served to reinforce class distinctions and, if we believe Parker’s testimony, reinforce the gender binary by asking them to pretend to be submissive women).

There are two major traumas at work when the rent boys come forward to give testimony as witnesses. Recall that Felman defines trauma as “a blow to the self . . . a shock that creates a psychological split or rupture, an emotional injury that leaves lasting damage to the psyche” (171). The first is the trauma inflicted on the hetero-male upper-class, those against whom the rent boys represented a material threat. These would be the men in positions of power and privilege who would have vaguely interpreted Wilde’s homosexual relationships as indicative of the performative construction of their own hetero-patriarchal claim to power. But we cannot assume that the spectators were of a monolithic perspective in their interpretation of the trials. There also may have been a

spectrum of men for whom the rent boys' materiality caused a psychic "blow to the self" in terms of catalyzing a certain sexual self-consciousness, a glimmer of recognition. They might have projected themselves into the dock with Wilde, and have seen that they were in effect on trial as well.

And of course there is the self-consciousness of the rent boys themselves, who provided self-incriminating testimony in exchange for immunity. What did they think of themselves in the context of the courtroom? Did they conceive of their activities with Wilde purely in monetary terms, or did some of them experience a "blow to the self" as they became central to the trials' trajectory? As Felman writes, "the body of the witness is the ultimate site of memory of individual and collective trauma" (9). There are two kinds of witnessing occurring in the trials as well as in the play: the rent boy witnesses delivering their testimony, and the witnesses in the audience watching the witnesses. Spectatorship, witnessing, and testimony combine to produce a rich cultural moment worthy of analysis. In terms of watching the play, if a male audience member takes any kind of erotic pleasure in watching the actors portraying the rent boys, he in effect shares culpability with Wilde; in that sense, Wilde's ordeal becomes the spectator's as well.

What makes the rent boy witnesses and their testimony so interesting is the fact that male sexuality is objectified in the public space of the courtroom and theater. Their bodies were held forth as potential objects of desire for both sexes: the very fact of male prostitution—sex for a price—implies that men are not essentially heteronormative in their orientation, but are also influenced by custom, power, gender, race, and class dynamics.<sup>27</sup> As Charles Parker states in the play,

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<sup>27</sup> "[G]ender is a kind of imitation for which there is no original" (Butler, "Imitation" 378).

I said that if any old gentleman with money took a fancy to me, I was agreeable.

*(The audience gasps.)*

I *was* agreeable. I was terribly hard up.

*(Laughter)* (89)

When gender is seen as fluid and subject to manipulation, any hierarchies in place that institute gender inequality come to seem constructed rather than essential. As Shulz argues, the Criminal Law Amendment of 1885 was ultimately about regulating masculinity; Kaufman critiques that regulation through capitalizing on witnessing the bodies of sexualized male witnesses in the theater. Some male audience members may desire the witnesses, or at least see those witnesses' bodies through the lens of Wilde's desire, thus sympathizing with and legitimating the homosexual desire of those bodies. By having the audience share Wilde's desire, Kaufman works to dissolve Wilde's past culpability.

### **Wilde's Speech from the Dock**

Another major dramatic moment in Wilde's trials was his famous speech from the dock during the second trial, in which he earnestly defended "the love that dare not speak its name," in reference to Lord Alfred Douglas's poem "Two Loves." Kaufman successfully dramatizes the moment in his contemporary play *Gross Indecency* by using the language from Hyde's account of the trials.

Gill: What is the "Love that dare not speak its name"?

Wilde: The "Love that dare not speak its name" in this century is such a great affection of an elder for a younger man as there was between David and

Jonathan, such as Plato made the very basis of his philosophy, and such as you find in the sonnets of Michelangelo and Shakespeare. It is that deep, spiritual affection that is as pure as it is perfect. It dictates and pervades great works of art like those of Shakespeare and Michelangelo, and those two letters of mine, such as they are. It is in this century misunderstood, so much misunderstood that it may be described as the “Love that dare not speak its name,” and on account of it I am placed where I am now. It is beautiful, it is fine, it is the noblest form of affection. There is nothing unnatural about it. It is intellectual, and it repeatedly exists between an elder and a younger man when the elder man has intellect and the younger man has all the joy, hope, and glamor of life before him. That it should be so the world does not understand. The world mocks at it and sometimes puts one in the pillory for it.

*(Loud applause, mingled with some hisses.)* (Kaufman 110-111)<sup>28</sup>

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<sup>28</sup> See Hyde, 201. Kaufman basically takes the speech verbatim from Hyde’s “official” legal account. However, as Leslie Moran has shown, the textual authenticity of Wilde’s speech is uncertain because of the many different versions of the trial. Moran systematically compares the textual discrepancies among the versions given in Millard’s *Oscar Wilde: Three Times Tried* (1912) and Montgomery Hyde’s account of the trials. These discrepancies raise the issue of the ethics of transcription and to what extent different editors added material (Moran 245).

Lucy McDiarmid’s scholarship uncovers equally provocative questions about the authenticity of Wilde’s speech in the dock. McDiarmid claims the speech originally appeared in *The Picture of Dorian Grey* (1890) five years earlier, when Dorian thinks about the kind of love that Basil has for him:

The love that he bore him – for it was really love – had nothing in it that was not noble and intellectual. It was not that mere physical admiration of beauty that is born of the senses, and that dies when the senses tire. It was such love as Michael Angelo had known, and Montaigne, and Winckelmann, and Shakespeare himself. Yes, Basil could have saved him. (qtd. in McDiarmid 455)

Given the uncertainty, Wilde’s speech in the dock may not function as authoritative legal discourse. His own testimony was literary in nature, considering that he was quoting from his own novel. The speech’s hybrid composition—partly legal, partly literary—makes it perfect to include in the present study of gay legal theatre.

It is also worth noting that Wilde’s speech from the dock falls in the tradition of such speeches delivered by Irish patriots facing imprisonment or death for rebelling against English rule, stretching back to the 1790s. See *Speeches from the Dock, Part I: Protests of Irish Patriotism* (Dublin: A.M. Sullivan, 1868), published as a Project Gutenberg e-book prepared by Jonathan Ingram and Martin Pettit, <http://www.gutenberg.org/files/13112/13112-h/13112-h.htm>. Viewed in this tradition, Wilde

Kaufman utilizes legal testimony in order to solidify what Alexander terms the “master narrative” of gay male identity shaped by the trauma that gay men historically endured. When Wilde delivered some version of his famous speech from the dock during the second trial (exactly what he said will never be known), the speech became a dynamic site for the master narrative of gay male identity.<sup>29</sup> Alexander observes that “storytelling is ... a complex a multivalent symbolic process that is contingent, highly contested, and sometimes highly polarizing” (12). Because the speaker was a dramatist, and the speech has been successfully utilized in artistic representations of the trials, it is relevant as an important text that works toward establishing the “four critical representations” necessary for creating such a master narrative<sup>30</sup>: 1) Wilde’s speech implies the nature of the pain inflicted on him and other men who had to hide their desire or sexual activities, hence “the love that dare not speak its name”; 2) Wilde sympathetically describes the “nature of the victim” by placing this form of identity in the tradition of great artists like

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the Irishman becomes martyred even more so when we consider his speech as an act of rebellion against oppressive English law. See Éibhear Walsh, “The First Gay Irishman? Ireland and the Wilde Trials,” *Éire-Ireland* 40.3-4 (Fall/Winter 2005): 38-57, 42. In 1916, twenty years after Wilde made his speech from the dock, Irish patriot Roger Casement followed in this rhetorical tradition in protest of his conviction of treason for participation in the Easter Rising. For text of the speech, see “Roger Casement’s Speech from the Dock,” *New Statesman*, 1 March 2010. Web. <http://www.newstatesman.com/2010/03/ireland-law-england-irishmen>, date accessed 6 January 2016. Interestingly, British government officials used evidence of Casement’s homosexuality, from Casement’s so-called Black Diaries, to undermine his reputation after the trial and keep him from achieving martyr status (Jaeger 134). The shadow of Casement’s homosexuality hung over the memory of his trial for treason and in effect reopened and replicated the trauma trial as it had played out with Wilde. Thank you to Professor Mary Burke for pointing out this fascinating connection. See Elizabeth Jaeger, “Roger Casement: How Effective was the British Government’s Smear Campaign Exposing the Homosexual Black Diaries?” *Éire-Ireland* 46.3 (2011): 132-169; Lucy McDiarmid, “The Posthumous Life of Roger Casement” in *Gender and Sexuality in Modern Ireland*, ed. Anthony Bradley and Maryann Gialanella Valiulus (Amherst: U of Mass P, 1997), 127-158.

<sup>29</sup> Havelock Ellis wrote in *Studies in the Psychology of Sex*: “No doubt the celebrity of Oscar Wilde and the universal publicity given to the facts of the case may have brought conviction of their perversion to many inverts who were only vaguely conscious of their abnormality and, paradoxically though it may seem, have imparted greater courage to others” (qtd. in Kaplan 264).

<sup>30</sup> See Alexander, 12-15.

Michaelangelo and Shakespeare. He portrays the victim as blameless and instead worthy of admiration.

The third “critical representation” according to Alexander is the “relation of the trauma victim to the wider audience”: “To what extent do the members of the audience for trauma representations experience an identity with the immediately victimized group?” (14). Alexander claims that in the beginning stages of developing a master narrative, the wider audience may not fully share and sympathize with the victims of the trauma (14). Indeed, we see that with the presence of the “hisses” as recorded by Hyde. However, over time, if the master narrative successfully embeds itself in a culture, members of the wider culture will begin to sympathize with the minority identity even if they do not share the identity itself. There were undoubtedly never any hisses in the audience of Kaufman’s play during this moment. That is because the fourth and final critical representation was present in the play: locating an antagonist responsible for the minority identity’s trauma. By the end of Kaufman’s play, that antagonist is symbolically figured as the audience itself to stand for the larger homophobic society.

When Wilde came forth at the end of the second trial to answer for the previous testimony, his sincere speech trying to justify and give revisionary witness to the “love that dare not speak its name” was received in varying ways. Hyde writes that after he finished the speech, there was “loud applause, mingled with some hisses” (236). It is impossible to know what really occurred at that point in the trial, but the loud applause gives one pause to consider the positive potentialities of re-enacting and dramatizing historical trauma: the value of re-visionary martyrdom. Kaufman may partially replicate the general trajectory of the trials’ discourse in the play *Gross Indecency*, but he does so

with Wilde as the story's hero. In asking the contemporary audience to shift their sympathy and perspective toward those who gave "loud applause" after Wilde's speech, Kaufman in effect privileges the perspective of that minority for whom the witnesses sparked a certain self-recognition or consciousness. In the play's epilogue, the narrator tells us, "By the year 1920, Oscar Wilde was, after Shakespeare, the most widely read English author in Europe" (130). The audience is meant to re-evaluate Wilde's trials as unjust persecution, and instead sympathize with him as worthy of great admiration. Kaufman attempts to solidify the master narrative of the gay martyr and the trajectory of modern gay rights.

In legal discourse, the climax of a trial is the verdict. ("That's why I could never be a lawyer. In court all that matters is the verdict.")<sup>31</sup> In Kaufman's play, however, Wilde's speech from the dock is the emotional climax: the moment when the dramatic suspense is at its height, when the final possibilities of the narrative are still open; the moment before the law is handed down as either a liberatory exculpation or an inexorable sentence of condemnation. The initial rituals of gay legal theatre were the sodomy and gross indecency trials; Kaufman's play contributes to their reimagining and refashioning. *Gross Indecency* repeats the trauma of the Wilde trials, which in turn repeated the traumatic sodomy trials before them. However, the play is performed as a cathartic repetition meant to heal the wounds inflicted by the Criminal Law Amendment Act of 1885, and by extension, the wounds from all laws that criminalized and stigmatized male-male sexual intimacy throughout the twentieth century.

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<sup>31</sup> Louis speaking in Tony Kushner's *Angels in America Part I: Millennium Approaches* (New York: Theatre Communications Group, 1992), 38.



## Chapter 2

### Re-imagining the Law: Coward, Orton, and 1960s British Gay Legal Theatre

#### Historical Timeline

|               |   |
|---------------|---|
| 1956          | Wolfenden Report issued, recommending the repeal of Wilde-era laws criminalizing all homosexual conduct   |
| 1958          | The absolute ban on all theatrical depictions and discussions of homosexuality lifted by Lord Chamberlain; only “serious” discussions of homosexuality allowed on stage |
| 29 June 1964  | Orton’s <i>Entertaining Mr. Sloane</i> premieres  |
| 14 April 1966 | Coward’s <i>A Song at Twilight</i> premieres  |
| 29 Sept. 1966 | Orton’s <i>Loot</i> premieres   |
| 4 July 1967   | Sexual Offences Act decriminalizes homosexuality in private spaces. Only implemented in England and Wales.  |
| 10 Aug 1967   | Orton murdered by his lover   |
| 1968          | Theatres Act of 1968 abolishes Lord Chamberlain’s powers to censor the theatre  |
| 1970          | Gay Liberation Front formed in UK   |
| 1973          | Coward dies   |

## Introduction

This chapter investigates how two gay British dramatists navigated representations of homosexuality in the dynamic period that began in 1956, when the British Wolfenden Report was issued, and spanned just over a decade. The report, which was a long time coming after much public debate, recommended that the old Wilde-era laws criminalizing all homosexual conduct be reformed to decriminalize private homosexual conduct. Over the next decade, the British engaged in a cultural debate regarding whether those old laws should be reformed: what were the implications of such legal reform, the British citizenry asked itself, in terms of family, society, and artistic expression? In 1958, the censor over British theatre, the Lord Chamberlain, relaxed the absolute ban on all discussion and representations of homosexuality, ostensibly allowing only “serious” references on the stage. This allowed the cultural debate over legal reforms to be presented in public theatrical forums.

The sixties brought monumental cultural changes to attitudes surrounding family, sexuality, and the theatre. Joe Orton’s and Noël Coward’s commercially successful theatre produced during this time reflected and contributed to these changes. This chapter will analyze how Orton’s plays *Entertaining Mr. Sloane* (1964) and *Loot* (1966), and Coward’s last play *A Song at Twilight* (1966) positioned themselves in the cultural and legal debate over homosexuality, and in particular how the plays contributed to the political process underway that would culminate in decriminalization of private homosexual conduct and the dismantling of the British theatre’s censorship apparatus.

So much of gay drama has arisen in response to the legal restrictions in place upon homosexuality in the larger culture and within theatrical venues. The affectations

and “camp” style of Wilde and Coward, for example, arose as a response to the strictures in place against directly representing same-sex desires on stage and in public spaces. For most of his career, Coward’s hallmark style, captured in plays like *Hay Fever* (1925), never directly addressed the subject of homosexuality, in part because the Lord Chamberlain prohibited it on the stage. But Coward’s inimitable style arose in response to the prohibitions; when those prohibitions fell away, his last play, *A Song at Twilight*, became less purely aesthetic and more directly political. Coward’s last play, in retrospect, becomes the work of a Gay Liberationist, whether he would have admitted it or not. *A Song at Twilight* dramatizes a gay man who has been crippled by the laws and cultural biases surrounding homosexuality, and becomes a rather didactic plea for change. That change would come one year after the play premiered, with the passage of the 1967 Sexual Offences Act.

Coward and Orton in a sense were the dramatic predecessors, in that dynamic decade of the sixties, of the later strands of Gay and Queer Liberation. They made choices in their art, choices which would be mirrored politically in the decades to come. For most of Coward’s career, when the laws surrounding homosexuality were seemingly intransigent, he had pursued a coded discourse of camp as a successful strategy of mounting commercially successful plays pitched to a variety of audience members, some of whom were aware of a homosexual subtext, as Alan Sinfield argues in “Private Lives/Public Theatre: Noël Coward and the Politics of Homosexual Representation.” When the legal paradigm began shifting, though, his particular mode of gay drama was transformed into the overtly political.

Orton, on the other hand, contributed to legal and cultural reform in a different, more radical way. His dramas utilized a queerly libertarian politics; Orton's plays do not characterize gay men as a distinct identity or even homosexuality as a distinct subject or "problem" to be solved. Rather, his plays attempt to destabilize all institutional structures and paradigms—legal, familial, as well as those governing gender and sexuality—in order to highlight the futility and insidiousness of state intervention in matters governing the family and sexuality.

Orton was personally and artistically obsessed with crime. His plays comedically repeat taboo crimes again and again—blurring the line between normative behavior and criminality—amidst real legal changes involving theatrical censorship and conduct outside of theatres. By positioning the idea of crime as absurd, precisely at the moment when the crime of homosexuality was coming under public scrutiny for potential revision and repeal, Orton was able to call attention to the dangers of state regulation of morality and sexuality.

In his play *Entertaining Mr. Sloane* (1964), following a few years after the Wolfenden Committee issued its recommendations about changes to the law regarding homosexuality that had been in place since Wilde's lifetime, Orton argues that laws governing intimate relationships have only limited power over the manner in which both individuals conduct their private lives and families are actually constructed. *Entertaining Mr. Sloane* suggests, in a libertarian spirit, that individuals should be free to establish among themselves, contractually or otherwise, a multiplicity of familial and sexual arrangements. Two years later in 1966, just one year before the Sexual Offences Act was passed into law, Orton articulated a more radical critique of state laws in *Loot*.

Interestingly, considering that the thrust of the Sexual Offences Act was to decriminalize homosexual conduct *in private*, Orton's play *Loot* suggests that private spaces are equally subject to a corrupt state surveillance apparatus as public spaces. The play serves as an anarchic complaint about the dangers of state intervention into family and sexual matters.

### **Dramatic and Legal Context**

There are two sets of legal regulations worth exploring throughout this study examining gay drama and the law: those governing same-sex activity in the world outside the theatres, and those involving representations of homosexuality on the stage. The two sets of laws influence each other, and sometimes collide.

In his history of British homosexual law reform, Stephen Jeffery-Poulter illuminates how laws surrounding homosexuality have been slow to change because political reformers often hesitated to begin or enter the debate, lest they be thought to condone homosexual activity. Laws punishing homosexual behavior in England have roots in the Middle Ages, when Ecclesiastical Courts had the power to burn those convicted of sodomy. In 1533, Henry VIII reformed the court system as part of the Reformation and the crime came under the authority of state courts, which would still inflict the death penalty for it (Jeffery-Poulter 9). In the 1820s, although over a hundred crimes were removed from being capital offences, "buggery" remained on the books, in part because "[d]uring the debates on these reforms the Victorian MPs could not bring themselves to use the word buggery and instead referred to it as the crime 'INTER CHRISTIANOS NON NOMINANDUM' –'not named amongst Christians'" (9).

Finally, the death penalty was removed as the punishment in 1861; instead, life imprisonment was the new sentence given, or ten years for those attempting the crime.

The Criminal Law Amendment Act of 1885 actually widened the reach of the previous laws, in that it included not just acts of sodomy, but *any homosexual activity* between men in public or private. The governing language of the 1885 statute reads: “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.” The language here is quite broad; basically, anyone in the company of other men who might be interested in homosexual activity could be charged with gross indecency.

The British Lord Chamberlain banned all stage representations and discussion of homosexuality or homosexuals until 1958 (De Jongh, *Politics* 82). In 1958, because homosexuality was becoming more openly discussed, “Only ‘serious’ plays would be allowed, presumably because homosexuals were considered an improper subject for laughter” (*Politics* 83). Nicolas De Jongh notes, “‘Embraces’ of the homosexual kind or, worse, ‘practical demonstrations of love’ (as [the Lord Chamberlain] called them) ‘between homosexuals’ would still be outlawed. As a final concession, he solemnly announced ‘We will allow the word ‘pansy’ but not ‘bugger’” (*Not in Front* 90).

1967 proved to be a pivotal year for legislative reform of sexual morality. New laws were passed regarding homosexuality and abortion, and a law governing divorce was almost passed. Mark Donnelly argues that these legal reforms were based on a shift in the paradigm for thinking about the role of state regulation: “Reform essentially arose from the utilitarian philosophical position which held that the criminal law should be

used to serve the public good rather than to impose a particular pattern of moral behavior on individuals” (120). That shift for purposes of homosexual legal reform was recommended by The Wolfenden Report of 1956, which concluded that the purpose of criminal law “was to preserve public order and decency, and to protect the weak from exploitation. It was *not* to impose a particular pattern of moral behavior” (Weeks 165). The 1967 Sexual Offences Act decriminalized all homosexual conduct in England and Wales between adult men in private spaces.<sup>32</sup> That same year, abortion was legalized under certain conditions: “The new law permitted an abortion within the first 28 weeks of pregnancy provided that two doctors confirmed it was necessary either on medical or psychological grounds. Thus, for the first time, an abortion could be allowed on ‘social’ grounds, rather than exclusively on the narrow justification that a termination was required to safeguard the mother’s health” (Donnelly 120-21).<sup>33</sup> A bill to reform divorce was almost passed that year as well, but failed to get through because the legislators ran out of time; however, the Divorce Reform Act of 1969 introduced no fault divorce into Britain for the first time (Donnelly 121).

The laws governing “private” and “public” homosexuality, on stage and in the wider culture, later collided in spectacular fashion in 1982, when the director of Howard

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<sup>32</sup> The Sexual Offences Act only applied in England and Wales, not Scotland and Northern Ireland. The statute defined “two adult men” as older than twenty-one, whereas the age of consent for heterosexual activity was sixteen. In addition, the statute did not apply to the merchant navy and the armed forces. See Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet, 1990), 176. Scotland did not see homosexual decriminalization until The Criminal Justice Act of 1980. See Roger Davidson, “Sexuality and the State: the Campaign for Scottish Homosexual Law Reform, 1967-80,” *Contemporary British History* 20.4 (2006): 533-558. Northern Ireland did not decriminalize private homosexuality until the Homosexual Offences Order of 1982 as a result of the case *Dudgeon v. United Kingdom* (1981) in the European Court of Human Rights. The Republic of Ireland did not decriminalize until 1993 as a result of the European Court of Human Rights case *Norris v. Ireland* (1988).

<sup>33</sup> “In effect the responsibility for policing abortion passed from the police themselves and the courts to (usually male) doctors. There was no question, however, that abortion was now being defined in terms of a woman’s ‘right to choose’ (Donnelly 121).

Brenton's *The Romans in Britain* was "charged with attempting to procure an act of gross indecency between two males in defiance of the Sexual Offences Act" (*Politics* 246).

The play featured a simulation of male rape, although the rape is really a vivid allegory for the British colonization of Ireland. The Attorney-General intervened and the case was withdrawn, but not before Mr. Justice Staughton issued a ruling "that the Sexual Offences Act could, in theory, be applied to performances on stage and that the simulation of buggery on stage might constitute gross indecency" (*Politics* 246). The problem, as *The Guardian* noted at the time, was "The draftsmen...forgot to ensure that statutory as well as common law could not be invoked against the theatre" (qtd. in *Politics* 246). In other words, because the theatre was a public space, the Justice's ruling implied that even representations of homosexuality were not in the protected zone of decriminalization.

Part of the problem lay with the law's insistence on maintaining a fragile public/private dichotomy. This dichotomy breaks down most apparently in Orton's queer dramatic vision, as I will explore later in the chapter.

### **Coming Out: Noël Coward's *A Song at Twilight***

When three men published and signed an open letter proclaiming their homosexual identity to the *New Statesman* in 1960, they became the first British men to publicly divulge their gay identity to a society that legally condemned their acting on that identity. They advocated not just legal reform, but also the necessity for a larger cultural reform, as they were among the first to come out of the closet in a spectacularly public forum of a newspaper:



[“The homosexual situation”] is a problem only because of the prevailing attitude towards it, and because the law encourages such an attitude and hinders every attempt to overcome it. Even so, law reform, although essential, is only a first step; there will remain the much larger and longer task of dissolving centuries of accumulated and deeply ingrained misconception. (qtd. in Jeffery-Poulter 67)

“Coming out” became an important political focus of the emerging Gay Liberation Movement in both the United States and the United Kingdom. The British Gay Liberation Front formed in 1970; the organization promoted three central political aims: coming out, coming together, and eradicating sexism generally (Weeks 191). Coming out was a new phenomenon that bridged the transition from assimilationist political strategies to more liberationist ones. Assimilationist strategies downplayed differences between gays/lesbians and straight society, in order to advocate for legal reform on the basis of a shared humanity. Nikki Sullivan writes:

The aim of assimilationist groups was (and still is) to be accepted into, and to become one with, mainstream culture. Consequently, one of the primary tenets of assimilationist discourses and discursive practices is the belief in a common humanity to which both homosexuals and heterosexuals belong. And this commonality—the fact that we are all human beings despite differences in secondary characteristics such as the gender of our sexual object choices—is the basis, it is claimed, on which we should all be accorded the same (human) rights. (23)

The distance between legal and cultural reform—and between assimilation and liberation—is highlighted in Noël Coward’s swan-song, *A Song at Twilight* (1966). Coward’s last play makes a direct plea for homosexual legal reform in Britain on the basis of the real damage existing laws inflicted on gay men. The main character, Hugo Latymer, represents the liminal period between assimilation and liberation. The play ultimately critiques assimilation as a failed strategy that ruined lives, and works toward a fledgling liberationist politics. Hugo realizes that his assimilationist careerism, which caused him to conceal his homosexuality from the public in order to achieve fame—came at a great personal price that fills him with elegiac dread by play’s end.

Although reviews of the play throughout its production history, and scholarly criticism of the play, have always tended to downplay it as a quaint or lackluster product of an aging, increasingly irrelevant Coward, the play mirrors the cultural trajectory toward open visibility for gays and lesbians. The larger cultural changes in the sixties, when “gay men and lesbians began to see themselves as a specific, oppressed minority with its own identity and culture,” informed the work of Gay Liberation (De Jongh, *Not in Front* 87). *A Song at Twilight* was a commercially successful drama that, in the course of its performance—specifically at the end of Act I—“outs” itself as an explicitly gay drama, just as Coward a little less explicitly outed himself by performing in the main role on stage. Assimilation is positioned as a failed strategy, and the play points toward a liberationist politics.

Although a master of camp and the veiled gay code throughout most of his dramatic career, in plays such as *The Vortex* (1924) and *Design for Living* (1932), and a publicly closeted gay man himself, Coward saw the culture changing throughout the

twentieth century. In *Twilight*, he dutifully follows the censorship rule set out in 1958 that only “serious” discussions of homosexuality were allowed on the stage. *A Song at Twilight* adheres to the censorship regulations in the theatre, and although nominally a comedy, it is an earnest, elegiac response to the legal landscape of the 1960s: elegiac in the sense of a mourning for all of the gay lives marred by an oppressive legal regime. It is a political call for reform, painting a loosely autobiographical picture of a man whose life was plagued by the secrets he had to keep from the public.

Coward followed the debates surrounding homosexual law reform, as noted several times in his diaries. On 13 February 1966, just two months before *Twilight* premiered in London, Coward reflected on the imminent passage of the Sexual Offences Act:

The Homosexual Bill has passed through the House of Commons with a majority of fifty-five votes. I read the debate in the *Telegraph*. Really some of the opposition speeches were so bigoted, ignorant and silly that one can hardly believe that adult minds, particularly those adult minds concerned with our Government, should be so basically idiotic. However, now all will be well apparently and the law will be changed at the next session. Nothing will convince the bigots, but the blackmailers will be discouraged and fewer haunted, terrified young men will commit suicide. (*Diaries* 624)

The play takes place in a luxurious Swiss hotel room in 1966, in which the aging author Hugo Latymer spends time reflecting on the twilight of his life and career. Hugo is described in the stage direction as “an elderly writer of considerable eminence” (9),

which certainly sounds like Coward at that point in time. He lives with his wife Hilde, but the relationship is strained and infused with bitterness. Act I involves the entrance of Carlotta Gray, an actress who had an affair with Hugo many years before. She has come to convince Hugo into letting her publish their old love letters for her soon-to-be published memoirs. Publishing the letters would give Carlotta's book an added appeal and commercial success. When Hugo refuses, Carlotta blackmails him by divulging that she is in possession of another set of love letters: ones that Hugo wrote to his male secretary, Perry Sheldon many years before. The element of blackmail echoes Coward's thought in his diaries about the need for legal reform. Act I ends with the startling revelation of Hugo's homosexuality:

Hugo. What do you know about Perry Sheldon?

Carlotta. Among other things that he was the only true love of your life.

Good night, Hugo. Sleep well. (80-81)

If performed properly, this revelation should be a surprise for the audience. I attended the 2014 Hartford Stage production, directed by Mark Lamos, and there were audible gasps in the audience when this revelation was made. I imagine there were similar sounds in the 1966 production. There are few indicators that Hugo has homosexual tendencies, except for some muted interactions with his butler, a "startlingly handsome young man of about twenty-eight."

Coward said that the premise for the play came from W. Somerset Maugham's relationship with his secretary Gerald Haxton, and his later disavowal of that relationship. In Coward's play, Carlotta criticizes Hugo for referring to Perry Sheldon as merely an "adequate" secretary. However, what complicates this premise for the play is the fact

that Coward himself played the role of Hugo in the British production in 1966. Even though Coward tried to distance himself from the character of Hugo, there is clearly an autobiographical linkage there. Nicholas de Jongh develops the link: Coward “would pose as the sophisticated heterosexual, never quite finding the ideal woman. He lived off and through facades. In public he was all perfect pose” (*Not in Front* 127). Clive Fisher describes Coward’s embodiment of Hugo as that of a “live polemicist: by appearing on stage, even disguised as someone else, Coward was exposing himself in a way which was entirely uncharacteristic” (247). Fisher’s term “live polemicist” is a striking term of art that captures the metamorphosis Coward underwent in style and politics in his final play. He was coming out in his own spectacular fashion: not as directly as the brave men who wrote to the newspaper in 1960, but by presenting his physical body as the representation of the time period’s gay man, Coward was courageously making a stand of his own. His last performance should be considered a political statement suffused with Gay Liberationist ideals.

The character Hugo Latymer’s physical and emotional stagnation is reminiscent of the decrepit Oscar Wilde depicted in David Hare’s *The Judas Kiss* (1998), in which Wilde spends his last days drunk and lonely in an Italian flat, even though Hare continuously casts him as a Christ figure. Coward himself was physically declining when he played the part, and even though reviews were kind to him, it was noted that he had a difficult time remembering his lines and had to occasionally have the prompter’s help, along with the aid of his fellow actors (Fisher 250). In the 2014 Hartford Stage production of *A Song at Twilight*, directed by Mark Lamos, Hugo, played by Brian Murray, spent the bulk of the production slouched over, physically and emotionally

drained, in a chair. The play was an exercise in stagnation. The Hartford Stage production evoked the twenty-first century legal and cultural debates surrounding same-sex marriage, especially when Carlotta and Hugo discuss the laws of the 1960s:

Hugo. According to the law in England homosexuality is still a penal offence.

Carlotta. In the light of modern psychiatry and in the opinion of all sensible people and unprejudiced people that law has become archaic and nonsensical.

Hugo. Nevertheless it exists.

Carlotta. It won't exist much longer.

Hugo. Maybe so, but even when the actual law ceases to exist there will still be a stigma attached to "the love that dare not speak its name" in the minds of millions of people for generations to come. It takes more than a few outspoken books and plays and speeches in Parliament to uproot moral prejudice from the Anglo-Saxon mind. (105)

This moment in the play is the most earnest and political, but Coward problematizes any easy sympathy by making the character of Hugo rather unlikeable. He treats his wife Hilde dismissively, at times contemptuously, and is generally a misogynistic, hypocritical old prig. He cares everything for outward appearances, even if the reality of his marriage and inner life is grim. The bulk of his life has been in service of assimilationist goals, even though he is starting to realize the personal cost. Towards the end of play, after Hugo's same-sex relationship has been uncovered, he criticizes Hilde for spending time socializing and drinking with a friend, whom he labels "that leather-skinned old

Sapphist” (124). However, Coward seems to be criticizing Hugo’s life choices. Carlotta asks Hilde, “You don’t find it humiliating to have been used by him for twenty years not only as an unpaid secretary, manager, and housekeeper, but as a social camouflage as well?” (133). Hilde remarks, “The conflict within him between his natural instincts and the laws of society has been for the most of his life a perpetual problem that he has to grapple with alone” (136).

But Hilde is no helpless victim; in fact, she is the moral center of the play: her steadfast devotion to Hugo is not ultimately a pathetic show of powerlessness, but a pragmatic choice that she made with full knowledge of Hugo’s sexual proclivities. She admits to never having been in love with Hugo, either, but “thought that it was a most realistic and sensible arrangement and, what is more, I think so still” (136). Hilde, a German, was in love once with “one of my own countrymen, who was destroyed by my own countrymen in 1944” (136). It is ambiguous why the Nazis killed her lost love: was he Jewish? Gay? Whatever the reason, it goes unspoken, which deepens the play’s theme of repressed identity. Hilde “recognized [Hugo’s] need for a ‘façade’ and was quite content to supply it” (136), in order to extricate herself from post-War Germany. The two form a marriage of convenience that suits both of them, to a point.

It is ultimately Carlotta’s devotion to Hugo, despite his imperfections, that saves Hugo from public outing. Carlotta sees that Hilde has an admirable loyalty to Hugo, and agrees to return Perry’s letters. Hilde escorts Carlotta out and returns moments later, as Hugo painfully reads over some of the old love letters. The last moments of the play are evocative of the ending of Edward Albee’s *Who’s Afraid of Virginia Woolf* (1961), as a

married couple attempt to communicate on a new threshold of reality and communication:

Hugo. (after a long pause) I heard you come in.

Hilde. (almost in a whisper) Yes. I thought you did.

*Hugo continues reading the letter as*

*The curtain slowly falls.*

The future of Hugo and Hilde is uncertain and ambiguous. Will they continue in their imperfect yet sustaining relationship, or will they part ways? That interpretation can vary depending on directorial vision and actor performance choices. Textually, it seems they will stay in the pattern they've established over the years.

Reviews of *A Song at Twilight* during Coward's time, and for more contemporary productions of the play, have consistently been luke-warm. In his biography of Coward, Philip Hoare characterizes the reviews in 1966 as "eulogistic," and ultimately implies they praised the play more in the vein of a Lifetime Achievement award than for the merit of the actual production (503). Oddly, Coward wrote that the play was "far and away the best-constructed play I have ever written, and when I played it I knew as an actor that as a writer I had served myself very well; there is an almost mathematical precision to it that in no way detracts from the reality of it" (qtd. in Fisher 253). Perhaps the word "reality" is key to Coward's esteem for his final work. The play follows the letter of the Lord Chamberlain's law that only "serious" discussions of homosexuality were allowed on stage. Coward solemnly comes out in support of gay liberation. The age of the dandy was officially over; the poses were put aside in favor of a new



conception of gay identity, which would solidify in the 1970s through the Gay Liberation movement.

In the 2014 Hartford Stage production, when Hugo talked of his past relationship with Perry Sheldon, two young nude men were illuminated behind a scrim upstage to indicate his memory of that past, idyllic relationship. Coward certainly didn't call for any such flourish in the play's stage directions, but the directorial choice added a layer of contemporary relevance. Even though the *New York Times* was tepid in its praise of the Hartford Stage production, lamenting like almost all reviews of the play since its first production that it did not match up to Coward's earlier works, it did note that, "To suppose that the play would someday be presented with nude men embracing on the stage, before audiences that might easily include men married to each other, would have seemed sheer folly. And to suppose that its themes would still feel relevant — well, Mr. Coward might well have imagined that" (Gold). Even though the play was a didactic plea for homosexual law reform in 1960s Britain, Coward also understood the limitations of law in terms of cultural prejudices and envisioned his play as a way to help to influence those attitudes, even in a small way. Most recently, the Hartford production attempted to catalyze cultural acceptance of gay lives as a way of increasing support for the contemporary legal reform movement involving same-sex marriage.

### **Joe Orton's Critique of Law: Queer Families & the Surveillance State**

As Coward was entering into his twilight, Joe Orton's star was rising. If Coward for the most part worked within the censorship laws surrounding productions of his plays, Orton was interested in anarchically dismantling all legal regimes in his dramatic

universe. Like Wilde, Orton spent some time in prison; unlike Wilde, he seemed to enjoy at least the nominal status of criminal. Orton and his lover were charged with defacing library books in 1962 and sentenced to six months in jail. In *Prick Up Your Ears: The Biography of Joe Orton* (1978), John Lahr illuminates how prison affected Orton's attitude toward legal authority:

Orton was never abused by the police, but he felt threatened. 'I wasn't actually beaten up,' he said. 'But they hovered around...I found that the best thing was to be as nice as possible and as utterly vulnerable as possible because it was no use standing on your rights once they've got you in their power.' Privately, he contended that their severe sentence was "because we're queers." (Lahr 86)

According to Lahr, "Orton found a focus for his anger and a new detachment in his writing" from his experience in prison (90). This anger and detachment would focus most directly on legal themes in his plays *Entertaining Mr. Sloane* (1964) and *Loot* (1966). Whereas Coward's play fairly directly calls for legal reform, Orton's plays problematize the notion of law in order to question the need for government regulation of sexuality and family arrangements.

**"An Arrangement to Suit All Tastes": Contractual Families in *Entertaining Mr. Sloane***

Nicholas de Jongh has also found it fruitful to compare Coward's *A Song at Twilight* with Orton's *Entertaining Mr. Sloane*, claiming the two plays could

have been written in two different centuries for all their similarities...Coward's style of camp depended upon languid affectation. Here it had become so decrepit and listless that it could not even aspire to artificiality. Homosexuality, in his twilight dramatizing, is the cause of guilt, concealment and evasion. It is the cause of blackmail by virtue of reveal-all letters. *Entertaining Mr. Sloane*, by contrast, is the sight and the sound of the future before it occurs. Homosexuality loses its old gloss. The stereotypes vanish. The accretions of negative myths and fictions are discarded—a few years before the designation “gay” replaces homosexual and begins to be taken as an identifying badge of pride. A great cultural change is coming on and *Entertaining Mr. Sloane* is a faint premonition of the changing of consciousness. (*Not in Front* 87).

De Jongh's juxtaposition of *A Song at Twilight* and *Entertaining Mr. Sloane* is admirable; however, he mischaracterizes Coward's play as somehow outdated or responsible for circulating outdated stereotypes. *Twilight* is about the need to bury the self-defeating stereotypes surrounding homosexuality in order to move toward some semblance of gay liberation; it is a mistake to dismiss Coward's play as an already outdated artifact. *Twilight* is gesturing towards the future, and by Coward himself embodying the role of Hugo Latymer, he participated in a theatrical “coming out,” a process that Gay Liberationists would be championing by the end of the decade.

However, to be fair to Orton, he does gesture far beyond the time period in his plays, towards a twenty-first century, progressive vision of intimate relationships and family law. Orton comically presents gender, sexuality, and law as unstable, de-centered

forces that are constantly shifting and responding to new circumstances and desires. In brief, the plot of *Entertaining Mr. Sloane* is as follows: an attractive young man, Sloane, is brought into a flat inhabited by a woman, Kath, her brother Ed, and their father Kemp. Sloane is invited to rent a room in the flat, although it is implied he will be paying through sexual services to both Kath and Ed, who are more than interested in taking such payment. The father, Kemp, recognizes Sloane as the murderer of his employer, and threatens to tell the police; this causes Sloane to savagely kick Kemp to death. The third act of the play involves the family renegotiating its boundaries and contractual terms, resulting in an arrangement by which Ed and Kath will sexually share Sloane, in exchange for not turning him into the police for murdering their father.

*Sloane* works in an absurdist vein, akin to Harold Pinter, and the dramatic universe presented in Orton's play seems so outrageous and far-fetched that it was allowed to be performed despite the contemporaneous theatrical censorship regulations by the Lord Chamberlain. *Sloane* revolves around an emerging "family" that is constantly negotiating, and circumnavigating, its own illegality. There are hints of incest, homosexuality, prostitution, and rape throughout the play, although very little physical touching occurs on stage. The play is not "about" homosexuality in a central sense, but rather about intimate relationships and sexuality more generally, which is why I think it did not meet serious objections with the Lord Chamberlain. Orton's subversion of the typical homosexual stereotypes theretofore presented on the stage probably also helped allow the play's depictions of homosexuality to slip through censorship regulation.

The vaguely sinister, but comedically absurdist comedy, an influential predecessor to Pinter's *The Homecoming* (1965), arises from the familiar British

drawing-room setting being subverted by the representation of a working-class flat and illegal and taboo activities. In fact, *Sloane* was performed a year before *The Homecoming*, indicating Orton's influence on that play's unconventional contractual family arrangement. *The Homecoming* is the heterosexual version of *Entertaining Mr. Sloane*. Perhaps that is partly why *The Homecoming* eclipsed *Sloane* as a canonical text. Orton wrote that "*The Homecoming* couldn't have been written without *Sloane*. And you know, in a way the second act—although I admire it very much—isn't true. Harold [Pinter], I'm sure would never share anyone sexually. I would. And so *Sloane* springs from the way I think. *The Homecoming* doesn't spring from the way Harold thinks" (qtd. in Lahr 131). Orton links his own sexual identity to the quality of his drama.

Biographical criticism seems appropriate and at times necessary when investigating a body of texts like "gay drama."

*Sloane* involves a sinister visitor intruding into a space, a Pinteresque trope that dramatically works to heighten tension and interest. *Sloane* is an ambiguous figure and hard to categorize, but he is sexualized and supposed to be very attractive. He is open to sex with both men and women, and has blood on his hands but may be an innocent victim. Ed and Kath are the brother-sister pair who welcome him into the home and both sexually desire him. It is inferred that Kath could very well be *Sloane*'s mother in an Oedipal echo. The father of the household, Kemp, recognizes *Sloane* as the man who killed his boss, but it seems that *Sloane* killed the man after he threatened to publish pornographic photos of *Sloane*.

*Entertaining Mr. Sloane* was "the first play in which homosexuality was a simple if sexy fact of life" (De Jongh, *Politics* 120). De Jongh notes, "In style, though not in

content, the play was oblique and ambiguous. Orton did not beat about the bush, but his diction was veiled in the euphemism of lower-middle-class pseudo-gentility. For his time, though, Orton was a homosexual radical” (*Politics* 119). Sloane as a character is incapable of being categorized: he simply gives his body to the men or women who can help him. The character Ed is the closest Orton gets to a gay character in the play. Ed is portrayed as a masculine, “principled” character, who happens to be interested in very young men. Orton wrote in 1967, “In *Sloane*... I wrote a man who was interested in having sex with boys. I wanted him played as if he was the most ordinary man in the world, and not as if the moment you wanted sex with boys, you had to put on earrings and scent. This is very bad, and I hope that now that homosexuality is allowed, people aren’t going to continue doing the conventional portraits there have been in the past” (qtd. in Lahr 156). Literary critics are divided over whether Orton can even be considered as producing gay drama, because the characters are mainly bisexual. John Clum notes, “While this bisexuality may seem transgressive, it also denies the possibility of exclusive homosexuality. Orton’s boys—Sloane, Hal, Dennis, Nick—are never gay” (105). Alan Sinfield similarly questions whether the bisexuality isn’t a way for Orton to avoid offending his audiences, suggesting it “keeps a distance from very many actual homosexuals; it was not how Orton lived, or others that he knew” (qtd. in Clum 105).

Although Sloane describes his parents as wealthy, there is a sense that he could very well be lying, and in the first act the audience member/reader gets the impression he could very well be Kath’s son. Sloane is put forth as an orphan boy who could be a substitute for the child that Kath had to put up for adoption. Kath asks Sloane to become part of her family:

You'll live with us then as one of the family?

Sloane. I never had no family of my own. (67)

In this there are hints of mixed-up identities and the misplaced babies of Wilde's *Earnest*.

But Orton tries to make the audience much more uncomfortable than Wilde ever did.

The hint of incest appears when Kath begins flirting with Sloane:

Sloane. You're not alone.

Kath. I am. (Pause.) Almost alone. (Pause.) If I'd been allowed to keep my boy I'd not be. (Pause.) You're almost the same age as he would be. You've got the same refinement.

Sloane. (Slowly.) I need...understanding.

Kath. You do, don't you? Here let me take your coat. (Helps him off with his coat.) You've got a delicate skin. (Touches his neck. His cheek.) He shudders a little. Pause. ...

Sloane. (clearing his throat.) How much are you charging? I mean---I've got to know. (68-9)

The familial and sexual arrangements in Sloane are constantly in flux, approaching and then retreating from the taboo subjects of incest, prostitution, and homosexuality. Sloane asks Kath how much she is charging, with the hint not only of the room rate but also for her body.

Echoing the Oedipus myth, as Orton himself acknowledged in 1964 (Lahr 147), the boy and his mother consummate their relationship at the end of Act One. This was the part of the play that caused the Lord Chamberlain the most consternation.

The funny thing about the Lord Chamberlain,' Orton said, 'was that he cut all the heterosexual bits and kept in all the homosexual bits.' The Lord Chamberlain disallowed Sloane's pinching of Kath's breasts and warned that any simulation of intercourse when she rolled on top of him at the end of Act I would be interpreted as obscene. ... Homosexual passion could not be so explicit; and the play benefited from the necessity to be oblique. (Lahr 159)

Over the course of the play, it is not so much Sloane who emerges as the play's main focus, but rather the character Ed, a closeted gay man who orchestrates his father's murder and rewrites the rules governing family morality in order to fulfill his sexual desire for Sloane. The underlying father-son conflict is revealed when Kemp discloses why he hasn't spoken to Ed in twenty years. The falling out was a result of Kemp discovering his son Ed participating in homosexual activity:

Kemp. Then one day, shortly after his seventeenth birthday, I had cause to return home unexpected and found him committing some kind of felony in the bedroom.

Sloane. Is that straight?

Kemp. I could never forgive him.

Sloane. A puritan, are you?

Kemp. Yes.

Sloane. That kind of thing happens often, I believe. For myself, I usually lock the door.

Kemp. I'd removed the lock. (71)



We have here a direct reference to the illegality of all homosexual activity, whether in public or private, that had been the governing statute since the Criminal Law Amendment Act of 1885. When *Sloane* premiered, though, that law was being negotiated and contested to only outlaw public acts of homosexuality, and to allow its legality, if not sanction its existence, in private spaces. Sloane's reaction to Kemp characterizing Ed's act as a "felony" indicates Orton's view of the antiquated laws surrounding homosexuality: "A puritan, are you?" Sloane's comment supports the direction that the law was heading in the upcoming Sexual Offences Act of 1967: "That kind of thing happens often, I believe. For myself, I usually lock the door." In other words, the "problem" of homosexuality was not going away and all it really needed was the protection of privacy. Kemp's reply, "I'd removed the lock," is the 1885 old legal ideology, which is being eclipsed by more progressive legal and cultural reforms favoring privacy: "For myself, I usually lock the door."

Kemp policed his son's sexual activities, rather than allowing the privacy a lock affords. His interest in law and order, however, exists only to the extent that it promotes a superficial appearance of propriety:

Sloane. Why didn't you go to the police?

Kemp. I can't get involved in that type of case. I might get my name in the papers.

Sloane. I see your point of view. (73)

Romantic love doesn't exist in Orton's dramatic world, but Ed feels as close to love for Sloane as Orton permits a character. Ed is jealous that Sloane spends time with

Kath and some friends. When he discovers that his car is being used by Sloane and his friends to take women out, Ed feels sexual jealousy:

Ed (emotionally). Oh, boy...Taking birds out in my motor.

Sloane. Would you accept an unconditional apology?

Ed. Telling me lies.

Sloane. It won't happen again.

Ed. What are your feelings toward me? (111)

When Ed discovers that Sloane has been beating his father and has impregnated his sister, his initial indignation quickly subsides at the chance of cementing his relationship with Sloane. "My word, you're unforgiveable. (Pause.) I don't know whether I'm qualified to pronounce judgment" (120).

The play turns toward its climax when Ed decides to forgive Sloane his transgressions in order to keep him as his own sex-slave/employee. He forgives a murder in order to allow his own gay relationship with Sloane the sanctioned privacy he desires for it:

Appeal to his better nature. Say you're upset. Wag your finger perhaps. I don't want you to be er, well...at each other's throats, boy. Let's try...and...well be friends. (Pause.) I've the fullest confidence in your ability. (Pause.) Yes...well I'm going out now. (Pause.)...it's a funny business en it? ... I mean...well, it's a ticklish problem. (Pause.) Yes...it is. (123)

Suddenly, Ed realizes that someone is willing to actually murder his father (echoing the Oedipal myth), whose presence rankles Ed and prevent him from constructing his own private relationships in a dwelling place.

Laws surrounding morality and sexuality become contested and relativized, and the characters work to rationalize Sloane's murder of Kemp in order to position law as a relative, ultimately meaningless positionality:

Kemp. You're a criminal.

Sloane. Who says I am? (123)

Indeed, Sloane's crime is quickly forgiven in light of the ascendancy of contractual sexual exchange by the end of the play. Next to crime, another theme that runs through *Sloane* is the idea of victimization and blamelessness; Orton portrays characters that transgress laws, but those same laws have also victimized the characters in some way. Every crime in the play has some kind of justification. Kath may have been raped by Ed's friend; even though Kath is comedically portrayed as a sex-starved simpleton, there are hints of her own victimization. Sloane may have been the victim of a pedophile, which is why he ended up killing the man who was Kemp's old boss; and Ed's complicity in his father's murder resulted from being unjustly branded a criminal and *persona non grata* by his father.

After Sloane makes a speech about being victimized by a pedophile, Kemp refuses to sympathize with the story and labels Sloane a queer: "Liar...lying little bugger. I knew what you was from the start" (126). Kemp says he is going to call the police, at which point Sloane beats him to death, an artistic vehicle for Orton to express his rage against a homophobic society.

The characters negotiate their own interpretation of laws in order to position their own interests. The law is also positioned as an inscrutable force, subject to random change depending on political will and interpretation.

Ed. They'll hang him.

Pause.

Kath. Hang him?

Ed. They might. I'm not sure. I get confused by the changes in the law.

(137)

This exchange sounds like a direct reference to the uncertain trajectory of the homosexual law reform movement in the 1960s; the Wolfenden report was constantly debated in Parliament, but nothing was passed into law for many years, keeping the status of gay men in limbo.

The ending of *Sloane* has other striking parallels with Pinter's *The Homecoming*, namely the negotiation of a contract among adults entering into a non-normative sexual arrangement. It should be noted here, in a relevant biographical linkage, that Orton and his lover Kenneth Halliwell drew up wills naming "the other as sole beneficiary" (Lahr 3). Instead of turning Sloane into the police, and in order to keep Kath from having Sloane all to herself, Ed thinks of "an arrangement to suit all tastes" (147). Ed and Kath will share Sloane sexually. Ed says, "I've got no objections if he visits you from time to time. Briefly. We could put it in the contract. Fair enough?" (149). Pinter must have been cognizant of this exchange when he fleshed out the ending of *The Homecoming* a year later, when Ruth and Lenny negotiate the terms of her sexual contract:

Ruth. I would naturally want to draw up an inventory of everything I would need, which would require your signatures in the presence of witnesses.

Lenny. Naturally.

Ruth. All aspects of the agreement and conditions of employment would have to be clarified to our mutual satisfaction before we finalized the contract. (93)

One response to these emphases on contractual familial and sexual arrangements is that they are a logical legal response to the issue of state-control of private relationships: allow people to enter into private contractual relationships, rather than be governed by universal standards. Orton's comedy does not end in marriage; in fact, the characters explicitly refuse that state-sponsored solution to their lives several times. As Kath says, "I don't mind about marriage as long as he doesn't leave me" (148). We are left with a queer family: a family that escapes neat categorization, but also one based on a private contractual arrangement of marriage. The individuals within that family queerly avoid reductive labels; they turn to the flexibility of contractual arrangements to define their destinies, not a state-sponsored decree of their relationships' validity. Criminal laws of the state regarding murder, prostitution, and homosexuality are ignored in the play, and private contracts become the defining boundaries of personal relationships. However, these "private" contracts are queered in the play, performed as they are in a public forum, indicating that the public/private binary of family relationships and sexuality does not have rigid boundaries. In that sense, Orton's play criticizes the 1967 Sexual Offences Act before it is passed, noting its oppressive policing of "private" spaces, and instead

encourages the law to move beyond a private/public conceptualization of intimate relationships.

Both Coward and Orton belong in a canon labeled “gay drama,” to be sure, but Orton’s vision is also queer because he moves beyond and critiques identity categories. Orton presents a broader vision of acceptable intimate relationships and “arrangements,” contractual or otherwise. Coward’s character Hugo Latymer is revealed to be a gay man oppressed by laws that, if changed, according to the play, could help to lessen that oppression and result in some semblance of gay liberation. Orton, on the other hand, conceives of the law as a constantly shifting, uncertain locus of authority; as Ed says, “I get confused by the changes in the law” (137). This line reflects the uncertain trajectory of the homosexual law in the 1960s as the Wolfenden Report was debated. The political process shaped the law and in turn the law became subject to the vagaries of popular will. With the exception of Ed, Orton doesn’t present gay characters; instead, he presents characters freed from identity labels.

In terms of their relationship with law, Orton’s plays enact a queer legal theory of family. Graeme Austin writes, “Queer legal theory contests the desirability of advancing the causes of sexual minorities within the confines of a liberal, rights based agenda” (46). Orton is not characterizing gay liberationists because he considers state-sponsored legislation as irrelevant, and potentially damaging, to the ordering of human lives and relationships, and because he does not characterize gay identity on the stage. It is in Orton’s libertarian, contractual emphasis on “An arrangement to suit all tastes” that the linkage to a progressive, queer legal theory can be found.

Orton puts forth a queer, libertarian approach to marriage and family – a celebratory if farcical vision of myriad personal relationships, marital or otherwise. Legal scholar William Eskridge writes, “Modern family law in ... [the twentieth] century has been characterized by a shift in emphasis from status to choice, from the status-based roles imposed by communal tradition to the consensual duties created by contract” (277). Eskridge was elaborating on Sir Henry Maine’s statement that “the movement of progressive societies has hitherto been a progression from Status to Contract.” Indeed, by avoiding an essentialized formulation of gay identities on the stage, *contra* Coward’s Hugo Latymer, Orton mirrors Maine’s theory of the contractual trajectory of family law. This trajectory played out in both British and American law over subsequent decades, and in many ways it paved the way for legal recognition of same-sex marriage in both countries. Although same-sex marriage has been grounded in rights-based identity politics and legal theories, its gradual cultural acceptance has been helped by general societal shifts toward characterizing marriage as a contractual arrangement that can be formed and broken at will. These changing legal conceptualizations of intimate relationships, as mirrored in Orton’s prescient plays with their emphasis on accepting a multiplicity of adult relationships, contributed to the gradual legal passage of same-sex marriage laws in the twenty-first century.

Scholars have varied in their reactions to Orton’s parodic portrait of a modern family, often indicating more their own cultural moment. In 1988, Bert Cardullo expressed his disgust in *The Explicator* at the “profoundly disturbing” vision that Orton prophetically conjures: “writing a parody on the Oedipal theme in 1964, Orton foresaw at the same time the age of test-tube babies, sperm banks, single-parent families, and

homosexual fathers and mothers” (51). Cardullo is right that Orton was prophetically envisioning some semblance of these things; however, Cardullo’s characterization of single-parent families and gay and lesbian parents as “profoundly disturbing” indicates that twenty-five years after *Sloane* was published, scholarly interpretations were built on the political and cultural biases of the 1980s.

What is legitimately disturbing about *Entertaining Mr. Sloane*, though, or somewhat unsettling for some people, is the suggestion that because law is not ever Law—not some static set of dictums and clear regulations—people are free to negotiate their own values of ethics and morality. This can be considered a positive indication of liberty, hence the libertarian strand of thought in the play, or it can lead to a more nihilistic, anarchic view of a society in which no person or institution deserves the authority that law provides. These ideas come to full fruition in Orton’s play *Loot*.

### ***Loot: On the Cusp of the 1967 Sexual Offences Act***

*Loot*, Orton’s dramatic diatribe against the British police, and against law as a legitimate societal authority, is a response to the contemporaneous legal reforms being implemented regarding homosexuality. The same law that ensnared Wilde was still in place in 1966 when *Loot* was first performed. Men who engaged in same-sex practice, even in the confines of a home, were subject to arrest and prosecution. The 1967 Sexual Offences Act would finally decriminalize homosexual conduct in private spaces, ostensibly protecting same-sex intimacy from certain intrusions by the state. *Loot* premiered in the year before this law was passed; the play can be read as a critique of a corrupt legal system and surveillance state. Orton suggests that even if legal reforms



came, queer individuals would still be subject to disturbing surveillance and infiltration of their lives.

Homosexual law reform involved the push to enact laws that decriminalized homosexual conduct in private, but *Loot* critiques homosexual law reform efforts as insufficient and actually dangerous because there are no such things as secure private spaces when a police force is corrupt. The proposed 1967 Sexual Offences Act actually required a policing of the boundaries between public and private spaces, *Loot* reminds us, with the constant threat of infiltration of any space.<sup>34</sup> Because the play's performance transforms a private space into a public one within the space of the theater, Orton is trying to suggest the limitations of the proposed legal reform. In this sense, *Loot* stands in direct contrast to Coward's political and legal reform efforts in *A Song at Twilight*. Coward's play seems to suggest that allowing gay men private spaces for their sexuality will result in gay liberation. Orton, on the other hand, suggests in *Loot* that there are ultimately no such things as private spaces protected from the forces of societal and government surveillance.

Orton's biography illuminates the play's meaning. Not only did Orton think he was discriminated against in prison because of his perceived homosexuality, but he was almost denied a visa to visit the United States for the Broadway rehearsals of

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<sup>34</sup> Jeffrey Weeks notes that the 1967 Sexual Offences Act "absurdly restricted the meaning of 'private': for the sake of the Act, 'public' was defined as meaning not only a public lavatory but anywhere where a third person was likely to be present" (176). Mark Donnelly describes the consequences of the law: "The Act never challenged the assumption that homosexuality was 'abnormal', and it insisted that individual freedoms in this area could be exercised only behind closed doors. Definitions of 'public decency' meant that activities such as importuning in public lavatories and cruising grounds remained offences. The police were keen to enforce this distinction between private and public behavior: between 1967 and 1976 the number of prosecutions of males for indecency trebled and the number of convictions quadrupled. Thus the Gay Liberation Front, which was founded in October 1970, was less than satisfied with the 1967 Act, insisting that further change had to recognize the absolute validity of homosexuality as a sexual orientation." Mark Donnelly, *Sixties Britain: Culture, Society and Politics* (London: Pearson, 2005), 120.

*Entertaining Mr. Sloane*; he was asked about his criminal history and was asked whether he was a homosexual, which he denied (Lahr 174). C.W.E. Bigsby writes, “*Loot*, completed in October 1964, was the first evidence of a shift in Orton’s work away from the Pinter-influenced absurdism of the early plays to the absurdist world of anarchic farce. It was very clearly an act of public revenge for the humiliations society had inflicted upon him in an equally public way” (41). Bigsby’s term “anarchic farce” perfectly characterizes the energy of *Loot*, and especially its thematic insistence on destabilizing every possible avenue for legal and moral authority.

Orton’s sendup of law’s hypocrisy not only reflects his personal experience in prison, but also has contemporaneous historical resonance. There was a sense in much of the British press coverage of the time that the legal punishments being meted out for homosexuality in private were inconsistently and incompetently applied. The real push for homosexual law reform in Britain—the drive to revisit and revise the Criminal Law Amendment Act of 1885—began after the Crown mishandled the gross indecency trial of Lord Montagu in 1953.<sup>35</sup> Lord Montagu’s trial was among several other high-profile cases that brought the current laws into closer public scrutiny. (One prominent case

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<sup>35</sup> See Weeks, 161-62; Harry Mount, “Dandy peer and the sex trial that changed Britain: Lord Montagu, who’s died at 88, was at the pinnacle of society – until he was jailed for homosexuality,” *Dailymail.com*, 31 August 2015. Web. 6 February 2016. Lord Montagu, who died in 2015, was a young aristocrat caught up in a sensational trial reminiscent of the Wilde trials in its press coverage and general public interest. Originally accused by two boy scouts of molestation in 1953 (after he had accused them of theft), Montagu’s trial on the charge was botched and he was awaiting a retrial when the Crown brought a new charge against him. Montague and Peter Wildeblood, a Daily Mail reporter, were charged in 1954 with conspiring to commit gross indecency with two British airmen. The Crown promised immunity to the airmen if they agreed to testify against Montague and Wildeblood. In the trial, the prosecution quoted from the Wilde trial and drew similarities to that case, such as the difference in class position among the men: “It is a feature, is it not, that inverts or perverts seek their love associates in a different walk of life than their own?” (Weeks 161). The two men were convicted of committing private homosexual acts and spent over a year in prison. Although an apparent repetition of the Wilde trial, Montagu’s trial met with public debate over the way he was treated. Public opinion was changing, and the movement for homosexual law reform continued for the next fourteen years until the 1967 Sexual Offences Act was passed.

involved distinguished actor Sir John Gielgud, who pled guilty to attempting a homosexual act in a public lavatory and was fined in 1953.) Montagu's trial was botched and declared a mistrial due to shoddy police work and corruption. His residence was searched without a warrant, they refused him access to a lawyer, and his passport was altered while in police custody (Jeffery-Poulter 17). When Montagu and others caught up in the scandal were convicted, the public was divided over the justice of the result. The *Sunday Times* penned an editorial in 1954, "Law and Hypocrisy," calling for legal reform:

The law, it would seem, is not in accord with a large mass of public opinion. That condition always brings evil in its train: contempt for the law, inequity between one offender and another, the risk of corruption of the police...The case for a reform of the law as to acts committed in private between adults is very strong. The case for an authoritative enquiry into it is overwhelming. (qtd. in Jeffery-Poulter 18).

The "authoritative enquiry" came in the form of the Wolfenden Committee's work and eventual report in 1956, which recommended homosexual law reform. However, because British politicians were reluctant to publicly engage in the debate, the actual legal reforms were delayed eleven more years until 1967. Although a portion of the public was outraged at the hypocrisy apparent in the Montagu case, the actual subject of homosexuality was still fraught with potential political peril for those seriously engaged in promoting policy changes.

In *Loot*, Detective Truscott is Orton's characterization of a corrupt police authority and the laws they enforce. Truscott's hypocrisy reflected the public unease

over the Montagu trial, but the character was also based on an actual person, Detective Sergeant Harold Challenor, who made news as a corrupt and brutal policeman in 1964 (Lahr 196).

Truscott: The process by which the police arrive at a solution to a mystery is, in itself, a mystery. ... It's for your own good that Authority behaves in this seemingly alarming way. (With a smile.) Does my explanation satisfy you?

McLeavy. Oh, yes, Inspector. You've a duty to do. My personal freedom must be sacrificed. I have no further questions. (250-51)

Orton suggests that the solution the Sexual Offences Act provides—giving homosexuality free reign in private spaces only—has limited consequence because the boundary between private and public spaces needs to be policed by a corrupt civil authority. The need for surveillance of the boundaries results in an oppressive regime. As Alan Sinfield claims in his discussion of the 1967 law's formulation of the public/private dichotomy, “the idea of private space might seem to free an autonomous zone for self-expression, but the effect, rather, is a focused policing of the border between the two” (*Out on Stage* 239). Orton puts queer pressure on the private/public binary, and exposes it as insidiously policed by an authority with no regard for due process:

Fay. You must prove me guilty. That is the law.

Truscott. You know nothing of the law. I know nothing of the law. That makes us equal in the sight of the law.

Fay. I'm innocent till I'm proved guilty. This is a free country. The law is impartial.

Truscott. Who's been filling your head with that rubbish? (254)

*Loot* is a farce about the nature of crime, and Orton revels in presenting characters that transgress against written and unwritten codes. The bisexual robbers, Hal and Dennis, are sleeping together when they are not robbing banks. They bring the money home and Hal thinks of a perfect place to hide the loot: his mother's coffin. They remove the corpse from the coffin, stuff her into a wardrobe, put the money in the coffin, and undress the corpse so the body can't be identified. As they remove the corpse from the coffin, Hal and Dennis discuss how their crime is so shocking and new there is not a name for it:

Dennis. Seems a shame really. The embalmers have done a lovely job.

*They lift the coffin from the trestles.*

There's no name for this, is there?

Hal. We're creating a precedent. Into the cupboard. Come on.

*They tip the coffin on end and shake the corpse into the wardrobe.*

(208)

This performance of a crime so great it has no name, evokes the "unspeakable" crime of sodomy in the Victorian era. But Orton is concerned with crime and taboo more generally, and works to truly shock the audience with a character's casual and disrespectful handling of his mother's dead body.

Just as with *Entertaining Mr. Sloane*, the Lord Chamberlain was not concerned with homosexuality in the play, partly because the sexual relationship between Dennis and Hal is oblique; once again Orton's characters have a sexuality that defies easy categorization and stereotype. In part, this choice may be a pragmatic solution to

generating mainstream commercial success for his plays, something that John Clum and Alan Sinfield criticize; however, Orton's vision of gender and sexuality is queer, not gay, and I would suggest this dramatic strategy was just as politically and legally productive as the representation of gay characters like Coward's Hugo Latymer.

Orton is not writing a play "about" homosexuality; rather, the play is about the nature of crime: what constitutes crimes, and how and why crimes make us uncomfortable. The Lord Chamberlain was instead concerned about the treatment of the corpse as potentially obscene, and demanded the following before a license was given:

1. The corpse is obviously a dummy.
2. The corpse remains fully clothed throughout the play and is not undressed, even behind a screen, at any time; and the accompanying dialogue is adjusted accordingly. (qtd. in Lahr 189)

Some audience members were still offended by the play: dozens of people left the touring production performance in Bournemouth, upset with, as *The Times* reported, "dialogue which uses the word brothel and which satirizes sex, patriotism, death and the law" (qtd. in Lahr 207). Police had to attend the performance in Manchester to ensure public safety (Lahr 207), but by the time it arrived in London, there was general critical acclaim and commercial success for the play, and Orton won the 1966 *Evening Standard* Award for Best Play.

Although the play is a farce, it has serious undertones. Orton wrote in the production notes for the American production, "Loot is a serious play ... Ideally, it should be nearer *The Homecoming* than 'I Love Lucy' ... The play shouldn't be one long giggle—there should be depths" (Lahr 200). Indeed, Truscott is a somewhat sinister

character, especially in certain moments of physical violence when he savagely beats Hal:

*Truscott kicks Hal violently. Hal cries out in terror and pain.*

Truscott. Don't lie to me!

Hal. I'm not lying! ...

Truscott (shouting, knocking Hal to the floor). Under any other political system I'd have you on the floor in tears!

Hal (crying). You've got me on the floor in tears. (235)

In a final indication of the police's corruption, Truscott takes a bribe from Hal to keep the robbery a secret. After Mcleavy tries to get another police officer to intervene, Truscott has him arrested and agrees to have him killed in prison. Mcleavy, the one character who had respect for the law and legal authority, ends up being falsely imprisoned:

Mcleavy. You can't do this. I've always been a law-abiding citizen. The police are for the protection of ordinary people.

Truscott. I don't know where you pick up these slogans, sir. You must read them on the hoardings. (274)

The ending of *Loot* echoes *Sloane's* ending, in which Hal, Dennis, and Fay might set up a bisexual love-triangle, but don't only because of the way that would appear; in other words, the private space of the flat is subject to the public surveillance of state and society:

Hal (pause, to Dennis). You can kip here, baby, Plenty of room now.

Bring your bags over tonight.

*Fay looks up.*

Fay (sharply). When Dennis and I are married we'd have to move out.

Hal. Why?

Fay. People would talk. We must keep up appearances. (275)

The ending of *Loot* collapses the private/public binary; after all, the “appearances” that Fay references are consistently exposed as bogus. *Loot* ultimately indicates that as long as the State is given authority over matters concerning intimate relationships and sexuality, every individual is in a public space of state control.

## Conclusion

Coward and Orton were two of the most prominent gay dramatists engaging in cultural debate over the place of homosexuality in Britain, on stage and off. In terms of the law, these playwrights positively contributed to the legal reform efforts culminating in the 1967 Sexual Offences Act. Although Orton was skeptical of any legal regulation of intimate relationships and sexuality, his plays are ultimately an argument for legal reform. Everyone who attended and engaged with one of these popular plays became a part of that debate to a degree. The plays' commercial success indicates that they positively contributed to cultural and legal reform. Those reform efforts would continue in Britain with alternative theatre companies like Gay Sweatshop, which began mounting more directly political productions in the 1970s.

Gay Sweatshop also included women in the productions and involved issues pertaining to lesbians. For example, the theatre company produced *Care and Control* (1977), scripted by Michelene Wandor; the play was a dramatization of actual court cases involving legal disputes over lesbian mothers' custody rights over their children. This



strategy of using legal controversy as the basis for theatrical performance was similar to what Moisés Kaufman would later pursue in *The Laramie Project* and *Gross Indecency* in the United States.

But in a central sense, the 1967 Sexual Offences Act and the subsequent abolition of theatrical censorship in Britain marked a turning point in representations of gay characters and the focus of British gay drama. Of course, legally speaking, homosexual *sex* was still only allowed in private spaces—hence the outrage over the simulated male rape in Brenton’s *The Romans in Britain* (1980)—but with the abolition of censorship, representations of same-sex intimacy, like kissing, were gradually introduced. Sometimes dramatists would test their newfound freedoms for the purpose of shocking audience members out of their complacency: the In-Yer-Face theatre of the 1990s, for example. Mark Ravenhill’s *Shopping and Fucking* (1996) pushed dramatic representations of homosexuality to the threshold, and occasionally past the threshold, of obscenity and pornography. The threshold was now obscenity, though, not homosexuality or same-sex intimacy *per se*. In other words, all forms of sexuality on the British stage were now theoretically governed by obscenity laws. Homosexuality did not have its own subset of proscriptions.

In the United States, however, these debates would continue for several more decades on stage and in courtrooms. Although most states ended theatrical censorship of homosexuality in the 1960s, there would not be a definitive legal resolution to the larger cultural issue of homosexuality at the Federal level until the Supreme Court case *Lawrence v. Texas* (2003), which basically fulfilled the same function as the 1967 Sexual Offences Act in Britain: the decriminalization of homosexuality. The next chapter will

analyze popular gay American drama as mirroring particular debates in United States Supreme Court gay rights jurisprudence. American legal reform efforts did not mainly focus on statutory resolutions to these issues, as the British had done. American gay rights lawyers, and even some gay dramatists as I will argue in the next chapter, instead focused their efforts on the United States Constitution and the growing genealogy of sexual privacy case law. The focus on the legal and cultural place of homosexuality in American culture yielded a hermeneutic question: what are the best interpretive strategies to pursue when reading America's central text, the Constitution?

## Chapter 3

### Domestic Spaces in American Gay Legal Theatre: *The Boys in the Band* and *Angels in America*

#### Introduction

Hanna Scolnicov argues in *Woman's Theatrical Space* (1994) that spatial constructs within modern drama reflect “the growing awareness of the specificity of gender differences and the changing attitudes to woman and her sexuality” (1). In modern drama, particularly that of Ibsen and Chekhov, the space of the home is represented as “a dated convention, out of pace with social, political and economic changes. . . . it is woman’s emancipation that has overthrown the traditional scenic conception, because it has severed her emotional bonds with her house” (125).

I recognize an analogous spatial logic occurring in twentieth-century gay and lesbian drama. As the century progressed and different legal regimes took shape and were modified, representations of gay men and lesbians on the American stage portrayed the often fraught relationship these people maintained with domestic space. For most of the twentieth century, gay and lesbian characters on stage—whether closeted or otherwise—were somehow exiled from the domestic space and any kind of home. Classic examples include the offstage lesbian suicide at the end of Lillian Hellman’s *The Children’s Hour* (1934) and Mr. Dulcimer’s murder in his flat at the end of Mordaunt Shairp’s *The Green Bay Tree* (1933). As laws relating to transatlantic homosexuality in

society and on the stage began to change in the 1960s, dramas began to reflect the changing understanding of the proper place and home allowed to gay and lesbian characters.

This chapter analyzes the kinds of spaces that two popular gay dramas imagined for sexual minorities. I will look first at the closeted apartment under siege by the law in the 1960s world of *The Boys in the Band* (1968), and then the more abstract conceptualization of the domestic national and constitutional spaces allotted to LGBT citizens in *Angels in America* (1992). Premiering in New York one year before the Stonewall riots, a watershed moment for the contemporary gay rights movement in the United States, Crowley's play marks the beginning of the uncloseted gay tradition in American drama. *The Boys in the Band* reflects the oppressive legal situation for gay men in the late 1960s, even as its breakdown of barriers between actor and audience and normative and gay experience works to create and sustain a queer spatial aesthetic. In depicting gay domestic spaces that appear to be collapsing because they are legally and culturally unsustainable, Crowley forces the audience to imagine offstage a place for gay existence and domestic viability. In this sense, he queers the performance space of the play. *Boys* blurs and subverts the boundaries between characters and audience, performative as well as sexual. In so doing the play encodes the growing but still uncertain space for sexual privacy being recognized in Supreme Court jurisprudence by the end of the 1960s.<sup>36</sup>

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<sup>36</sup> Just as drama can be traced in traditions, so too can bodies of case law and legal precedent. *Griswold v. Connecticut* (1965) held there is a right to marital privacy for contraceptive use. This ruling was extended a few years later by *Eisenstadt v. Baird* (1972), which held that unmarried heterosexual couples could buy contraceptives for private use. Those cases built the foundations for later rulings decriminalizing homosexuality (*Lawrence v. Texas*, 2003) and allowing for same-sex marriage (*Obergefell v. Hodges*, 2015).

Kushner's epic *Angels in America*, in turn, is partly a response to the Supreme Court decision *Bowers v. Hardwick* (1986), which reversed the apparent trend in case law by holding that sexual privacy did not extend to homosexual activity. Kushner takes his gay characters outside of domestic spaces in order to subvert that legal decision and imagine a new space for gay and lesbian Americans. *Angels* is a dramatic text and theatrical performance—a particular cultural response to the legal text and cultural effects of *Bowers*. Kushner queers the composition of family structures and mirrors a liberal American constitutional hermeneutics, akin to the “living Constitution” method of Supreme Court jurisprudence that allowed the domain of sexual privacy to culminate in private LGBT spaces in *Lawrence v. Texas* (2003). A cultural precursor to *Lawrence* and eventually the case that legalized same-sex marriage, *Obergefell v. Hodges* (2015), Kushner's drama offers an expansive, inclusive vision of domestic space and intimate relationships.

### **Guilt and Spatial Logic in Gay and Lesbian American Drama, 1933-1993**

For at least a sixty-year period in the United States, gay and lesbian characters were represented as needing to resolve an internalized sense of guilt regarding their sexuality. Earlier in the twentieth century, gay and lesbian characters were expelled or sacrificed from the drama in order to purge their guilt: a consuming atonement was necessary but forgiveness impossible. A prominent example of this is Tennessee Williams' *Suddenly Last Summer* (1958), at the end of which the gay character Sebastian Venable is literally eaten alive for his homosexual and pedophilic crimes. Sebastian Venable is sacrificed and consumed in order to purge the guilt of his homosexuality. Pre-

liberation gay and lesbian drama demanded the atonement of guilt through reparations made by sacrificing the characters. Besides *Suddenly Last Summer*, prominent examples of this trope include Lilian Hellman's *The Children's Hour* (1934), Mordaunt Shairp's *The Green Bay Tree* (1933), Meyer Levin's *Compulsion* (1957), and two other Williams dramas, *A Streetcar Named Desire* (1947) and *Cat on a Hot Tin Roof* (1955). Early gay and lesbian drama often reinforced the legal rituals of crime and punishment involving transgressions against laws governing normative sexuality.

Wilde's conviction of gross indecency established a new aesthetic for the proper place of gay men and lesbians: the dock and the jail cell. The Wildean dandy was uncovered for his deviant sexuality, and the artifice at the heart of aestheticism was seen to be a mask covering up criminal inclinations.<sup>37</sup> A little over forty years after the Wilde trials, Mordaunt Shairp's successful play *The Green Bay Tree* (1933) would re-introduce the Wildean dandy as a barely disguised pervert. Although it premiered in London, the play had a popular run on Broadway with Laurence Olivier in the role of Mr. Dulcimer. The effete Mr. Dulcimer is portrayed as a malevolent force of sterility as he attempts to keep his adopted son, Julian, from entering into marriage. The play ends with Julian's natural father shooting Dulcimer in order to save his son, but the effects of Dulcimer's

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<sup>37</sup> Of course, homosexuality was not only produced and contained through legal regulations. The medical model of homosexuality also circulated in England and the United States in the nineteenth and twentieth centuries, which made the asylum and hospital other aesthetic (and literal) spaces for gay men and lesbians. Medical and legal discourse often worked together to classify and contain homosexuality. See Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet, 1990): 23-32. Early medical theories had potential implications for criminal law, such as the congenital theory formulated by German lawyer Karl Heinrich Ulrich (1825-1895) that homosexuality was in essence a natural biological manifestation. Accepting such a model of homosexuality would relieve gay and lesbians of any moral blame (Weeks 26-7). However, the medical model of homosexuality as a sign of disease more often resulted in further social stigmatization, and prompted punitive medical treatment such as castration and aversion therapy in the United States and Europe. Aversion therapy, practiced through the 1960s, involved "making people nauseous and inflicting electric shocks on them while viewing pictures of same-sex people to whom they [were] attracted" (31).

lifestyle are an unstoppable contagion: Julian inherits Dulcimer's money, forsakes marriage, and retreats into the queer and sterile space of the dandy's flat.

Guilt in *The Green Bay Tree* resides unambiguously in Dulcimer, and its atonement comes through the sacrificial murder of the corrupted dandy at the play's conclusion. Shairp reinforces the laws and cultural understanding of homosexuality in the 1930s: homosexuality as a crime and disease. In terms of its ritualistic function, the play repeats and amplifies the legal rituals being enacted against those who broke sodomy and gross indecency laws. However, even some of the earliest plays in the gay tradition negotiate an ambiguous relationship with the legal disposition of homosexuality. Lillian Hellman's *The Children's Hour* (1934) superficially seems to replicate the same trajectory as *The Green Bay Tree*—the lesbian character is expelled and destroyed by play's end—but the play's message is ambiguous. It remains unresolved whether Martha actually deserves her fate. Hellman's drama involves legal themes and enacts legalistic rituals of guilt and punishment, but it remains unclear whether justice has been achieved at the end.

*The Children's Hour* is based on an actual court case in 1810 Scotland against two teachers for sexual misconduct (Sinfield, *Out* 94). The play presents two female teachers being accused of homosexuality by a spoiled schoolgirl. One teacher, Martha, is set up as a potential lesbian, as she seems sexually jealous of the other teacher Karen's impending marriage. In an echo of the Wilde trials, the women bring a libel suit against their accuser, the mother of the spoiled girl. They lose the case, as did Wilde, and that legal resolution has a profound effect on both of the women. Even though it is only Martha who is portrayed as possibly lesbian, Karen equates the results of the trial with

actual guilt. She now believes she is a lesbian because the legal verdict implied as much. They set up a dreary household together, coded as lesbian, and the heterosexual relationship falters between the engaged Dr. Cardin and Karen Wright.

Losing the case has a negative impact on the women, making them lose confidence in their ability to stabilize their lives and identities through the use of language. Although Karen denies having any involvement with Martha, she cancels the marriage to Cardin. Karen says to Cardin: “And every word will have a new meaning. Woman, child, love, lawyer—no words that we can use in safety any more. (*Laughs bitterly*) Sick, high-tragic people. That’s what we’ll be” (73). Words with seemingly stable meanings—“woman, child, love, lawyer”—are no long accessible to them. With the legal imputation of homosexual guilt, they both internalize new understandings of themselves, but have a difficult time because of the historically “unspeakable” nature of homosexuality and lesbian identity. The legal system is depicted as an imprecise mechanism for resolving questions of non-normative desire and identity. Martha equates their loss of the libel case with proof of her guilt, and comes to a realization that soon causes her to commit suicide: “I have loved you the way they said” (78).

Martha: I’ve got to tell you how guilty I am.

Karen (deliberately). You are guilty of nothing.

Martha. . . . It’s there. I don’t know how, I don’t know why. But I did love you. I do love you. I resented your marriage; maybe because I wanted you; maybe I wanted you all along; maybe I couldn’t call it by a name... (79)



In an allusion to the Wilde trials, Martha's desire for Karen is unspeakable: it is "the love that dare not speak its name."<sup>38</sup> Martha shoots herself off stage soon after this scene.

The potential lesbian is expelled from the action, but more intriguing is Karen's fate.

Even though there is ample evidence that she had a heterosexual orientation, the legal rituals have labeled her otherwise and change the course of her life. She leaves the school at the end of the play and seems destined for a lonely, closeted, lesbian life.

Sometimes the hybrid nature of the legal theatrical ritual allows for an imaginative adjudication of the gay or lesbian character, never fully resolved like the finality of legal judgment and sentence. In the final moments of the play, Martha is dead in the other room and Karen is gauging the future. Mrs. Tilford asks, "You'll write me sometime?" "If I ever have anything to say," replies Karen (86). Karen is suspended in the now sterile domestic space, forced to live a solitary life of atonement for the sins of living with Martha, for "acting" like a lesbian. But her future is uncertain because she has not been fully silenced; she acknowledges there might be something to say in the future, if her gender and sexual identity can somehow be resolved. There remains the possibility she could eventually articulate a protest against the legal and cultural censure of lesbian identity.

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<sup>38</sup> Lesbian desire and sexuality was doubly unspeakable, considering its historical absence from anti-homosexual legislation in the United Kingdom and United States. Just as the Labouchère Amendment only targeted men, the sodomy laws in the United States did not include women until oral sex was included within prohibited behavior in many states after 1880. "Oral sex could also be perpetrated by women with other women, and for the first time in Anglo-American history lesbian relationships could be made illegal (although few states did so before World War I). ... Although most states had sodomy laws ... few if any of them applied to same-sex activities between women, and none of them was enforced against women having sex with women." William Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge: Harvard UP, 1999), 159-60. Women were occasionally prosecuted under "lewdness" statutes, but historically they were not the prime targets of the laws governing homosexuality (157).

In mid-century American drama, gay characters were often displaced and hidden from view, put into a closet of containment. John Clum claims that Tennessee Williams' *A Streetcar Named Desire* (1947) "is the quintessential closeted gay play, and Blanche Dubois is in many ways the quintessential gay character in American closet drama" (123). In this sense, Blanche is invisible because her symbolic status as a gay man is veiled from the audience. The one gay character, Blanche's husband Allan Grey, never appears on stage: he committed suicide when she discovered and outed his homosexuality. Clum convincingly points to Blanche's artificial theatricality as symbolic of the roles gay men had to play in order to pass as heterosexual. When she finally is revealed in the play, it is as a sexual deviant, someone who slept with a seventeen year old boy and was promiscuous, perhaps even prostituting herself. In the end, Stanley rapes Blanche, which can be read as punishment for a gay man's contamination of the heterosexual domestic space. Blanche's fate as a character is a result of her domestic and sexual transgressions, and she is taken away to a mental asylum at the end of the play. In *Streetcar*, the outed and closeted gay figures are ejected from the dramatic action.

Williams uses similar strategies of gay displacement in *Cat on a Hot Tin Roof* (1955), which recounts the suicide of the tortured Skipper because of his homosexuality. Like Allan Grey, then, Skipper kills himself to atone for the sin of loving another man, Brick, and is never visible in the play. The visible protagonist Brick's anguished, self-destructive character stems from his own internalized homophobia, if we understand that, as Brenda Murphy demonstrates, Williams intended to represent "a gay man trapped in a

heterosexual marriage.”<sup>39</sup> Brick is displaced from the gay relationship he should have had with Skipper, and is instead struggling in a relationship he should never have entered. Admittedly, *Cat* also describes the more positive relationship between the former owners of the plantation, Jack Straw and Peter Ochello. Straw and Ochello left great wealth behind and are described as a successful and loving gay couple. As the opening “Notes for the Designer” describes their bedroom, “It is gently and poetically haunted by a relationship that must have involved a tenderness which was uncommon” (15). In this sense, a positive gay relationship suffuses the physical space of the play and provides a model that Brick is not able to realize because of his own homophobia.<sup>40</sup> However, the promise of a healthy gay relationship is not realized by the visible characters in the play.<sup>41</sup>

Some gay and lesbian dramas repeat and entrench legal rituals of crime and guilt centering on homosexuality. For example, Meyer Levin’s play *Compulsion* (1957), based on the “trial of the century” Leopold and Loeb case, dwells on the homosexual relationship between the two men, Judd and Artie, as being at the root cause of their criminality. Alan Sinfield views the play as “encourag[ing] the inference that homosexuality may be at the heart of a criminal personality” (212). *Compulsion* is a ritual of forensic drama that enacts a theatrical punishment for a murder and the homosexuality that caused it.

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<sup>39</sup> Brenda Murphy, ““Claustrophobia: Containment and Queer Spaces in *Tea and Sympathy* and *Cat on a Hot Tin Roof*” in *Critical Insights: Gender, Sex & Sexuality*, ed. Margaret Sönsner Breen (Ipswich, MA: Salem Press, 2014): 181-94, 193.

<sup>40</sup> Ibid, 189. See also Michael Bibler, “A Tenderness which was Uncommon: Homosexuality, Narrative, and the Southern Plantation in Tennessee Williams’s *Cat on a Hot Tin Roof*,” *Mississippi Quarterly* 55.3 (2002): 381-400, 384.

<sup>41</sup> John Clum notes, “the positive image the love of Jack Straw and Peter Ochello provides is presented only in the stage directions: otherwise, the silence and invisibility surrounding homosexual desire are maintained” (127-28).

There was a changing arc of resolution to this guilt post-Stonewall and when AIDS dramas began appearing in the 1980s. Writers gradually moved the internalized guilt of the gay subject and the (self)-sacrifice necessary for its atonement and imposed the guilt onto the national body. In recent gay drama, such as William Hoffman's *As Is* (1985), Moisés Kaufman's *Gross Indecency* (1998) and *The Laramie Project* (2000), and Terrence McNally's *Corpus Christi* (1999), this same ritual of atonement and potential forgiveness must be enacted by America itself, demanded because of its transgressions against the gay subject. The new national dramatic ritual enacted in gay American drama is consistently connected to the fate of America itself.

Tony Kushner transforms the old ritual of atonement onto the national body in *Angels in America: A Gay Fantasia on National Themes* (1992). Kushner does more than champion the lives and rights of sexual minorities; he engages in a larger project of national re-imagining. Beginning with *Part I: Millennium Approaches*, followed by *Part II: Perestroika*, the United States is figured as needing blessing and forgiveness for transgressing against gay men, lesbians, and the victims of AIDS. Because *Angels* achieved not just popular but also canonical status in American drama, a remarkable thing happened. The culminating protagonist of twentieth-century American drama, not just gay drama, is a gay man living with AIDS. The margin becomes the center. Moreover, Kushner directly intervenes in legal debates surrounding gay and lesbian rights. *Angels* re-imagines the Constitution as an expanding text, symbolic of the kind of liberal interpretive strategy that would later result in landmark legal victories in the LGBT rights movement.

### Spatial Strategies in *The Boys in the Band*

Kushner's critique of LGBT legal oppression can be traced directly back to 1968, when Mart Crowley's landmark play *The Boys in the Band* premiered. *Boys* became the first commercially successful play about gay men, running for 1,002 performances, officially beginning the uncloseted gay tradition in American drama. The play was produced at a unique cultural and historical moment. Cultural productions like *The Boys in the Band* helped precipitate the 1969 Stonewall Riots, widely considered to be the beginning of the modern gay rights movement. There was a simmering anger against police harassment that exploded over the course of that weekend in June, 1969.<sup>42</sup> LGBT people rioted at the Stonewall Inn, a gay bar in Manhattan, in response to police harassment. Crowley captured some of that anger and bitterness in his play the year before, and helped stoke the discontent that would soon materialize in violence and more direct political action.<sup>43</sup>

It is important to recall the socio-legal situation for gays and lesbians in the 1960s. Legal scholar William Eskridge writes in his book *Gaylaw: Challenging The Apartheid of the Closet* (1999):

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<sup>42</sup> For a description of the events of the dramatic weekend, see John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: U of Chicago P, 1983), 231-33. When Allen Ginsberg got to the Stonewall Inn on Sunday, he noticed a shift in the mood of its patrons: "They've lost that wounded look that fags all had ten years ago" (232).

<sup>43</sup> The Gay Liberation Front was founded a month later, which took a more radical, confrontational approach to gay and lesbian rights. THE 1969 GLF statement of purpose stated: We are a revolutionary group of men and women formed with the realization that complete sexual liberation for all people cannot come about unless existing social institutions are abolished. We reject society's attempt to impose sexual roles and definitions of our nature. We are stepping outside these roles and simplistic myths. We are going to be who we are. At the same time, we are creating new social forms and relations, that is, relations based upon brotherhood, cooperation, human love, and uninhibited sexuality. Babylon has forced us to commit ourselves to one thing—revolution!" (qtd. in D'Emilio 234).

The homosexual in 1961 was smothered by law. She or he risked arrest and possible police brutalization for dancing with someone of the same sex, cross-dressing, propositioning another adult homosexual, possessing a homophile publication, writing about homosexuality without disapproval, displaying pictures of two people of the same sex in intimate positions, operating a lesbian or gay bar, or actually having oral or anal sex with another adult homosexual. The last was a serious felony in all states but one, and in most jurisdictions also carried with it possible indefinite incarceration as a sexual psychopath. (98)

The term “homosexual,” as Timothy Scheie writes in his recent article about *The Boys in the Band*, is “a juridico-medical term of pathological provenance” (4); indeed, the play shows the negative effects that legal and medical discourses have in shaping the self-conceptions of stigmatized populations. It was not until 1973 that the American Psychiatric Association voted to remove homosexuality from its catalogue of mental disorders. Medical and legal discourse worked in tandem in their treatment of gays and lesbians, but I am focusing on the law here because while medical discourse definitely informs the internalized homophobia of all the men in the play, the play’s main dramatic crises are propelled by legal themes.

The characters in *The Boys in the Band* were under threat of criminal prosecution by engaging in homosexual activity. Private consensual “sodomy” (a capacious term encompassing heterosexual and homosexual activity) was a felony in New York, where the characters live, until 1980, when the New York Court of Appeals in *People v. Onofre* held that the state anti-sodomy law was unconstitutional because it violated the right of

privacy (Nelson 320).<sup>44</sup> Not only were private gay spaces subject to surveillance and prosecution, but public gay spaces were as well. In his history of the emergence of the homosexual minority in the United States, John D’Emilio writes,

As a gay subculture took root in twentieth-century American cities, police invoked laws against disorderly conduct, vagrancy, public lewdness, assault, and solicitation in order to haul in their victims. Gay men who made assignations in public places, lesbians and homosexuals who patronized gay bars, and occasionally even guests at gay parties in private homes risked arrest. (14)

In 1964 and 1965, almost all the gay bars in New York City were closed in anticipation of the World’s Fair (Rosen 167). The closures were largely achieved through exploiting the laws governing liquor sales and raiding gay bars under the pretenses of enforcing liquor laws. In his work on police harassment of gay men in New York City during the time period, Steven Rosen observes, “Because New York bartenders believed that liquor licensing laws subjected bar owners and their staffs to legal liability for serving persons known to be homosexual, they prohibited men from dancing together or touching each other in most bars, and some did not even allow men to enter unless they were accompanied by a woman” (167). This harassment of gay men in public spaces like gay bars would eventually lead to the Stonewall riots, when not just men, but lesbians and trans people, resisted this kind of spatial infiltration.<sup>45</sup>

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<sup>44</sup> Historically, sodomy laws were enforced in the original American colonies as part of the English common law or through statute. The Labouchere Amendment of 1885 in Britain included oral sex in the sodomy laws. “After 1885, thirty-one states and the District of Columbia ... amend[ed] their sodomy laws to include oral sex...” (Eskridge 157)

<sup>45</sup> For a description of the diverse LGBTQ crowd of about 2,000 people that formed, see D’Emilio, 231-233.

Although the laws regulating homosexuality in society were strictly enforced, two kinds of legal regulations were beginning to change in the sixties: laws governing theatrical representations of homosexuality, and U.S. Supreme Court decisions regarding sexual privacy. *Boys* was able to achieve commercial success in part because laws regulating the depiction of homosexuality on stage in the United States gradually began to relax in the sixties. New York state lifted its ban on theatrical representations of homosexuality in 1965. In addition, American constitutional law in the 1960s began to recognize the right to sexual privacy within certain tightly defined heteronormative domestic spaces. The right to marital privacy emerged in the Supreme Court case *Griswold v. Connecticut* (1965). *Griswold* conceptualized spatial “penumbras” and “emanations” from the Bill of Rights that protect “zones of privacy” for the marital space. In particular, the case recognized the right of married couples to use contraception within their protected space: to have non-procreative sex, which logically makes it more difficult to justify criminalizing homosexual activity. However, these gains for sexual privacy did not yet extend to protecting private gay activity. “With two dissenters from the judgment and at least four Justices explicitly denouncing ‘homosexuality’ and the opinion for the Court stressing the marital context of the contraception, *Griswold* did not appear to protect private gay spaces” (Eskridge 105). *Eisenstadt v. Baird* (1972) extended *Griswold* to include and protect the space of unmarried heterosexual couples; it allowed them to buy contraceptives for use in their private sexual space. Sexual privacy was expanding, although it did not yet include LGBT people and practices.

Although these legal precedents would provide the support to overturn state sodomy laws in future decades, and eventually allow for constitutional protection of



same-sex marriage, at the time *The Boys in the Band* premiered in New York City, gays and lesbians had not won any substantive legal rights for themselves. This was the legal and cultural background to the 1968 production of *The Boys in the Band* and the characters it presented.

Crowley's play takes place in the New York apartment of a gay man, Michael, who is throwing a birthday party for his friend Harold. The play's central crisis arises when Michael's ostensibly straight college roommate makes an unexpected arrival on the scene as the men are dancing together. What results is an increasingly nasty and embittered clash between two worlds, one the heteronormative cultural majority and the other a slice of gay subculture.

Although the play was highly successful and was later made into a film, little has been published on its significance, and nothing substantial has been said about the role of the law in the play. The majority of the characters are figured as some version of the self-hating homosexual—as Michael puts it, “You show me a happy homosexual, and I’ll show you a gay corpse” (128)—and both critics and playwrights have expressed a discomfort with the play's portrayal of self-loathing gay men. Although he initially praised the drama for its bold representation of the subject matter, *New York Times* critic Clive Barnes eventually wrote in his final review of the play in August 1970, that he was “more and more disturbed by the antihomosexual element in the play” (qtd. in Scheie 5). Gay liberationists Dennis Altman and Peter Fisher critiqued the play in the 1970s for its stereotypical representations of gay men (Scroggie 238). In 1995, Joe Carrithers blamed the play and film adaptation for privileging heterosexual viewers and their stereotypes of gay men. Doric Wilson's play *Street Theater* (1982), according to Timothy Scheie,

“crystallizes this sentiment in a scathing indictment of Crowley’s characterizations” (6).

Wilson’s play presents characters that parody Michael and Donald from *Boys*, and the play’s theme is the importance of gay activism rather than self-loathing.<sup>46</sup>

Despite these valid critical concerns, *The Boys in the Band* provided the closest thing possible to a commercially viable theatrical gay space in 1968. John Clum notes that the play “has become for its detractors, particularly those who did not experience gay life before Stonewall, a paradigm of politically incorrect drama. For some, this antipathy to the play is based on its lack of a sense of the sadder elements of gay history” (203). Indeed, historical context is crucial to understanding the significance of *The Boys in the Band*. The play mirrored and challenged the depictions and treatment of gay men in the 1960s by showing the ways in which gay identities were shaped by both breaking the law and capitulating to its dictates.

The law’s oppressive influence is deployed within Crowley’s dramatic strategies that involve the use of gay domestic space. The dramatic space, Michael’s apartment, functions as a metaphor for closets literal and figurative. The apartment is at various times invaded, repulsed, conflated, rejected, and collapsed, all done because of the law’s simultaneous authority and illegitimacy with regard to its treatment of the play’s characters. Because of its fluid borders and multiple trajectories, the apartment’s space works both within the law, at times being complicit with it, and against the law. The

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<sup>46</sup> Obviously, the political and historical situation for gays in 1982 afforded such a viewpoint, coming as it did after the Stonewall Riots and the decade that had since passed. Interestingly, *Street Theater* was performed “in a small space in Tribeca and then in the Mineshaft leather bar. Its gay audience and use of a gay space stand in telling counterpoint to the mainstream appeal of *The Boys in the Band*” (Scheie 6). *Street Theater*’s 1982 celebration of a sexualized gay space like the Mineshaft came just as the AIDS crisis was emerging, which in turn would cause gay men to have a more ambivalent attitude toward such spaces; there was a newly discovered threat of infection in sexualized spaces, not just sexual liberation.

dynamic relationship between the law and gay spaces produces part of the trauma that necessarily attended late 1960s United States gay identity.

*The Boys in the Band* reflects this anxiety of gay men being subject to police harassment and legal prosecution in public spaces like gay bars, and even in their own homes. The play is set in an apartment in the East Fifties in Manhattan. The setting is a private space—although of course it is performed in the public space of a theater. John Clum notes, “In . . . *The Boys in the Band*, the gay world is a dangerously closed society. Domestic space becomes a refuge from the hostile terrifying world. ‘Out there’ are hostile heterosexuals; inside, gay men face their own private demons (created by the people out there). Isolated within the domestic space, the creative gay man is at a dead end” (207). All of the characters in Crowley’s play are under surveillance. The audience watches their behavior, and so comes to recognize particular gay sub-cultural codes. Moreover, implicitly within the dramatic fiction itself, the characters are under the constant threat that the police or some other un-friendly outside force will enter into the private gay space.

So, for example, after the first scene between Donald and Michael ends, the buzzer sounds and they think it is going to be Alan, an old college friend of Michael’s, who has unexpectedly called Michael in tears and has asked to come over. Suddenly, several of the other characters are described as “bursting in,” with Emory, the stereotypically effeminate character, shouting, “ALL RIGHT THIS IS A RAID! EVERYBODY’S UNDER ARREST!” (24). Emory’s humor comes from a group of gay men, led by the most effeminate of them, mocking the idea of the police raids that could

occur at any instant. They are generating humor from actual fear, a grounded fear that pervades much of the play.

Emory is the most susceptible to police harassment, as he is the one most obviously gay. The next time the buzzer sounds, he yelps, “Oh my God, it’s Lily Law! Everybody three feet apart!” (38), to campily indicate a potential undercover police officer. When Michael opens the door to meet the delivery man with the cake—the plot is built around a birthday party for their friend Harold—the stage directions have him close the door behind him. The men do not want anyone outside of their group to witness their social interactions.

Such witnessing of course happens soon thereafter when Alan walks in on the group of them dancing together. Alan typifies the threat of Lily Law and all outside heteronormative surveillance. Significantly, he is a Washington lawyer whose entrance into the space is the dramatic catalyst for the play’s main events. Alan’s entrance is meant to be a dramatic moment of tension, and Michael turns off the music abruptly because the men have been “caught.” There is some general awkwardness and rising tension. Act I culminates with the theretofore highly polished Alan beating Emory in a rage, drawing blood and screaming anti-gay epithets. Then, oddly, Alan collapses moaning into the arms of Hank, the most masculine gay character who holds Alan’s respect because he appears normative.

According to William Eskridge, one of the first main goals toward “end[ing] the tyranny of the closet” after Stonewall in 1969 was “to protect *private gay spaces* against spying and intrusion of the police” (15). Even before Stonewall, Crowley’s play does some of this political work. *The Boys in the Band* dramatically transforms a private gay

space into a public forum on the legitimacy of police harassment and gay oppression in general. Alan articulates a stereotypical question posed to gay people: “I couldn’t care less what people do—as long as they don’t do it in public—or—or try to force their ways on the whole damned world” (51). Alan is referring to Emory’s campy behavior in the private space of the apartment, yet he is still conceptualizing that space as public. For Alan, a public space is a space subject to anyone’s view. In trying to formulate an argument for protecting private gay spaces, the play also queerly indicates the fragile dichotomy between private and public.

Michael’s apartment functions as a metaphor for the closet, which is, as Eve Sedgwick claims, “the defining structure for gay oppression in this [20th] century” (71). Even when its inhabitants are hermetically sealed within it, the dread of infiltration sets in, and the effect is a “claustrophobic space.” Brenda Murphy coins this term in her analysis of queer space in *Tea and Sympathy* (1953) and *Cat on a Hot Tin Roof*.<sup>47</sup> Murphy defines queer space in those two plays as a dramatic setting or effect “in which both gender identity and sexuality are far more fluid than the heteronormative conception prevalent in the fifties allowed for, and the setting and transgression of boundaries takes place constantly” (183). I think the idea of queer space also works well in application to *Boys*. The inhabitants of Michael’s apartment may be asked, as Michael does of Donald and Emory, to “play it straight” and change their behavior, and therefore it is also never completely a “gay” space because the men are always self-consciously monitoring their behavior for ambiguous entrants like Allan. The claustrophobic space of Michael’s

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<sup>47</sup> Brenda Murphy, “Claustrophobia: Containment and Queer Spaces in *Tea and Sympathy* and *Cat on a Hot Tin Roof*” in *Critical Insights: Gender, Sex & Sexuality*, ed. Margaret Sönser Breen (Ipswich, MA: Salem Press, 2014): 181-94, 183.

apartment is ultimately presented in a state of multiple tensions, and the sustainability of its gay characters has an uncertain future.

The main spatial trajectory of Act One involves the infiltration of gay domestic space by a threatening normative space: Alan literally occupies that normative space and brings with him, as a lawyer, the authority, condemnation, and harassment that the law imposed on gay men in the late 1960s, even as his own questionable sexuality problematizes the legitimacy of that authority. After Alan's violent beating of Emory, Michael stands in the center of the room as if in a trance. He sees the havoc wrought by the collision of the gay and heteronormative worlds, and from then on he self-destructively works to destroy the domestic space as a viable site for gay existence. An alcoholic who had been sober for five weeks, he promptly walks to the bar and begins guzzling gin, and the act ends as Harold, the birthday boy, enters the apartment, sees the party's general wreckage, and "laughs and laughs and laughs." As a character, Harold evinces an inscrutability and general weirdness that, memorably portrayed in the 1970 film by Leonard Frey, effectively changes the mood of the play and helps to create the unpredictability of events in the darker and more tragic second act.<sup>48</sup>

Act Two involves a spatial trajectory opposite to that of the first act. Michael gets drunk and turns into a more sinister character as, with an obvious nod to the games in Edward Albee's *Who's Afraid of Virginia Woolf?*, he tries to orchestrate a party game called Affairs of the Heart. (Albee refused to be a producer for the play because of the negative gay stereotypes within it.) Michael creates a contest whereby the men are

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<sup>48</sup> Harold's dark queerness is reminiscent of Lenny's in Harold Pinter's *The Homecoming* (1964). Both men use desire and sexuality as weapons. Both characters also do a lot of *watching*. Harold enters at the end of Act I to survey the damage and laugh into it. Lenny stands at a distance at the end of *The Homecoming*, watching his father and brother become enslaved to their desires.

supposed to telephone the one person they've truly loved: "If you make the call, you get one point. If the person you are calling answers, you get two more points. If somebody else answers, you get only one. If there's no answer at all, you're screwed" (91). Donald retorts, "You're screwed if you make the call" (91). While this seems like a silly game that middle-school children might play, the men conceive of the game as a transgressive push out into normative spaces, to either win by appropriating them or lose and be subdued by them.

Two characters, Emory and Bernard, are crushed by the game because they are unable to articulate their love for the heterosexual man at the other end of the phone. Emory calls his first unrequited love, Dr. Delbert Botts, now a married dentist, but is unable to say he loves him. Instead, Emory call himself "nobody," after which Botts hangs up on him. Michael forces Alan to make a phone call, accusing him of being gay and that he should not call his wife, but rather Justin Stuart, another college friend with whom Michael thinks Alan had an affair. Alan actually calls his wife, which devastates Michael, and then leaves the apartment, although it is unclear if Alan is actually gay but just rejecting the miserable gay community he's been presented with over the course of the evening. Michael doesn't play the game, probably because, as Harold puts it, "He's never loved anyone" (118). Michael has a breakdown and flees the apartment. He wants to collapse the domestic space into itself, asking near the play's end, "Do you suppose there's any possibility of just burning this room?" (129). He retreats to a midnight mass where he can presumably ask forgiveness in a holy space. The church's sacred space serves as a counterpoint to the damned, burning domestic sphere of the gay man.

It is actually the couple Larry and Hank who win the game. (Technically they tie with Alan, but Alan's ambiguous exit from the party puts his adherence to the game's rules in doubt). Hank and Larry manage to tell each other that they love one another over the phone: Hank leaves a message on their answering service, telling an operator about his love for Larry. This is meant to be a dangerous act; there is a sense that, while he is not literally breaking the law by giving voice to such sentiment, Hank is opening himself up for some sort of police harassment or public stigmatization. Larry and Hank then go up to Michael's bedroom upstairs to make love. While they are the only victors in the game and play, they have not escaped the potential trauma of criminal persecution. In the invisible space of the bedroom, they are breaking the law. They have appropriated the space for their own, but are still subject to legal threat at any time for breaking the law. Larry and Hank retire to a somewhat private sexual space—as private as such a space can be when its inhabitants are breaking the law—but they have not been violently ejected from the dramatic action as in earlier gay dramas. They will continue living together in the future, but Larry demands a more flexible understanding of a domestic arrangement that allows for sexual freedom. He wants “Respect—for each other's freedom. With no need to lie or pretend. In my own way, Hank, I love you, but you have to understand that even though I do want to go on living with you, sometimes there may be others” (116).

The open queer “marriage” that is depicted between Hank and Larry is actually a quite radical dramatic representation, especially considering the time period of the play's premiere. The invisible bedroom inhabited by Hank and Larry offstage at the end of play—a queer space—is suggestive of any number of sexual and domestic realities.



However, Joe Carrithers argues that the play and film privilege the heterosexual gaze and spectator, and that *Boys* circulates

images that are antithetical to the redefinitions of sexuality and relationships supported by many gay men of the post-Stonewall generation. Such mediated depictions comfort the straight audience--primarily its men--by not forcing them to encounter (and, by extension, perhaps to accept) the possibility of other forms of sexuality, particularly non-monogamous gay forms. (64)

Carrithers disregards the negotiations that Hank and Larry undertake as they attempt to form a long-term relationship that may be non-monogamous. I disagree that the play and film privilege any particular gaze; rather, they suggest a multiplicity of viewpoints and queer any solid framework in which to categorize Hank's and Larry's relationship. *The Boys in the Band*, and by extension much of gay drama, queers the space in which it is performed. Gay dramas can destabilize ostensible borders between the performative spaces that the gay characters inhabit and those filled by spectators in the audience. Spectators are removed from the action, but only to a point, and in effect share the same space as gay characters, which may generate greater sympathy for those gay characters. Because the boundaries between the "gay" theatrical play and its spectators are porous and fluid, the energies that flow within the entire space(s) and between the actors and audience are queer.

Jean-Ulrick Désert provocatively writes in his theorizing about queer urban space, 'A queer space . . . is at once private and public. Our cities, our neighborhoods, our homes are loosely defined territories inscribed not merely by the laws of proprietary ownership but by implicit and shifting inflections of presence, conspicuous or otherwise'

(21). In his essay ‘Queer Space,’ Désert formulates helpful definitions: “Space” is commonly defined as a delineated or loosely bounded area occupied cognitively or physically. . . . This terrain of physical space, both natural and designed, increasingly includes literary, media, and electronic space. Queer space crosses, engages, and transgresses social, spiritual, and aesthetic locations. . .’ (20). Because it is impossible to discern the boundaries between actors and the characters they inhabit, and the nature and desires of the audience members as they watch and emotionally respond to those characters and actors, dramas like *The Boys in the Band* queer their performance spaces. The energies that flow between actors and audience members are incapable of categorization. When an audience is asked to emotionally respond to gay and queer characters, the theatrical space is queered and a cultural subtext is performed simultaneously to the theatrical production. The space in which a “gay” play is performed can no longer be assumed to be a heterosexual space. Representing LGBT characters destabilizes, queers that particular cultural space.

*The Boys in the Band* highlights the injustice of the law’s treatment of gay men. By focusing on the need for protection of private gay spaces, the play contributed to the first main goal of the gay liberation movement as articulated by William Eskridge. The play also points to the ultimate political and legal goal of the movement as Eskridge views it: that of “equal gay citizenship,” demanding “public equality and equal treatment on their merits as employees, soldiers, immigrants, and parents” (15). The trajectory from protection of private spaces to the ultimate goal of equal gay citizenship is a logical legal progression, one that is more forcefully mapped out in Tony Kushner’s *Angels in America* (1992).

Crowley's play employs a spatial logic that served as a literary-theatrical springboard to the modern gay rights movement. More specifically, it foreshadowed the rhetoric and spatial logic imbedded in the landmark 2003 Supreme Court case *Lawrence v. Texas*, written some thirty-five years after *Boys* opened in New York City. *Lawrence* held unconstitutional all state anti-sodomy statutes and has paved the way for state Supreme Court judicial opinions legalizing same-sex marriage. Justice Kennedy wrote the *Lawrence* majority opinion, which employs spatial rhetoric throughout, such as the "more transcendent dimensions" of liberty that all individuals possess. (An influence perhaps from the 1965 *Griswold* opinion's spatial rhetoric of "zones of privacy," "penumbras," and "emanations.") Kennedy's rhetoric in *Lawrence* establishes a link between the understanding of family arrangement and of individual identity:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition, the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions. (539 U.S. 562)

The language of this important judicial opinion employs a rhetoric that bleeds into the literary. Justice Kennedy's understanding that liberty has not only spatial, but also "more transcendent dimensions" shows an interest in identities, those intangible things that so many minority groups had come to prize by the end of the twentieth century.

However, although Kennedy rhetorically attempts to move outside of the realm of space entirely, he is unable to completely escape spatial metaphors when he refers to the transcendent “dimensions” and “spheres” of our existence. This shows an inevitable overlap between the ideas of private space and the free person. If people are granted privacy, the state is in effect affirming their worth as individuals. Hank and Larry deserve privacy in their upstairs bedroom as they negotiate the physical and emotional contours of the relationship; they deserve this privacy, because following Justice Kennedy’s argument, “there are other spheres of our lives and existence” that deserve respect, namely “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”

“Freedom extends beyond spatial bounds.” In other words, true liberty, the kind protected in the Fifth and Fourteenth Amendments, is unencumbered by spatial constraints: it has no boundaries. By moving away from spatial privacy and making a nod toward universal, intrinsic human rights, Justice Kennedy rhetorically conceptualizes freedom as space-less, or infinite, in order to grant equal gay citizenship. Justice Kennedy, the unlikely conservative gay rights champion on the Court, employs the rhetoric of queer space when he lays out the reasoning of the Court’s opinion. As Dèsert theorizes, we queer our literal and figurative spaces when we attempt to transgress or revise existing social codes. Queering space is a rhetorical strategy that is employed in aesthetic and legal discourses. Mart Crowley utilizes it aesthetically in his drama in order to help usher in the modern gay rights movement. Justice Kennedy makes a similar intellectual move within legal discourse in an opinion many consider the beginning of the end of the struggle to attain equal gay and lesbian citizenship.

### ***Angels in America: Re-Mapping Guilt and the Constitution***

*The Boys in the Band* urges the protection of private gay spaces in the political agenda of the gay rights movement, and by extension works to influence the direction of gay rights jurisprudence. The play mirrored much of twentieth-century gay drama in that it located guilt in a gay man, Michael, and expelled him from the drama. However, Crowley uses the strategies of queer space to begin changing this paradigm and actually helped galvanize the modern gay rights movement.

Tony Kushner's epic *Angels in America*, in turn, is concerned with achieving equal citizenship for all minorities in the public space of democratic pluralism. He does this by advocating for a national re-imagining of the spatial logics of the closet and the United States Constitution. Constitutional law, and in particular the hermeneutics that are applied to constitutional interpretation, includes a more abstract understanding of domestic space, if we interpret "domestic" as encompassing the national homeland, the United States.

Kushner's epic is a meditation on the best way of interpreting the American legal and social domestic space. *Angels in America* advocates a liberal method of legal interpretation with the political aim of LGBTQ equality. It does so by championing a "living Constitution" and envisioning the nation's most important legal document as constantly expanding outward and moving forward in time. Running parallel to this theme is the dramatic device of taking gay characters out of closeted domestic spaces, and placing them at the center of the national domestic space of the future. Our methods of interpretation are vitally important to the ways in which we construct ourselves. The

nature of identity is dependent on the nature of its hermeneutics, whether constructed through legal or dramatic texts.

At the end of *Angels in America*, Prior describes a desire to re-enter and re-claim some vision of America and a new kind of American: “We will be citizens.” The desire for full and equal citizenship is considered by many to be the desired end of the gay liberation movement. Legal scholar William Eskridge describes the trajectory of the movement in this way: 1) Protection of “private gay spaces”; 2) Achieving protection and gaining control over “institutions of gay subculture”; 3) Attaining “equal gay citizenship” (15). While Crowley is mostly concerned with the first part of the gay rights movement—protection of private gay spaces—Kushner is clearly interested in achieving full equality: not just for gay men, but all disempowered people. Although *Angels* is a “gay fantasia on national themes,” it has an intersectional political vision because Kushner consistently draws attention to overlapping identities, and advocates different groups of people banding together to solve the problems brought on by the AIDS crisis. Intersectional identity is shown through Kushner’s use of characters that hold several identities.

The characters of *Angels* depict a wide diversity of religion, sexual orientation, gender identity, race, class privilege, and HIV-status. For example, both Louis and Prior are white, gay men, but the partners also have significant differences: Louis is a middle-class Jew and Prior is a Protestant with a trust fund; Prior has AIDS, while Louis is HIV-negative. Belize is a gay African-American who uses his drag name instead of his birth name, Norman Arriaga. In performance, such as the 2003 HBO miniseries, Belize is often played flamboyantly, in contrast to the more traditionally masculine, closeted gay

character Joe. AIDS links many of the characters together, and although no female character has AIDS, Hannah, Joe's mother, is deeply affected by her friendship with Prior, and becomes an LGBT ally and someone interested in addressing the problems of the AIDS crisis. In addition, cross-casting techniques require many characters to play multiple parts in order to reinforce an intersectional political vision. So, for example, Emily the nurse is performed by the actor cast as The Angel, and the Man in the Park with whom Louis has sex is performed by the actor cast as Prior. These diverse characters and cross-casting choices paradoxically draw attention to a common thread of humanity that runs throughout all people. The play reveals that AIDS was never just a gay issue because people cannot be confined to one axis of identity and human beings are deeply interconnected. All significant social problems are the responsibility of everyone to solve, and indeed can only be solved by finding common purpose.

### **The New High Priests of America: Absolving America the Closet**

On his death bed, Roy Cohn eulogizes himself because no one else will: "Lawyers are... the High Priests of America. We alone know the words that made America. Out of thin air. We alone know how to use The Words. The Law: the only club I ever wanted to belong to" (*Perestroika* 87-88). However, it is clear that Roy's and Joe's facility with legal language has not helped them navigate emotionally successful lives. Although they are gay, these two characters experience the fate of past characters in gay drama: they are expelled from the action. (Roy memorably so, as he is finally, albeit comedically, depicted as burning in Hellfire.)

The new High Priests of America, symbolized in Prior Walter, are gay artists who can orchestrate communal rituals of forgiveness. By extension, Kushner portrays himself as such an orchestrator as the epic's playwright. The two-part play deals with the themes of law, transgression, justice, and forgiveness, often through spatial metaphor and device. Forgiveness was a new theme in the gay drama canon. Forgiveness denotes a full and absolute pardon, and is different in nature from atonement, which, besides its Judeo-Christian meaning, requires reparations for a crime or injury in order to expiate guilt. Forgiveness may follow from atonement, but not necessarily. Some acts can be atoned for, but are not forgivable. In an interview about the play, Kushner mentioned his focus on forgiveness:

Forgiveness is a very complicated thing. It certainly became, as I wrote *Perestroika*, the chief issue because it became a big issue in the world, starting with perestroika, and all of these sort of democratic revolutions that were going on, not just in Eastern Europe, but also in Latin America for instance, where people really had to ask themselves, "Can you let go of the past?" Can you forgive somebody that's done something really, really terrible to you? It's undertheorized and underdiscussed in the Left. (Cunningham 62-63)

Kushner explores the theme of abandonment, and whether such abandonment can be forgiven, in several forms: by lovers, family members, the state, the state's law, and finally by God. Gay men are equally prone to actually be the ones doing the abandoning, as we see with Louis leaving his sick lover Prior and Joe leaving his wife Harper. Fathers leave their unloved children, as Joe's father did to him; the state abandons those with AIDS, as the Reagan administration did; laws governing those with AIDS abandon them



at the time of their greatest need; and above all, at the end of the twentieth century and the last millennium, as this great plague descended on America and it seemed that so many things, including history, were coming to an end, Kushner's drama presents God Himself as having abandoned the country.

God the Father, the ultimate Judge and arbiter of all laws, has abandoned His children, and this abandonment is presented as perhaps the only unforgivable act in the play. Prior tells the angels that they "should *sue* the bastard. That's my only contribution to all this Theology. Sue the bastard for walking out. How dare He" (*Perestroika* 130). Cohn volunteers to be God's lawyer in such an event, but advises his client, "I gotta start by telling you you ain't got a case here, you're guilty as hell, no question, you have nothing to plead but not to worry, darling, I will make something up" (*Perestroika* 141). Louis learns that his abandonment of Prior is to a certain extent unforgivable as well, although importantly their relationship as friends does survive. Even Roy Cohn is forgiven when Belize, Louis, and Ethel say the Kaddish, the Jewish prayer for the dead, to "thank him" for the AZT pills that he is leaving behind for them to take. Louis is incredulous as to the very concept of forgiving Roy, to which Belize responds: "He was a terrible person. He died a hard death. So maybe...A queen can forgive her vanquished foe. It isn't easy, it doesn't count if it's easy, it's the hardest thing. Forgiveness. Which is maybe where love and justice finally meet. Peace, at least" (*Perestroika* 122).

*Angels in America* enacts a cultural ritual of forgiveness, similar to what August Wilson accomplishes in *Fences* (1983). *Fences* deals with themes of judgment and forgiveness, and ultimately works to orchestrate a communal healing of past racial

wounds inflicted on African Americans. *Angels* does the same thing for not only the victims of the AIDS crisis, but also a range of LGBT communities.

The trope of sacrificing or expelling gay and lesbian characters in twentieth-century American drama can in part be explained through the concept of containment: the need to establish boundaries around perceived threats. Drawing on cognitive theory, Bruce McConachie has investigated how Cold War rhetoric and the concept of containment infiltrated numerous ways in which Americans conceptualized the world and each other, which in turn was mirrored in American theatre. Containment was such a pervasive concept after World War II because the United States was worried about containing the spreading threat of Communism. There were perceived external and internal threats posed by Communism to the future of the United States, but the idea of containment also spread to gender roles of the time. McConachie employs the term “Empty Boy” to describe the ways in which American culture came to understand and value masculinity and the idea of America during the Cold War. Boys were considered empty containers that could realize the potential of America, but could also be infiltrated by insidious outside forces. McConachie contends that, “In the popular imagination, the American boy represented the potential strength of the nation” (57).

Moreover, in taking on the burden of representing the future of America, the American male became in effect a symbol for America itself:

The popular mythology surrounding the ‘good war’ tended to conflate American boys with America itself. . . . Most believed that the American boy, an embodiment of what was best in the nation, was the first line of defense in the Cold War. In the postwar quest among public intellectuals to identify an

American ‘national character,’ the figure of the Empty Boy often stood behind their characterizations. The notion of national character was itself a Platonic abstraction intended to define the essence of Americanness in the expectation that this essence would be sharply different from its Soviet counterpart. In addition to confronting an external danger, the construct of national character posed an internal question of authenticity: Are we being true to ourselves? (58)

McConachie identifies homosexuality as a perceived cultural threat of the time to the empty containers that boys and young men represented in American culture, and documents how gays and lesbians were targeted in general. David Savran highlights the similar cultural connections made between Communists and homosexuals: “Zealots such as Senator McCarthy and Senator Kenneth Wherry, the Republican floor leader, insisted that there was an inevitable link between Communists and homosexuals,” and making such connections “was extremely productive for the Cold War hegemony insofar as it rationalized the exercise of containment on the domestic front” (*Communists* 86). Not only did Communism need to be contained, but also the threat of homosexuality; otherwise, the Empty Boy—America itself—would be contaminated and the contagion would spread.

Because containment was such a pervasive spatial metaphor for Cold War American culture, we can apply its meanings to the treatment of homosexuality in American drama, and especially the spaces that gay characters inhabit in popular gay dramas. Containment helps to further contextualize the closet as a spatial metaphor; after all, the closet functions as a form of containment for gays and lesbians.

The Cold War ended in 1989, on the cusp of a decade that would see striking changes in gay lives and their representations in American drama, most notably in Tony Kushner's *Angels in America*. The title *Perestroika*, the second part of the epic, explicitly refers to the ending of the Cold War as a major theme of the work. It is the Russian word for "restructuring." Indeed, perestroika's economic reforms contributed to the ending of the Cold War. The juridico-medical discourse surrounding homosexuality had also changed by the century's end, engendering larger legitimate spaces for gays and lesbians.

Restructurings also occurred within the dramatic devices used within popular gay dramas of the time, specifically in terms of the traditional expulsion or sacrifice required of gay and lesbian characters depicted in American drama. *Angels in America* is perhaps the most prominent example of a drama that subverts older gay dramatic rituals. As McConachie notes:

Kushner subverts metaphors of containment that shape personal identity and human interaction. Whereas the cold warriors of *Angels* act on their belief that identity is evident in the reality of either skin (Joe Pitt) or innards (Roy Cohn)—the boundary or the essence of a contained self—other characters come to understand that such Platonic metaphors avoid the messy complexities of identity and change. (197)

This highlights Kushner's blurring of the spaces allotted to any identity, including those of sexual minorities. McConachie argues that Americans had often equated boys and young men with the empty vessels and containers of America itself. This perspective reveals how Kushner uses cognitive metaphors of contamination, strategies of metonymy,

and the theme of forgiveness to subvert Cold War perspectives and American drama's methods for dealing with gay subjects. In the process, Kushner's plays demand a re-examination not only of America's gay inhabitants, but of America itself.

In speaking to the audience at the end of the play, and in fact blessing them, Prior invokes a tremendous forgiveness upon not only the spectators in the theater, but also metonymically all Americans and America itself. He serves as a new High Priest of America, by in effect re-conceptualizing the spatial logic of the closet:

This disease will be the end of many of us, but not nearly all, and the dead will be commemorated and will struggle on with the living, and we are not going away.

We won't die secret deaths anymore. The world only spins forward. We will be citizens. The time has come.

Bye now.

You are fabulous creatures, each and every one.

And I bless you: *More Life*.

The Great Work Begins. (146)

The walls of the closet are pushed to the boundaries of the United States. Because "we are not going away," the closet is rhetorically disbanded. Everyone is equalized in the audience, regardless of identity affiliation: everyone is equally fabulous and everyone has somehow been forgiven. As Eskridge claims, the end result desired for the gay liberation movement is equal citizenship. The previous paradigm of gay drama has been reversed: in Kushner's vision, America has sought and been granted absolution by its gay subjects. Kushner continues Crowley's use of queer space as well by re-conceptualizing the spaces of the closet and the country.

David Savran interprets Kushner's strategy in terms of an empty gesture of "dissensus": merely the "*rhetoric* of pluralism and moderation," which he argues is in fact only a mode of consumption that is ultimately "reaffirming a fundamentally conservative hegemony" (220). I find that argument too cynical for my taste, but in this I may be acknowledging predilections of consumption that Savran is highlighting as the problem. In contrast to Savran, David Román thinks that the spectator's engagement in a process of consuming a marathon performance of *Angels*—living through a day of dramatic representations about AIDS, remembering actual people living with the disease or who have died from it—actually constitutes a transformative "ritual of hope" (221).

I agree more with Román's interpretation of Kushner's achievement, mostly because I read *Perestroika* as successfully intervening in one of the recurring rituals in gay drama, going beyond what Savran thinks is merely the "*rhetoric* of pluralism and moderation," but actually instituting a theatrical praxis that has been so commercially successful precisely because it engenders a catharsis from a diverse pool of spectators. The final moments of *Perestroika* perform an act of judgment on the audience, one that culminates in collective absolution and encouragement to try again, "more life." In the process, it simultaneously breaks apart previous boundaries of containment and strengthens the community's earnest commitment to liberal pluralism, which, despite Savran's Marxist critique, is still the most valuable thing about the American project.

Gay drama has always been inextricably linked with resonant images of crime and its attendant guilt, atonement, and in recent years a potentially reconciling forgiveness. Successful performances of cultural forgiveness work towards a place, in the words of Kushner's character Belize, "where love and justice finally meet" (*Perestroika* 122). The

Empty Boy, metonymically figured as the unrealized potential of American masculinity and the American national body itself, has been fully and finally contaminated by unabashedly acknowledged homosexuality and the literal disease of AIDS. However, instead of using his protagonist as a warning about the threats to American masculinity and national direction, this “contaminated” character, Prior Walter, emerges as the only one who holds a potential answer to the future of America.

David Savran observes that *Angels* works by “placing this oppressed class at the very center of American history, by showing it to be not just the depository of a special kind of knowledge, but by recognizing the central role that it has had in the construction of a national subject, polity, literature, and theatre” (Ambivalence 227). Ron Scapp makes a similar argument with respect to AIDS and the significance of Prior’s speech at the end of *Perestroika*: “The cause of those dying of AIDS becomes the cause of America, of humanity. This moment evokes a universal act of transgression, of trespassing the boundaries of some prior state of exclusion and denial (and political wickedness)” (92).

*Angels* achieves this remarkable shift in the representational paradigm by moving the main thrust of its gay drama away from the traditional rituals of gay drama. Despite Crowley’s subversive use of queer space in *The Boys in the Band*, his play still depicted collapsing gay male bodies (Michael, Emory, even the ambiguous Allan all collapse at one point) and a tenuous domestic space, given Michael speaks of burning his lonely apartment and Hank and Larry are only imagined offstage. Instead, *Angels* becomes a collective ritual of expiating criminal and moral guilt through the act of forgiveness, not punishment. *Angels in America* figures the guilt as being projected onto

and thereby internalized in the American body politic for having committed sins against its LGBTQ citizens.

### **The Constitutional Hermeneutics of *Angels***

Like *The Boys in the Band*, Kushner's text is a cultural precursor to the landmark legal decisions *Lawrence v. Texas* (2003), *U.S. v. Windsor* (2013), and *Obergefell v. Hodges* (2015). But *Angels in America* is equally a rebuke to the case *Lawrence* would eventually overturn, *Bowers v. Hardwick* (1986), which held that state laws criminalizing homosexual conduct were constitutional. By extension, the play also rejects the kind of constitutional interpretation that resulted in the *Bowers* opinion.

In order for any liberation movement to occur, people must often first break existing laws in order to establish new ones. As Joe Pitt envisions an empty Hall of Justice in *Millennium Approaches* because its laws hold nothing for his particular identity, Louis tells him, "Sometimes, even if it scares you to death, you have to be willing to break the law" (*Millennium* 73). Joe literally works in the shadow of *Bowers v. Hardwick*. He writes judicial opinions from a Hall of Justice connected with the very legal regime that is silencing his identity. *Bowers* was issued in 1986, the year in which much of *Angels* is set. The cultural power of *Bowers* manifests in Joe Pitt and Roy Cohn, the two gay lawyers of the epic, who remain closeted in order to preserve their public personae. Kushner produces a dramatic text and performance that resists a legal text: the *Bowers* decision. The play is a cultural act of transgression. Simply to acknowledge one's gay identity—and certainly to act upon it—could be considered a transgression



under the *Bowers* holding. All states were free to make homosexuality illegal, although New York state had repealed its sodomy laws.

David Thompson reads *Angels* and *Lawrence* against each other in an effort to understand how both texts understand “the place of sexuality in our notion of the person and, more broadly, about the place of the person in our notion of the law” (244). He argues that the *Lawrence* decision’s use of the Fourteenth Amendment’s Due Process clause to formulate its holding indicates a view of personhood similar to that espoused in *Angels in America*. Thompson writes, “In *Lawrence v. Texas*, the Supreme Court nudges us toward a more subtle, more expansive, more transcendent understanding of what it means to have the acts of love that one engages in branded as ‘deviant’ and criminal, and of the violence that is done to the persons whose identities take shape within a system of laws that brand people and their activities in this way” (252).

*Bowers* was wrongly decided because the Court framed the issue too narrowly. The judicial opinion asked whether the plaintiff had a fundamental right to practice homosexual acts, as opposed to the broader holding of *Lawrence* which made the issue about a fundamental right to liberty, supported by the right to privacy. *Bowers* became the law of the land in 1986, and through the legal doctrine of *stare decisis*, it became entrenched as the law. *Stare decisis*, Latin for “to stand by things decided,” is the inherently conservative legal doctrine that establishes precedent in judicial opinions. Supreme Court precedent has the greatest weight. Lower courts cannot overturn Supreme Court precedent and must follow it. Only the Supreme Court can overturn its own precedent, and it does so cautiously. This causes certain judicial opinions to become

culturally entrenched, and makes case law and legal interpretation inherently conservative.<sup>49</sup>

Law, both divine and human, has failed to uphold its promise in *Angels in America*: Kushner envisions the Hall of Justice as empty on earth, and Heaven is a rubble-strewn earthquake zone without anyone in charge. Justice is figured as cold and un-adaptable to the complexity of human relationships. Louis thinks that American justice is too concerned with the verdict rather than the process of evaluating an individual's worth. This deliberative process is what Louis calls "the act of judgment" as opposed to the always reductive nature of a verdict: "it should be the questions and shape of a life, its total complexity gathered, arranged and considered, which matters in the end, not some stamp of salvation or damnation which disperses all the complexity in some unsatisfying little decision" (*Millennium* 38-39). This temporal process of evaluating the merits and crimes of the individual and the American nation is in many ways the underlying purpose of *Angels in America*, and part of what provides its epic nature. America is being judged, over the course of a marathon set of performances if one is to see both parts, after which America is forgiven in order for collective survival in the face of the global challenge of AIDS and the unknown challenges of the new millennium.

*Angels* looks and longs for anchorage and stability in texts and lives—some order or plan to follow in the wake of AIDS, but Kushner knows that textual stability can also

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<sup>49</sup> In the *Lawrence* opinion that overturned *Bowers*, Justice Kennedy had to acknowledge the weight of *stare decisis*. He writes, "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. . . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled" (539 U.S. 577-78). In the overruling of *Bowers*, the language of *Lawrence* is performative, in the Austinian sense, because it is an action: "*Bowers v. Hardwick* should be and now is overruled." And thus it was.

be a dangerous thing. The Angel wants Prior to preach the gospel of the Anti-Migratory Epistle, a text that would have humanity reach some sort of stasis through an utterly immobile text. This of course would result in Prior's death, I think, as AIDS represents and is a force that must be counteracted with a progressive knowledge. The angel shouts, "FOR THIS AGE OF ANOMIE: A NEW LAW!" (*Perestroika* 48). The etymology of anomie comes from the Greek word *anomia*, lawlessness. For this age of lawlessness, the angels want to deliver a stable law to humanity: a law that would come to definitive conclusion on all matters. The Angel Europa says, "This is the Tome of Immobility, of respite, of cessation. Drink of its bitter water once, Prophet, and never thirst again" (*Perestroika* 131).

But the answer is not as neat as Prior would hope. Prior wants to move forward, he wants "more life," because "The world only spins forward." He does this without a text, except the literary text he delivers as an actor and character in a play. There are dangers to Prior's philosophy when people go forward with a view of interpretation that allows for change and evolution, as when people abuse the powers of interpretation. Cohn sees the law as an "organ" to be manipulated; it is a phallic site of desire and domination that means nothing to him but words whose meaning can be twisted to fit his own ends: "Because I don't see the Law as a dead and arbitrary collection of antiquated dictums, thou shall, thou shalt not, because, because I know the Law's a pliable, breathing, sweating...organ..." (*Millennium* 66). As John Quinn notes, Cohn prizes the indeterminacy in law: "the indeterminacy of the rule of law is a central tenet of his creed of life" (83). Interestingly, although Cohn is a conservative character, he holds a liberal view of the law as a force that can change depending on the circumstances of the day.

This question of legal interpretation is particularly salient in the realm of constitutional law, which is the body of law that deals with America's supreme secular text. There are originalist scholars and Supreme Court Justices like Antonin Scalia who think that the text of the Constitution should only be interpreted through the meanings and intentions of the words when they were written in 1787. Other scholars and Justices, in the tradition of Justice Brennan, think that the Constitution is a living document that we must interpret in light of changing times.<sup>50</sup> The Justices in the *Bowers* majority looked at the history of sodomy laws in the country and could not see how the law could allow for a fundamental right to homosexual conduct; there is no mention of homosexuality in the Constitution, so how can the Constitution fundamentally protect those who practice it?

The *Lawrence* Court took a different, more expansive, forward-looking view. The Court held that there is a fundamental right to liberty and privacy guaranteed under the Fourteenth Amendment, which includes the intimate consensual acts committed within a home. Justice Kennedy's majority opinion in *Lawrence* sums up this view:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume

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<sup>50</sup> Justice Brennan championed this idea of a living Constitution. In a famous dissent issued just a few years before *Angels in America* was written, he wrote: "We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies ... The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty. The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. This Constitution does not recognize that times change ... I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. (539 U.S. 558, 579)

I see these same major constitutional law debates over interpretation being waged over the Anti-Migratory epistle in Kushner's American epic. John Quinn picks up on this line of thought: "In Kushner's America, secular law is a kind of religion, in much the same way scriptural law was religion in the world of Old Testament Judaism. Numerous legal scholars have theorized constitutional law as a kind of civil religion for America. Kushner renders this same concept theatrically" (86). Quinn goes on to label Prior's vision of the law as "gnostic": "Through Prior," he writes, "Kushner exemplifies a jurisprudential hermeneutics and substantive theme about salvation that are gnostic. Unquestionably, Prior demonstrates the gnostic triumph of spirituality over corporeality . . . Prior's knowledge . . . is intuitive, wisdom based on experience and observation rather than books and deliberation" (90). This understanding of the law is suggestive of Justice Brennan's vision of a living Constitution.

Kushner advocates a "jurisprudential hermeneutics" akin to the concept of the Living Constitution. Championing the flexibility of texts allows for a liberal politics, but a loss of certainty in knowledge and action. Kushner's domestic hermeneutics encompass a dramatic allegory that champions liberal methods of constitutional interpretation. In turn, this advocates for legal decisions that expand definitions of intimate relationships inhabiting domestic space.

The ending of *Angels in America* conjures a liberal pluralistic and expanding environment in the space of the theater itself, directly including the spectators of the play. The main characters have converged on the Bethesda fountain to discuss politics, art, and life in a post-Cold War world and amidst the continuing AIDS crisis, although, significantly, Prior is not dead. The couples presented at the beginning of the epic have broken up, and as David Savran notes, “the romantic dyad (as primary social unit) is replaced in the final scene of *Perestroika* by a utopian concept of (erotic) affiliation and a new definition of family” (Ambivalence 209). As Jill Dolan observes, the epic “draw[s] spectators into a revised vision of kinship in which gay men, Mormons, African Americans of Caribbean descent, and Jews find family together” (53). Paradoxically, considering the strong theme of sexuality in the play, the community in the final scene is strikingly desexualized. Hannah has donned a cosmopolitan identity (and perhaps a lesbian identity, as Meryl Streep’s performance in the film implies, as if she has some kind of awakening and realization after her sexual experience with the female Angel), and the former gay lovers Prior, Louis, and Belize are content to debate political issues like the Palestinian state.

The epilogue is set outside of any type of traditional domestic space, in front of Central Park’s Bethesda Fountain. The stage directions provide Kushner’s final idealized image: a diverse intellectual community of racial, sexual, and political debate. “*Prior is heavily bundled, and he has thick glasses on, and he supports himself with a cane. Hannah is noticeably different—she looks like a New Yorker, and she is reading the New York Times. Louis and Belize are arguing. The Bethesda Angel is above them all*” (143). Louis and Prior do not romantically reconcile; their domestic space permanently

collapsed in *Millennium Approaches*. Kushner takes gay characters out of traditional domestic spaces, where they had rarely met with positive fates. The final tableau in *Angels* demonstrates his consciousness of linked oppressions and the political strength gained through alliances forged across those oppressions. In that sense, this “gay fantasia on national themes” has an intersectional political vision. *Angels* depicts a group of characters—LGBTQ and allies, of different races, religions, and socioeconomic classes—that have banded together in common cause: greater visibility for those suffering with AIDS as well as the political power that comes through collective solidarity. They are outside in the “Central” park of New York City, making a loud call for political mobility.

### Conclusion

Una Chaudhuri’s seminal study *Staging Place: The Geography of Modern Drama* (1995) explores the central role of “home” in modern drama, and recognizes the position that place and space play in Tony Kushner’s gay fantasia on national themes: “*Angels in America* engages the question of place from its title onward. What America is, what modes of placement and displacement it enjoins—in short, what it means to be here, to be here physically, spiritually, psychologically, and ideologically—is the range of questions that the play’s expansive structure is designed to accommodate” (249-50).

*The Boys in the Band* and *Angels in America* persistently ask the question: what is the place of LGBTQ people in the United States? Should they continue to live in the shadows offstage? Crowley uses queer space to suggest the need for a new representational paradigm. Kushner fully remaps the paradigm, and advocates for the liberal methods of Constitutional interpretation that would not only result in *Lawrence v.*

*Texas*, but also the recent same-sex marriage cases *U.S. v. Windsor* (2013) and *Obergefell v. Hodges* (2015).

As *Angels* re-imagines the domestic legal spaces of constitutional hermeneutics, it simultaneously redraws the domestic spaces allotted to gay and lesbian characters in American drama. The opening credits of the 2003 HBO film version, directed by Mike Nichols, begin by soaring through the clouds over the main cities of America.

*Perestroika* gradually leaves the broken domestic spaces of *Millennium Approaches* and enters into spaces of nature and the cosmos. The work is a fantasia, breaking away from whatever principles in dramatic realism that may have applied.

By expanding outward and forward into a limitless universe, Kushner's epic calls for an expanding, evolving space allotted to LGBT citizens. Equal LGBT citizenship would be more fully realized in the Supreme Court decisions *Lawrence v. Texas* (2003) and eventually *Obergefell v. Hodges* (2015), which declared same-sex marriage a Constitutional right protected by the liberty afforded to all citizens under the Fourteenth Amendment. I will read *Obergefell* as the most recent example of gay legal theatre in the next chapter.



## Chapter 4

### A Case Study: Same-Sex Marriage in the United States

*“The performance of the laws then becomes a singularly powerful locus of social control, for it is the very means by which the members of the community know who they are.”*<sup>51</sup>

#### Introduction

Gay and lesbian drama has always been in part a legal drama, and the court proceedings adjudicating gay/lesbian rights have been aided by essential theatrical elements. The cultural drama of the Wilde trials firmly entrenched the emerging modern gay and lesbian subject as one surrounded by laws. When dramatizing them on stage throughout the twentieth century, dramatists were always cognizant of laws relating to representations of homosexuality on the stage and regulating homosexuality offstage. Sometimes those dramatic representations reflected and supported those laws, but often they challenged laws as well.

In this final chapter, I would like to make three main points about how drama and law worked together to change attitudes toward and eventually legalize same-sex marriage in the United States. First, same-sex wedding rituals were performed throughout the twentieth century, before laws were officially changed to allow for

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<sup>51</sup> Robert Hariman, ed. *Popular Trials: Rhetoric, Mass Media, and the Law* (Tuscaloosa: U of Alabama P, 1990), 17.

marriage equality. These rituals, along with theatrical representations of same-sex marriage in gay dramas beginning in the 1980s, worked to change attitudes and anticipate the real political and legal movement for marriage equality.

Second, the Supreme Court has worked as a kind of national theater and temple, in which the major gay and lesbian rights cases were performed and solemnized, culminating most recently in the case of *Obergefell v. Hodges* (2015). *Obergefell* illustrates my contention that gay and lesbian drama is often a hybrid discourse of law and literature. By reading the case as a kind of drama, we can uncover its superficial comic structure that not only ends in a marriage for the gay and lesbian plaintiffs, but also culturally entrenches the normalization of gay and lesbian citizens by ceremonially admitting them to the institution of marriage, and by extension the American “family.”

Third, reading *Obergefell* for its literary and theatrical properties makes some things apparent. The rhetoric in the fractured and fractious dissents, and the intense theatrical and jurisprudential conflict between the majority and dissenting opinions (and even conflict within the dissenting opinions), provides an ironic substructure for the drama, which undermines *Obergefell*’s comic structure and prevents closure of the legal-cultural debate. In addition, the limited nature of Supreme Court spectatorship demonstrates how U.S. constitutional law is problematically performed and consumed. As a result, despite my inclination to champion *Obergefell* as a triumphant vehicle of justice, the case also exposes some uncomfortable truths about how laws are legitimized in the United States, and reveals the tenuous sustainability of *Obergefell* in the years to come.

Since the Netherlands' passage of marriage equality legislation in 2001, more than seventeen other countries have passed laws or had courts recognize same-sex marriage. 2015 has been a monumental year for marriage equality. On May 22, the Republic of Ireland became the first country to legalize same-sex marriage by popular vote. With a voter turnout of 60.5%, voters ratified a constitutional amendment allowing for marriage equality, with 62% voting yes. A month later, the United States Supreme Court ruled in *Obergefell* that state laws prohibiting same-sex marriage were unconstitutional—that the fundamental right to marriage includes same-sex couples—thus guaranteeing full marriage equality in every state.

Beginning in the 1980s, several American gay AIDS dramas featured representations of same-sex marriages. Soon thereafter in the 1990s, gay marriage as a political goal began infiltrating the popular culture, in large part through the work of Andrew Sullivan. In *Virtually Normal: An Argument About Homosexuality* (1995), Sullivan argued “equal access to the military and marriage” should be the central aims of the gay and lesbian movement (173). In fact, on the day that *Obergefell v. Hodges* was issued on June 26, 2015, Sullivan came out of blog-retirement—he had been writing the popular “Daily Dish” on [andrewsullivan.com](http://andrewsullivan.com) for about a decade—to post an entry titled “It is Accomplished,” implying that the gay and lesbian movement is now completed: a problematic assertion, considering the substantial lack of LGBT anti-discrimination laws in place.<sup>52</sup> Although it took a few years to gain traction as a political idea, the call for

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<sup>52</sup> The Human Rights Campaign (HRC) is urging the need for a Federal Non-Discrimination Bill, now called The Equality Act, because there are currently thirty-one states with no LGBT anti-discrimination laws. HRC is making the following argument: “Even after a marriage victory at the Supreme Court, in most states in this country, a couple who gets married at 10 a.m. remains at risk of being fired from their jobs by noon and evicted from their home by 2 p.m. simply for posting their wedding photos on Facebook. No one should be fired, evicted from their home, or denied services because of who they are or whom they

marriage equality became a central preoccupation of the gay and lesbian rights movement beginning in the mid 90s. Sullivan acknowledges that his argument is a conservative one: “Gay marriage is not a radical step; it is a profoundly humanizing, traditionalizing step” (185). It has met with a legitimate critique by queer theorists, as I will explain shortly.

In response to the growing marriage equality movement, Congress passed the Defense of Marriage Act (DOMA) in 1996, signed by President Bill Clinton as part of a compromise he later came to regret; the law “defended” the heterosexual definition of marriage for the Federal Government. DOMA anticipated that state courts and legislatures would begin allowing same-sex marriage. Beginning in 2003, the Massachusetts Supreme Court in *Goodridge v. Department of Public Health* held that same-sex marriage could not be denied under the state Constitution. Thus began the last decade of legal wrangling between state courts and legislatures, as American culture began debating not only whether same-sex couples could get married, but also who would get to decide the issue: democratically elected representatives or judges?

On June 26, 2013, the Supreme Court issued two landmark gay and lesbian rights opinions, *United States v. Windsor* and *Hollingsworth v. Perry*. In *Windsor*, the more important of the two, the majority struck down DOMA as unconstitutional, thus mandating Federal recognition of those same-sex marriages legitimized in thirteen states at the time. Written by Justice Kennedy, the same Justice who penned the *Lawrence* decision ten years earlier to the day, the *Windsor* Court used a Due Process and Equal Protection argument to strike down DOMA as unconstitutional. The *Perry* majority

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love.” “Why the Equality Act.” *Hrc.org*. Human Rights Campaign.  
<http://www.hrc.org/resources/entry/why-the-equality-act>. Web. 28 July 2015.

focused on a narrower legal issue of standing, but its effect was to legalize same-sex marriages in California and overturn Proposition 8, the voter-passed referendum that banned same-sex marriage there in 2008. Although the rulings did not declare a fundamental constitutional right to same-sex marriage, and did not legalize same-sex marriage in the majority of states that outlawed the practice, it was a significant victory for LGBT rights.

Two years later to the day, however, on June 26, 2015, the Supreme Court issued its opinion in *Obergefell v. Hodges*, which will undoubtedly be considered a landmark civil rights case, akin in importance to *Brown v. Board of Education* (1954), which desegregated schools. *Obergefell* held that the fundamental right to marriage includes the right to same-sex marriage, as protected under the Liberty clause and Equal Protection clause of the Fourteenth Amendment.

### **Queer and Feminist Critiques of Same-Sex Marriage**

In the 1970s, gay liberation activists and lesbian feminists questioned the importance of same-sex marriage as a political and legal goal. Gay liberationists focused on the need for sexual freedom: “much of the early gay press urged men to overcome their sexual shame and to value the diverse pleasures and new friendships made possible by sexual experimentation with many partners” (Chauncey 93). In turn, lesbian feminists of the time greeted same-sex marriage with skepticism because they viewed marriage as a traditionally patriarchal and oppressive institution; instead, “many questioned monogamy and worked to construct new kinds of relationships and living patterns” (94).

Queer theorists have questioned the importance of LGBTQ political energies being spent on achieving marriage equality. Pushing back against assimilationist thinkers like Andrew Sullivan, scholars such as Michael Warner and Judith Butler think that marriage as an institution is inherently exclusive and discriminatory. Warner, along with a multitude of LGBT activists, lawyers, academics, dramatists (such as Terrence McNally and Paula Vogel), artists, and allies, published a manifesto that critiqued same-sex marriage, entitled “Beyond Same-Sex Marriage: A New Strategic Vision for all our Families & Relationships” (2006).<sup>53</sup> The manifesto argued that because families and relationships are so varied, marriage equality as the driving political goal is misguided and discriminatory. Excluded people include “single parent households,” “adult children living with and caring for their parents,” “[c]lose friends and siblings who live together in long-term, committed, non-conjugal relationships, serving as each other’s primary support and caregivers.” People should be free to enter into domestic partnerships of different varieties, the manifesto urges, and the economic benefits of marriage should not be contained to conjugal partnerships. As Warner observes, “Marriage sanctifies some couples at the expense of others. It is selective legitimacy. ... Marriage, in short, discriminates” (82).<sup>54</sup>

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<sup>53</sup> Available at [http://www.beyondmarriage.org/full\\_statement.html](http://www.beyondmarriage.org/full_statement.html). Accessed 12 February 2016. My use of Andrew Sullivan, Michael Warner, Judith Butler, George Chauncey, and “Beyond Same-Sex Marriage” is directly influenced by Margaret Sönsen Breen’s work in *Narratives of Queer Desire: Deserts of the Heart* (London: Palgrave, 2009), Ch. 2, “Love in the Shadows: The Same-Sex Marriage Debate and Beyond,” 42-71.

<sup>54</sup> Judith Butler holds the same view. In her book *Undoing Gender* (2004), she writes: The recent efforts to promote lesbian and gay marriage also promote a norm that threatens to render illegitimate and abject those sexual arrangements that do not comply with the marriage norm in either its existing or its revisable form. ... Similarly, efforts to establish bonds of kinship that are not based on a marriage tie become nearly illegible and unviable when marriage sets the terms for kinship, and kinship itself is collapsed into “family.” The enduring social ties that constitute viable kinship in communities of sexual minorities are threatened with becoming unrecognizable and unviable as long as the marriage bond is the exclusive way in which both sexuality and kinship are organized. (5)

The political and theoretical tensions over same-sex marriage are real and perplexing, and I do not mean to ignore them. However, marriage equality has been the predominant political issue for the LGBT rights movement in the last ten years, and as such deserves some careful cultural analysis. How did drama and law work together to make same-sex marriage such a culturally resonant issue for the past decade? The answers illuminate the nature of social change and how law gains its authority.

### **The Same-Sex Wedding Ritual**

“Even to say it in one word, ritual, is asking for trouble. Ritual has been so variously defined—as concept, praxis, process, ideology, yearning, experience, function—that it means very little because it means too much” (Schechner 228). In her book *Recognizing Ourselves: Ceremonies of Lesbian and Gay Commitment* (1998), Ellen Lewin observes, “Anthropologists have defined rituals as formal action that is highly structured, repetitive, frequently redundant, and imbued with symbolization. On perhaps the simplest level, rituals teach or reinforce the proper way to live, the values that a people hold in common, and the behaviors that are expected of them” (31). Many of the legal machineries at work in trials are ritualistic. For example, there is the recurrent dynamic interplay of performance, spectatorship, and judgment. In arguing before a judge and jury, the parties and lawyers are then *evaluated* on their performances: were they convincing? Is their cause just? In addition, the detailed rituals involving rules of procedure and evidence (filing and formatting deadlines, who speaks when in a trial, how to object, what is allowed as evidence, the principles and etiquette of navigating argument at the appellate level, etc.) ensure that the wheels of justice turn far too slowly,

but that the final result when it does come gains a symbolic moral legitimacy. Similarly, theatre has similar features to ritual, and theatre and ritual at times overlap. Theatre can be a community ritual, in which members of the public repeatedly come together to witness something that reflects or comments upon their society. For instance, the play *Antigone* at this point is also a community ritual because it has been repeated and performed throughout the centuries. Productions will emphasize different things in Sophocles' play depending on the historical and cultural moment, but performing *Antigone*, for example, is always now an inevitable blending of theatre and ritual.

The same-sex wedding ritual holds such power because it is laden with symbolism as it is performed. Let me emphasize that I am most interested in the power of same-sex weddings as theatrical ceremonies. Married life—what happens after the solemnization, the quotidian challenges and gratifications—is not of much interest to me in this study. I am fascinated with those moments when same-sex marriages are solemnized, often literally through legal apparatus, but often only through figurative means when the law does not recognize the union. Moments of gay and lesbian marriage solemnization can be powerful, even awe-inspiring events. Like gay and lesbian drama, these ceremonies fuse theatre, ritual, and legal discourse into resonant cultural enactments.

LGBT people have been having wedding ceremonies for hundreds of years, with varying degrees of solemnity. The concept of same-sex marriage did not reach popular attention in the United States until the late twentieth century, but there were gay weddings performed in Harlem as early as the 1920s, although they did not have any legal validity (Chauncey 88). Ellen Lewin reports on early lesbian ceremonies in the



United States: “A number of accounts of lesbian life in Depression-era Harlem describe weddings of butch/femme couples in elaborate ceremonies that included attendants and bridesmaids. Real marriage licenses were sometimes obtained ... either by masculinizing one partner’s first name or by having a male surrogate apply for the license” (4).

Although gay liberationists expressed ambivalence about the need to form families and marriages in the 1960s, in 1970 several gay couples requested marriage licenses in Minnesota and Kentucky, and the first lawsuits were filed in what would be a decades-long struggle to attain marriage equality (Chauncey 89-90). Three years after the Supreme Court held in *Loving v. Virginia* (1970) that anti-miscegenation laws were unconstitutional, Richard Baker and James McConnell asked for a marriage license in Minnesota. They were denied because the state statute specified that marriage was to be contracted between members of the “opposite” sex. The men filed a lawsuit, citing the *Loving* precedent as support for their case, which the Minnesota Supreme Court denied, holding that there was no fundamental right to same-sex marriage. The men appealed to the U.S. Supreme Court, which dismissed the appeal in a terse, one line, *per curiam* decision in 1972: “Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question” (810). This was official Supreme Court precedent until the Court explicitly overruled *Baker* in *Obergefell*. Throughout the 1970s, these legal questions continued to surface in pockets of the United States, with events anticipating the instances of civil disobedience that would arise again in the twenty-first century. Lewin’s research reveals, “In 1975 the district attorney in Boulder, Colorado, ruled that no laws bar same-sex marriages; based on that ruling the county clerk of Boulder issued six marriage licenses to same-sex couples.” These were valid until the state attorney general intervened and

stopped the licenses from being issued (8). Because the law at times seemed unsettled or unclear, same-sex couples would perform weddings hoping to shape and clarify the law.

It is important to contextualize same-sex wedding rituals within the legal framework that has historically prevented their state sanction. Sociologist Kathleen Hull conducted research on same-sex wedding ceremonies, concluding that in the years preceding full marriage equality in the United States, many gay and lesbian couples turned to such rituals to “enact legality in order to compensate for the absence of official recognition” (632). Hull found:

the most significant motivations [for enacting a wedding rite] include the reality-making function of ritual and the beneficial impacts for the couple both as individuals and as a committed partnership. ... But most respondents who had held a public ritual also discussed the importance of the ritual as a *public* event, witnessed by friends and family. The ritual gives the couple an opportunity to affirm or redefine the status of the couple’s relationship for those who matter most to them. (645)

Appreciating the “reality-making function of ritual” consistently arose in Hull’s interviews with gay and lesbians who participated in these ceremonies: they thought their relationships were not “real” unless they had orchestrated such a publicly witnessed performance (646).

A same-sex wedding can be a ritual that blends elements from theatre with the trappings of law’s authority, thus working to perform laws in order to precipitate their codification. For example, in 2004, San Francisco mayor Gavin Newsom allowed issuance of same-sex marriage licenses in defiance of California state law. Newsom did

this in reaction to President George W. Bush's call in his State of the Union Speech to "defend the sanctity of marriage" in the wake of the Massachusetts *Goodridge* case that declared a state constitutional right to same-sex marriage (Coontz 273). The ceremonies attracted a national audience via various media: "More than thirty-two hundred gay and lesbian couples, many from out of state, flocked to San Francisco to get married" (Coontz 273). The San Francisco wedding rituals were publicly televised, theatrical performances that should be considered transgressive; despite the normalizing and assimilationist impulse inherent in marriage, these ceremonies defied existing laws and were acts of civil disobedience. They were publicly enacted in order to gain the unique authority and acceptance that can only come through law's validation. The same-sex wedding rituals performed transgressively in 2004 led to the passage of Proposition 8, the California voter initiative banning same-sex marriage, and the legal challenges following Prop 8's passage, culminating in *Hollingsworth*, *Windsor*, and *Obergefell*. Thus, these illegal wedding rituals helped spark the events that would lead to the full legalization of same-sex marriage.

Until June 26, 2015, U.S. same-sex weddings always occurred in some relation to legal prohibition. Even if the couple was married in a state that allowed same-sex marriage, there were still other states that prohibited the practice, and so all same-sex marriages were performed in the shadow of the law. In this sense, U.S. same-sex weddings were, until quite recently, what anthropologists label "rituals of rebellion" (Lewin 33). Lewin characterizes the various kinds of wedding rituals that gays and lesbians have enacted, noting there is a spectrum of possibility between rituals of resistance and conformity that each couple navigates as they plan their ceremony (31-36).

I'll take the liberty of using a personal example to demonstrate this point. I took part in a same-sex wedding ritual myself in 2011, and the ideas in this chapter enrich my understanding of the experience.

The legal situation in 2011 was complex. Same-sex marriage was legalized by the Connecticut Supreme Court in 2006, my state of residence, but there had been no definitive statement from the U.S. Supreme Court on the matter, and so what my fiancé and I were doing was still somewhat novel, and, in our own small way, resistant. We were normalizing the gay marriage experience for ourselves and the many heterosexuals in attendance, it is true, but the legal context of the time made it in part a “ritual of rebellion.” The ceremony was also a legal-theatrical ritual of persuasion for everyone in attendance. We needed the legal authority of the state of Connecticut to give the ritual some apparent legitimacy and to make an argument for the national recognition of same-sex marriage. We also needed the theatrical elements of the wedding ritual to solidify the legal meanings in the audience's consciousness.

What made the experience so marvelous was that there was a collective sense that all of the people there that day—the actors in the wedding ceremony and the spectators—were *doing* something. We were making a contemporary political statement that same-sex marriage should be recognized at the Federal level and throughout the entire country, while simultaneously sharing something ancient and profoundly human: promising to love someone until the end. In fact, it was because the essential ritual was ancient that the contemporary political implications became so palpable that day. The political issue's importance arose from the community's enactment of, and reverence for, the ancient wedding ritual. When my fiancé and I entered the church, everyone in the seats

stood up and watched us walk down the aisle together, in a sign of respect for us, but also for the wedding ritual itself. We had invited about 120 people and put on a fairly “traditional” wedding. We married in our United Church of Christ church; we wore tuxedos; we had the first dance and cut the cake, all in front of our family friends. There were small but deliberate derivations from the traditional script: we walked each other down the aisle, for example, to make a subtle statement about our mutual support of each other and independence from our parents. The experience was a mixture of exhilaration, profound validation, and a touch of occasional embarrassment, being as we were the objects of attention all day. But for our family and friends, performing the various wedding rituals—sending out invitations, planning the ceremony, dressing for the occasion, walking down the aisle, exchanging vows, displaying affection, making and responding to the toasts, cutting the cake, opening the gifts, writing thank-you notes—reinforced our community’s appreciation of the legal status of the marriage.

Surely, the Supreme Court Justices who have officiated at same-sex weddings have been cognizant of some of these dynamics. Justices Sandra Day O’Connor, Ruth Bader Ginsberg, and Elena Kagan all officiated at gay and lesbian weddings before *Obergefell* was issued. One of the weddings was even performed in the Supreme Court!<sup>55</sup> I will explore the Court as a symbolic wedding theater later in this chapter.

### **Theatrical Representations of Same-Sex Marriage**

Stage portrayals of same-sex marriage rituals also helped to shape the cultural and legal debate. George Chauncey reveals how the 1980s saw greater “interest of lesbians

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<sup>55</sup> “Supreme Court Justice Elena Kagan Performs Her First Same-Sex Wedding.” *Washington Post*, 22 September 2014. Web. 28 July 2015.

and gay men in seeking legal recognition for their relationships” (95). The decade’s “lesbian baby boom,” in which many lesbian women began openly raising children, and the onset of the AIDS epidemic contributed to the emphasis on relationship recognition because these two issues were about “parenthood and death” (95). Chauncey explains, “AIDS raised the emotionally charged question of who counted as family in the most profound ways” (99). Both AIDS and the lesbian baby boom raise a plethora of legal issues involving custody disputes, visitation rights, and estate and inheritance issues.<sup>56</sup> We see some of these concerns reflected in 1980s gay drama. Representations of gay marriage on the stage began most obviously during the AIDS crisis; they would often be represented suggestively on the deathbed of one of the men. In William Hoffman’s *As Is* (1985), for example, Rich and Saul make love in Rich’s hospital bed soon before his death. The dialogue is suggestive of a marriage, with an exchange of promises.

Similarly, in the more commercially successful *The Normal Heart* (1985) by Larry Kramer, there is a preoccupation with the legal implications of the surviving partner in an AIDS death and a death-bed marriage is also portrayed at the end of the play. Felix, dying of AIDS, goes to a lawyer to get a will because he is concerned the insurance company will not honor his partner Ned as the beneficiary. If he does not mount some sort of legal defense, his estate, under the rules of common law intestate succession, will succeed to his son, who is currently living with Felix’s estranged ex-wife. The medical doctor officiates at the end of the play in the “church” of the hospital room:

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<sup>56</sup> George Chauncey describes the many legal issues that arose for gay men in the AIDS crisis involving estate issues, hospital visitation rights, housing, and funeral planning (97-104). For a description of the custody issues and legal cases involving gay and lesbian parents during the 1980s and 1990s, see Chauncey, 105-111.

Felix. I should be wearing something white.

Ned: You are. ...

Felix: Emma, could we start, please.

Emma: We are gathered here in the sight of God to join together these two men. They love each other very much and want to be married in the presence of their family before Felix dies. I can see no objection. This is my hospital, my church. Do you Felix Turner, take Ned Weeks...to be your...

Felix: My lover. My lover. I do.

Ned: I do.

(Felix is dead.) (122)

The doctor Emma figures the hospital as a church in this scene, and she co-opts legal and religious discourse within a medical setting, in order to show the fluidity of disciplinary and professional discourses. This scene takes its emotional resonance from the fact that the men are insistent on performing a ritual that has no legal validity, but do it anyway for its symbolic meaning. Felix does not call Ned his “husband,” but his “lover”; they are cognizant of the limitations of the ritual, but also intentionally shape its meaning and effect for their relationship. Ned is interpreted as a biographical reflection of playwright Kramer’s experience with the Gay Men’s Health Crisis during the beginning of the AIDS epidemic, when Kramer tried to counteract gay liberation’s emphasis on promiscuity with a message of safe sex and monogamy (Clum 62). Kramer was notoriously difficult to work with due to his zealous belief in the cause; GMHC eventually cut ties with him. John Clum and James Fisher both interpret the death-bed scene in *The Normal Heart* as

an “atonement” and sacrifice. Fisher reads this deathbed marriage as “a profound atonement for the character” (21). According to Clum, “there can be no happily-ever-after in Kramer’s jeremiad. Ned and Felix must pay for their promiscuous past...” (63). Clum’s and Fisher’s reading made sense fifteen years ago when Clum wrote his comprehensive book *Still Acting Gay: Homosexuality in Modern Drama*, but in 2015 the reading seems incomplete. Rather than read the scene as a mirroring of the traditional trope of atonement in gay drama, which I discussed in Chapter Three, I see it as a forward-looking impulse in these gay dramatists. Frustrated by the lack of legal and social protection for gay men in the 1980s, Hoffman and Kramer created theatrical rituals of same-sex marriage in order to encourage circulation and creation of a socio-legal reality.

In his introduction to *The Normal Heart*, Joseph Papp, who produced the New York premiere of the play, writes, “the element that gives this powerful political play its essence, is love—love holding firm under fire, put to the ultimate test, facing and overcoming our greatest fear: death” (29). Faced with the inexorable prospect of death in AIDS dramas, gay dramatists often reached for a logical symbolic antidote: marriage. In the face of collective suffering and death from the AIDS crisis, these dramatists staged deathbed weddings that were repeatedly circulated in the culture as a means of symbolic resistance and survival. Compare that reaction with Justice Kennedy’s concluding paragraph in *Obergefell*: “As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death” (28). For the widowed plaintiffs in *Obergefell*, just as the gay characters in *As Is* and *The Normal Heart*, marriage was figured as the bridge that sustains a couple through death.



In the decade following the beginning of the AIDS crisis, Terrence McNally portrays a same-sex marriage in a different context in the ritual drama *Corpus Christi* (1998). The play loosely follows the passion of Jesus, but is also a gay love story between Jesus and Judas. (Because Judas, true to the story, betrays Jesus, the gay marriage depicted is actually between two of the disciples, with Joshua/Jesus officiating.) Some conservative and fundamentalist Christians were offended by the recasting of Jesus as a gay man. As a result, the play's opening at the Manhattan Theatre Club in 1998 prompted bomb threats and public protest at the theatre's entrance (Fisher 25). Despite the play's notoriety, it did not meet with positive critical reception. Ben Brantley described the play as anti-climactic considering all of the controversy and the added security necessary to attend: "The excitement stops right after the metal detectors." Brantley critiques the play and characters as too nice, too non-controversial, too *normal*, and concludes "that 'Corpus Christi' is a minor work from a major playwright that probably would have come and gone quietly had it not been for its early and vociferous opponents."<sup>57</sup>

Matthew Shepard's death on October 12, 1998, one day before *Corpus Christi* premiered in New York, added to the play's cultural resonance. Shepard's murder caused McNally to quickly recognize his play as a prescient allegory for Shepard's murder; the playwright observes in his November 1998 preface to the published version, "Jesus Christ died again when Matthew Shepard did" (vii). In that sense, the play works to elevate Shepard to a gay martyr and enacts a communal ritual of expiation for the community's sins: "The play is more religious ritual than a play" (vii). *Corpus Christi*

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<sup>57</sup> Ben Brantley, "Theater Review: Nice Young Man and Disciples Appeal for Tolerance." *New York Times*, 14 Oct. 1998. Web. 20 July 2015.

asks the audience to reimagine sacred spaces and activities—the church, a wedding, the Christian passion play—as inclusive of gays and lesbians. Not only does the play reenact the passion of a gay Christ, but within the play there is a representation of a gay marriage. The play was performed several years before same-sex marriage had been legalized in Massachusetts; in other words, it was still considered a transgressive ritual and contract. In this scene, the disciples Bartholomew and James want to get married:

James. Bartholomew and I had wanted our union blessed for a long time—  
some acknowledgment of what we were to each other.

Bartholomew. We asked, Josh. They said it was against the law and the  
priests said it was forbidden by scripture. ...

James. Will You do it?

Joshua. If you say nobody else will!

Bartholomew. Out here? Someone might see.

Joshua. Where would you be married, Bartholomew? Down a dark hole?

We will marry you in broad daylight under the canopy of Heaven in the  
eyes of God and for all men to see. ...

It is good when two men love as James and Bartholomew do and we  
recognize their union. No giggling back there! Now, take each other's  
hand. Love each other in sickness and health. Respect the divinity in your  
partner, Bartholomew. Cherish the little things in him, James, exalt in the  
great. May the first face you see each morning and the last at night always  
be his. I bless this marriage in Your name, Father. Amen. Now let's all  
get very, very drunk. (49)

This theatrical ritual was repeated nightly at the Manhattan Theatre Club in the production directed by Joe Mantello. In the weeks following Matthew Shepard's death, *Corpus Christi* became an uncanny allegory for the murder. Shepard's death was in part a repetition of the ritual killing of gay men that reached back hundreds of years in the transatlantic sodomy trials. *Corpus Christi* presented an alternative ritual, one that began repeating with increasing frequency over the following decade.

***“8”: Staging the Legal Battle over Same-Sex Marriage***

After California voters passed Proposition 8 banning same-sex marriage in the state, gay and lesbian plaintiffs challenged the law in Federal court. The plaintiffs in *Hollingsworth v. Perry*, the case involving the constitutionality of California's Proposition 8, attempted to get the Federal District Court trial televised, but the efforts were contested until the U.S. Supreme Court prohibited cameras in the courtroom in a 5-4 decision with the conservative justices in the majority.<sup>58</sup> In order to counteract the lack of judicial transparency, efforts were immediately made to convey a dramatization of the proceedings to the public, beginning with John Ireland's and John Ainsworth's Youtube daily re-enactment of the trial at [marriagetrial.com](http://marriagetrial.com). There was such interest in the trial that Ireland and Ainsworth worked to dramatize the events hidden from the public view. Dustin Lance Black later wrote the play “8” to bring the trial to dramatic life, and hopefully work to influence public opinion towards greater acceptance of same-sex marriage. The Journalist narrator says in the prologue, “the transcripts of this trial could not be hidden. And on June 16, 2010, the closing arguments of this historic case

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<sup>58</sup> *Hollingsworth v. Perry*, On Application for Stay, 558 U.S. \_\_\_\_ (2010). Available at <http://www.supremecourt.gov/opinions/09pdf/09A648.pdf>

commenced. These are the words, the witnesses, the testimony and the trial that the defenders of Proposition 8 have fought so hard to keep from public view” (3).

“8” circumvents the Supreme Court’s order to ban television cameras in the courtroom. This would have been for the most part an invisible trial, except for the text of the transcripts and judicial opinions. The case, which eventually wound up at the Supreme Court, would have been culturally consumed on a mainly textual basis without the performative apparatus of a dramatized trial. Dustin Lance Black circumvented the Supreme Court’s order with his own cultural performance.

What made “8” so compelling was its celebrity star power. A-list actors were recruited by director Rob Reiner to play the parts. Brad Pitt was the District Judge Walker; journalist Campbell Brown played the narrator; George Clooney and Martin Sheen played attorneys David Boies and Theodore Olson respectively. The West Coast staged reading was political theatre: the March 3, 2012 reading “raised more than \$2 million for the fight to secure full federal marriage equality” (American Foundation). It was staged with the help of American Foundation for Equal Rights, which facilitated readings at multiple colleges and other locations throughout the country in the months leading up to the arguments at the Supreme Court. In fact, readings and performances of the play continue now even after the opinion in *Obergefell* has been issued. At the West Coast reading, the event was broadcast live on Youtube, and there have been several performances on college campuses.<sup>59</sup>

According to the description underneath its title, “8” is “based on the transcripts of *Perry v. Schwarzenegger*, [which later became the Supreme Court case *Hollingsworth*

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<sup>59</sup> A video recording of the performance is available at <http://www.8theplay.com>

*v. Perry*], firsthand observations and collected interviews.” Black follows the model provided by Eric Bentley’s play *Are You Now Or Have You Ever Been* (1972), which takes all of its dialogue from the Un-American Activities Committee hearings investigating communism in Hollywood.<sup>60</sup> “8” takes more liberties than Bentley because although much of *Perry*’s trial testimony is used as dialogue, the play also takes some artistic license to distill the arguments from both sides and more concisely frame the narrative with the personal stories of the gay and lesbian plaintiffs. The central action revolves around the trial’s closing arguments, with flashbacks to earlier portions of the trial’s testimony, interviews with the parties, and excerpts from interviews and some imagined dialogue among the plaintiffs and their families.

Black highlights the tension between intimate and legal discourse, indicating the imperfect way laws evaluate romantic and familial relationships. In an excerpt from Theodore Olson’s examination of Kris Perry about her relationship with Sandy Stier, the discursive clash evokes laughter:

Mr. Olson: And how did she feel about you?

Kris: She told me she loved me, too.

Mr. Olson: We will be asking her to verify that.

Kris (smiles): Okay.

*Laughter in the courtroom. (7)*

The play paints the defendants, the side defending Prop 8, as buffoons. Two of the defendant witnesses were read at the West Coast reading by George Takei, prominent gay activist of *Star Trek* fame, and John C. Reilly. The dramatic crescendo of the evening

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<sup>60</sup> Thank you to Professor Brenda Murphy for suggesting this connection.

occurred when Martin Sheen delivered Theodore Olson's closing speech. Sheen looked and sounded much like President Josiah Bartlett, his character on the popular television show "The West Wing." He seemed to be leveraging his visibility and gravitas as the well-known President Bartlett into the impassioned plea of not only Olson's words, but probably Sheen's political beliefs as well. The wall between actor and citizen broke down by the end of the play, if it was ever up to begin with in this production. The speech ended to loud applause.

The blending of gay and lesbian drama and the law was on full display during the West Coast reading of "8"; indeed, it was apparent as the play was read across college campuses and other venues as the trial court decision was appealed to the 9<sup>th</sup> Circuit Court of Appeals and then the Supreme Court. The popularity of the play, and the willingness of A-list celebrities to perform readings, indicated a widespread desire to see the upcoming legal proceedings mirror the theatrical ones being performed. In the weeks leading up to the Supreme Court decisions in *Windsor* and *Perry*, prominent politicians, including Bill and Hillary Clinton, joined celebrities in coming out for same-sex marriage.

Several days after *Hollingsworth* was issued in 2013, thus legalizing same-sex marriage in California, the actual lesbian plaintiffs Kris Perry and Sandy Stier were married in a widely televised ceremony. I was watching *The Rachael Maddow Show* on MSNBC and the event was treated as "Breaking News" and broadcast live. It was surreal to see the normally private wedding ritual transformed into a highly public ritual with cultural ramifications. As I watched Perry and Stier exchange legally valid vows in a televised ceremony, I couldn't help but compare their performance with that

given by Jamie Lee Curtis and Christine Lahti at the West Coast premiere of “8.” Whose love was more convincing, the actual plaintiffs or the actors playing them? Whose wedding had more cultural impact? Which ritual was more authentic? The distinctions between law and drama were increasingly dismantled as the issue of same-sex marriage headed toward the Supreme Court. Both wedding ceremonies, the theatrical and the “reality television” version, were in effect opening arguments of *Obergefell*. Only in performing the law first—imagining and witnessing its enactment—could the culture more fully sanction its promulgation.

### **The Social Drama of Gay and Lesbian Lives**

The “social drama” of gay and lesbian lives has been playing out in Western cultures since the early modern period. It has involved different periods of crisis and various means of addressing the emergence of gay and lesbian subjects. The United States is currently involved in a particular “social drama,” to use anthropologist Victor Turner’s theory, over the question of same-sex marriage. Social drama is a useful means of investigating the forces at work in Supreme Court theatre.<sup>61</sup> Turner argues that all societies undergo social dramas that involve four stages: “breach, crisis, redress, and *either* reintegration *or* recognition of schism” (69).

A social drama is initiated when the peaceful tenor of regular, norm-governed social life is interrupted by the *breach* of a rule controlling one of its salient relationships. This leads swiftly or slowly to a state of *crisis*,

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<sup>61</sup> My use of Victor Turner is inspired by Brenda Murphy, *Congressional Theatre: Dramatizing McCarthyism on Stage, Film, and Television* (Cambridge: Cambridge UP, 1999). Murphy uses Turner to analyze the social drama of the House Un-American Activities Committee.

which, if not soon sealed off, may split the community into contending factions and coalitions. To prevent this, *redressive* means are taken by those who consider themselves or are considered the most legitimate or authoritative representatives of the relevant community. Redress usually involves ritualized action, whether legal (in formal or informal courts), religious ... or military. If the situation does not regress to *crisis* ... the next phase of social drama comes into play, which involves alternative solutions to the problem. The first is *reconciliation* of the conflicting parties following judicial, ritual, or military processes; the second, *consensual recognition of irremediable breach*, usually followed by the spatial separation of the parties. (92)

Turner's social drama has played out from the early modern period to the present on the subject of homosexuality. When transatlantic societies began classifying homosexuality as a crime, heterosexuality became the norm that was breached when the laws were broken. It is useful to apply social drama theory to the myriad contexts of LGBT history, from the early political debates over gay liberation to the current legal contests over same-sex marriage. Legal machineries, in the form of the sodomy laws and public trials, and later the landmark gay rights opinions, were among the redressive, ritualized means used to address the crisis of modern homosexuality.

The extent of societal reconciliation over the subject of homosexuality is still in flux. Some families and states have achieved a semblance of "reconciliation" on the matter; other communities of actors are still in a "consensual recognition of irremediable breach." Even the *Windsor* and *Obergefell* decisions make it clear that there is still much



bitterness over the change in Federal recognition of same-sex marriage. The 5-4 split on the Supreme Court reflects that persistent schism. “Social dramas are in large measure political processes, that is, they involve competition for scarce ends—power, dignity, prestige, honor, purity...” (Turner 71). The marriage equality movement illustrates a “competition” for those very things.

Turner’s basic theory of social drama is interesting enough, as it can explain many dynamic moments of cultural change within societies. Even more fascinating is his discussion of the relationship between social drama and cultural performances. There is not a neat line that distinguishes between the social drama—political contests that occur within different venues including juridical processes—and theatrical performances and other cultural performances, such as same-sex wedding rituals and gay pride parades. Turner suggests that at some point social dramas feed off cultural performances, and vice-versa; there is a dialectical tension between social drama and cultural performance. Turner links the redressive phase of social drama to “the genesis and sustenance of cultural genres, both ‘high’ and folk” (74). “Whether juridical or ritual processes of redress are invoked against mounting crisis, the result is an increase in what one might call social or plural *reflexivity*, the ways in which a group tries to scrutinize, portray, understand, and then act on itself” (75). The continual public interest in the same-sex marriage trials and the desire of many to see them televised and performed in some way indicate an increase in social reflexivity on this issue.

We live in a world suffused with images and cultural performances that reflect on and intervene in the social issues of the day. Turner comments on this ultimately inextricable relationship:

Life itself now becomes a mirror held up to art, and the living now *perform* their lives, for the protagonists of a social drama, a ‘drama of living,’ have been equipped by aesthetic drama with some of their most salient opinions, imageries, tropes, and ideological perspectives. . . . Human beings learn through experience . . . and perhaps the deepest experience is through drama; *not* through social drama, or state drama (or its equivalent) *alone*, but in the circulatory or oscillatory process of their mutual and incessant modification. (108)

Cultural productions, such as films, television shows, plays, and wedding rituals, not only influence the development of law, but they also help give the law its authority. Law and cultural productions—social drama and theatre, as Victor Turner would label them—are not mutually exclusive. We need to look to cultural productions to see not only how law develops, but also how law gains its authority. *U.S. v. Windsor* and *Obergefell v. Hodges* would not have been written but for the totality of cultural productions portraying gays and lesbians in a sympathetic light and advocating same-sex marriage in the years following *Bowers v. Hardwick* and *Lawrence v. Texas*.

On personal and familial level, my father and I traversed the stages of Turner’s social drama, culminating in my own same-sex wedding ritual. As Turner states, “the social drama form occurs on all levels of social organization from state to family” (92). When my father delivered a heartfelt toast at the reception, it was incredibly cathartic for me; he had come a long way from his initial negative reaction to my sexual orientation when I came out in 1996. Like many others, our father-son relationship underwent the trajectory of Turner’s social drama, and because it ended happily there was a “reintegration,” a reconciling and general sense of closure, rather than a “recognition of

schism.” The reason my dad was able to ultimately participate in the ceremony, I think, was because he had been persuaded by the cultural productions suffusing the media since the 1990s, along with the recent legal decisions handed down with sufficient theatricality to give them authority. Both of us are lawyers; both of us respect the machineries of justice, slow and imperfect though they may be. It was not enough that the Connecticut Supreme Court had declared a state constitutional right for same-sex couples to get married. And it was not enough that he had witnessed the emergence of sympathetic gay and lesbian characters in television and film since the 1990s. The two components—formal juridical processes working to redress the “crisis” brought on by the movement for gay liberation and the dramatic power of those juridical processes and other cultural productions—had to reinforce each other. That is why gay and lesbian drama has always been suffused with the trappings of law and legal processes. Gay and lesbian drama has always been in part a legal ritual, ultimately helping to influence the juridical processes being navigated on behalf of gay and lesbian rights. And the courts that have delivered victories for LGBT rights have always done so by exploiting the theatrical tools necessary to achieve momentous social change.

### **The U.S. Supreme Court as National Theater-Temple**

The Supreme Court itself offers a theatre that combines juridical, ritualistic, and theatrical-literary processes. However, in order to protect itself from the dynamics of performance, which might erode public confidence in the Court’s legal decisions, cameras are not allowed in the Supreme Court. Audio recordings of oral arguments are made available to the public, but television cameras are strictly prohibited. Most

famously, the now-retired Justice Souter said in an interview, “The day you see a camera come into our courtroom it’s going to roll over my dead body.”<sup>62</sup> The most recently appointed Justices Sotomayor and Kagan indicated a willingness to allow cameras, but they are a minority on the Court.<sup>63</sup> One worry, as Justices Kennedy and Scalia have articulated, is that cameras would tempt the Justices to put on a performance during oral argument. Justice Kennedy said to the House Appropriations Committee in 2007:

I don't think it's in the best interest of our institution...Our dynamic works. The discussions that the Justices have with the attorneys during oral arguments is a splendid dynamic. If you introduce cameras, it is human nature for me to suspect that one of my colleagues is saying something for a soundbite. Please don't introduce that insidious dynamic into what is now a collegial court. Our court works...We teach, by having no cameras, that we are different. We are judged by what we write. We are judged over a much longer term. We're not judged by what

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<sup>62</sup> “Souter Won’t Allow Cameras in High Court, *L.A. Times*, April 9, 1996, at A6 (qtd. in McElroy 1838).

<sup>63</sup> For a helpful multi-media resource on the various Justices’ opinions on this issue, see C-Span’s website “Cameras in the Court,” available at <http://www.c-span.org/special/?camerasInTheCourt>. The website has links to remarks that each Justice had made about allowing cameras in the courtroom.

In her interview at the Aspen Institute on August 2, 2011, Justice Kagan said, “I do think it would be a good idea...If everybody could see this, it would make people feel so good about this branch of government and how it's operating...it's such a shame actually that only 200 people a day can get to see it and then a bunch of other people can read about it. Because reading about it is not the same experience as actually seeing...”

In her Confirmation Hearing on July 14, 2009, Justice Sotomayor said, “I have had positive experiences with cameras. When I have been asked to join experiments of using cameras in the courtroom, I have participated. I have volunteered. ”

In contrast, the other members of the Court do not support cameras in the Court. Justice Scalia said in 1990, “Well, when I first came on the court, I was in favor of having cameras in the court. I am less and less so...I don't want it to become show biz...It is the tradition of common law judges not to be public figures, not to be prominent in the political process or in the process of public interest. I think that's a good tradition...So, for those various reasons, I'm not a big fan of having our sessions televised. Our sessions are open and anytime any of you is in Washington, I certainly invite you to attend, urge you to attend. I think it's a good show myself.” Of course, Scalia admits it is a “show” at the end of his comments; he just wants it to be a restricted, elite performance.

we say. But, all in all, I think it would destroy a dynamic that is now really quite a splendid one and I don't think we should take that chance.<sup>64</sup>

Cameras would taint the supposed impartiality of the judicial proceedings, according to Kennedy and Scalia, and could cause discord among members of the Court and actually further erode the public's already eroded trust in the institution.<sup>65</sup>

Despite such attempts at achieving a Court immune to the dynamics of performance, the Supreme Court as an institution is very much a theater.<sup>66</sup> First, the widely watched Justice confirmation process includes highly staged Senator interviews with nominees, and the scripted, often infuriatingly opaque Senate confirmation hearings. All recent nominees have demurred on articulating anything that would indicate how they might rule in a future case, except to indicate a broad, not too controversial judicial philosophy.<sup>67</sup> Whether the confirmation hearings are tumultuous or smooth, legal scholar

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<sup>64</sup> Ibid., link to Justice Kennedy.

<sup>65</sup> For an exhaustive scholarly compilation of the various Justices' comments on the issue of cameras in the Court, during Confirmation Hearings and in interviews, see McElroy, 1838-1840. The other main arguments against using cameras in the Court include a fear that the media will disseminate misleading and sensational moments rather than the totality of the proceedings, and concern about the Justices' anonymity and personal security. See McElroy, 1873-1895; Mary Rose-Papandrea, "Moving Beyond Cameras in the Courtroom," *B.Y.U. L. Rev.* 6 (2012): 1901.

<sup>66</sup> Milner Ball provided the first sustained analysis in legal scholarship of the theatrical attributes and functions of modern courts. He focused on the similarities in space, audience, and modes of conflict. Milner Ball, "The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater," 28 *Stan. L. Rev.* 81 (1975): 81-115.

<sup>67</sup> Chief Justice Roberts stated the following in his 2005 confirmation hearing: "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire... I will remember that it's my job to call balls and strikes and not to pitch or bat." "Transcript: Day One of the Roberts Hearings. *Washington Post*, 12 September 2005. Web. 23 July 2015. Marrying judging to the umpire role in baseball was an effective rhetorical move, considering the huge national audience for the confirmation hearings, and the central importance of baseball in the American consciousness. A lay audience would find little to disagree with here; however, many legal scholars have made it clear that judging necessarily involves the imposition of values, and that it is disingenuous to pretend that judges can neatly apply facts to legal principles without making moral, ethical, and political choices. Justice Scalia makes a similar argument as Roberts to justify originalism in constitutional interpretation. For a convincing scholarly critique of the "umpire" argument, see Chemerinsky, 391-395. Legal scholar Robert Hariman argues that popular trials and legal opinions "are more profoundly rhetorical and less autonomously legal than supposed by either rhetorical or legal scholars" (18).

Tony Mauro observes that, after the hearings conclude, the successful nominee, most recently Justice Kagan in 2010, is admitted, through a series of rituals (such as swearing two different oaths, one public and one private, sitting in Justice Marshall's chair for the private oath, walking down the front steps of the Court with the Chief Justice for a photo-op) into a secret society (260). Before the admission into the secret society, the nominees undergo intense national observation. They must perform admirably in front of the Senate Judiciary Committee and the American public for hours at a time, submitting to questions ranging from "softballs" to adversarial and accusatory.<sup>68</sup>

With its majestic physical space, the Supreme Court building is itself a grand theater-temple. The architect designed it in the manner of a Greek temple, complete with religious friezes on its exterior. Steven Calebrisi observes, "Surely, that temple is a national, modern day St. Peter's Basilica for the American secular religion. Is it any accident that when the Supreme Court 'hands down a ruling' (as God handed down the Ten Commandments), all the television networks display the façade of the Supreme Court building to show the sacred source of the new decree?" (qtd. in McElroy 1858, fn 124). Lisa McElroy observes that the Justices have fashioned themselves as "high priests" as they work to reinforce a mythology about the Supreme Court that likens the Court to the Oracle at Delphi: discerning and communicating the laws of the Gods to the

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<sup>68</sup> Robert Bork's failed nomination by President Reagan in 1987, due in part to Bork's blunt articulation of his conservative views on cases like *Roe v. Wade*, prompted the recent trend of noneventful events, with the habit of vague responses to avoid Bork's fate. Clarence Thomas underwent a unique crucible in his nomination process, worthy of a chapter's analysis. Shoshana Felman would most likely label the Thomas confirmation process as a kind of trauma trial, raising as it did the complex societal traumas of race and gender. The Anita Hill testimony brought Thomas into a truly adversarial process. There is a suggestive connection between Thomas's confirmation trial and Thomas as the Silent Justice (he is the only Justice who routinely stays quiet as his colleagues pepper the attorneys with questions and comments). It is as if his confirmation process silenced him for his future oral arguments at the Court: he only engages through written word now.

people (1854). But the court also simultaneously works as a theatrical space in which the laws are performed for the people as they are simultaneously challenged and enacted.

The main courtroom includes a curtain from behind which the Justices enter and exit, and a stage upon which they interrogate the advocates.<sup>69</sup> The mysterious inner workings of the court involve myriad rituals hidden from public view, such as the weekly Conference when the Justices discuss how to resolve cases.<sup>70</sup>

As much as the physical space of the Court resembles a theater, the genealogy of landmark gay and lesbian rights Supreme Court cases—*Bowers v. Hardwick* (1986), *Romer v. Evans* (1992), *Lawrence v. Texas* (2003), *U.S. v. Windsor* (2013), and *Obergefell v. Hodges* (2015)—form a particular genre in the canon of gay and lesbian drama. We can read Supreme Court gay rights jurisprudence as a drama of its own, if we choose not to investigate the other trappings of theatricality involved in the preparation and dissemination of the opinions. The written opinions themselves constitute a dramatic canon that is not meant to be performed—a closet drama, with the obvious pun in my choice of term—but which has some of the rhetorical strategies and rhythms of theatre. However, when reading the opinions in synthesis with an appraisal of performances at oral argument and opinion announcement, as well as the various ways that citizens

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<sup>69</sup> Legal scholar Robert Hariman notes how the theatrical design and staging of courtrooms establishes legal legitimacy: “The use of official symbols constitutes the basic *mise-en-scène* of the popular trial. Here we include all the decorum activated by the physical setting itself, as well as the general characteristics of legal language and the special use of such symbols as “the Constitution.” These dramatic props are the source of the trial’s legitimacy—and so counteract the anxieties resulting from adversarial antagonisms” (26).

<sup>70</sup> McElroy argues that cameras should be allowed in Supreme Court proceedings, in order to transform the “aristocratic” mythology of the Supreme Court into a more democratic national mythology. She claims that the Court’s many rituals—public and private—work to entrench its cultural power. For a listing of the many (fascinating) rituals involved in the Supreme Court, see 1854-1857. The general consensus among legal scholars and members of Congress is that the Court should televise its proceedings. See, e.g., Tony Mauro, “Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism,” *Reynolds Ct. & Media L.J.* 1.3 (2011): 259-276.

witness and consume the decisions, we can discern a rich and suggestive theatre of gay and lesbian drama. So, for example, *Obergefell* in its performative totality may be understood as a piece of judicial, cultural, and literary theatre.

The physical setting of the Court provides the space of a national legal theater; in the case of *Obergefell*, the Court also doubles as a temple, in which the Justices are called on to function as a wedding officiant. The characters of the attorneys, Justices, parties, and spectators are involved in a complex legal-theatrical ritual. Beginning with oral argument, the suspense builds leading up to the decision, as the Justices work invisibly on the decision, often, as we know in the case of Justice Kennedy, changing sides and re-molding alliances during the opinion-writing process. On the day the opinion is released, the author of the majority opinion delivers an oral summary of the opinion in open court, which re-opens a complex dynamic of theatrical spectatorship not just in the Court, but on a national level. As the lucky few audience members in attendance get to witness the delivery, the performance of the law, everyone else interested in the decision must watch on the exterior of the action, imagining a theatrical dynamic in lieu of actually witnessing it. The Justice who writes the majority opinion delivers an oral summary of the opinion, occasionally giving rise to a rare oral summary of the dissent. Justice Kennedy orally delivered a summary of his opinions in *Lawrence*, *Windsor*, and *Obergefell*. Justice Scalia delivered both the written and oral dissent in both *Lawrence* and *Windsor*.

The ideological division of the Court creates an agonistic model of drama: the blockbuster 5-4 decisions issued every June amplify the Court as an institution of conflict. The division between conservative and liberal Justices on the issue of gay and lesbian rights—pitting the “swing” Justice Kennedy’s soaring rhetoric of dignity and



personhood against Justice Scalia's venomous dissents—heighten the stakes and suggest an epic conflict over not only the rights of gays and lesbians, but the place of law in society, the power of judges, and the political direction of the United States. These theatrical conflicts disrupt the mythology of the Supreme Court as Delphic Oracle, while simultaneously and paradoxically entrenching the Court's authority as legal arbiter. The decisions become more transparently political and unstable, but at the same time captivating, and so ultimately convincing, in their theatrical and ritualistic power.

The theatricality of the Supreme Court strengthens the Court's legitimacy in the cultural consciousness. Supreme Court jurisprudence and procedure both offer a conscious display of juridical theatricality. In order to have cultural capital, the Court must work in tandem with, indeed produce its own, cultural performances of justice. As Turner observes, "The winners of social dramas positively require cultural performances to continue to legitimate their success" (74). If we recall Shoshana Felman's definition of a popular trauma trial, we can view the Supreme Court as a place where the old sodomy trauma trial can either continue to traumatize new generations of sexual minorities, or be stopped.

### ***Obergefell v. Hodges*: A Gay and Lesbian Social Drama in Four Acts**

The Supreme Court's theatrical elements call for literary analysis, especially in social dramas like landmark gay and lesbian rights cases. I would like to read law *as* literature now, one of the methodologies used in the law and literature movement.<sup>71</sup> In

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<sup>71</sup> For the seminal Law & Literature books, see Peter Brooks and Paul Gewirtz, eds, *Law's Stories* (New Haven: Yale UP, 1996); James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: U of Wisconsin P, 1985). Both books emphasize reading judicial opinions and trials as narrative and rhetoric.

his essay in *Law's Stories*, "Narrative and Rhetoric in the Law," Paul Gewirtz lists some of the values intertwined with approaching law as literature. Indeed, these principles lie at the foundation of my analysis of *Obergefell*:

[A]s a matter of general outlook, treating law as narrative and rhetoric means looking at facts more than rules, forms as much as substance, the language used as much as the idea expressed (indeed, the language used is seen as a large part of the idea expressed). It means examining not simply how the law is found but how it is made, not simply what judges command but how the commands are constructed and framed. It understands legal decisionmaking as transactional—as not just a directive but an activity involving audiences as well as sovereign law givers; indeed, it emphasizes the ways legal processes involve speakers in exchange with audiences everywhere. It sees laws as artifacts that reveal a culture, not just policies that shape the culture. And because its focus is story as much as rule, it encourages awareness of the particular human lives that are the subject or objects of the law, even when that particularity is subordinated to the generalizing impulses of legal regulation. (3)

Specifically, I would like to read *Obergefell* as theatre in order to better understand the literary and theatrical elements that made this legal decision so culturally powerful. This is challenging, so I will focus on some basic dramatic elements: character, dialogue, conflict, setting, and audience.

There are several fascinating characters in *Obergefell*, constituting an ensemble cast. Legal scholar Robert Harriman explores the importance of character and characterization in trials:

From the witness's oath to the character witness to the stock characterization of the judge to the determinations of intent to the essentially ethical cast of judgment itself, the legal setting displays the elements of an inquiry after character, and the media amplify this theme into character studies ranging from laughable to penetrating. In any case, this tendency amplifies ... the dramatic nature of the trial, for characterization is a central element in dramaturgy... The popular trial becomes predominantly a series of character studies. (26-7)

Ironically, Edith Windsor and James Obergefell, as the two faces of same-sex marriage on the national stage, were positioned as de-sexualized: they are both widowed, so there would not be a consummation of their marriages in the public imagination, so to speak. They were also white and solidly middle-class. There is also a striking lack of protagonists of color, bisexual, and transgendered characters in these “landmark” cases. Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU), remarked that the ACLU “cast” the perfect case to bring to the Supreme Court in *U.S. v. Windsor*. The attorneys wanted to portray their client plaintiff Edie Windsor as a sympathetic, eighty-three year old lesbian in a forty-seven year relationship until her partner died. Edie was then taxed by the Federal Government \$368,000 on her spouse Thea’s estate because their marriage was not Federally recognized at the time: “If Edie

had married Theo, and not Thea, she would have paid zero for the assets she inherited.”<sup>72</sup> DOMA prevented their valid marriage in New York from being recognized on the Federal level. Similarly, Jim Obergefell was presented as a sympathetic widower who simply wanted to change his deceased partner’s death certificate to include Jim as spouse. Ohio did not recognize their marriage as valid. Obergefell wore a bow tie repeatedly in public, and became the “presentable,” safe, white, upper-middle-class, de-sexualized face of gay marriage.<sup>73</sup> In putting forth these two plaintiffs, the ACLU seemed to be pandering to a perceived homophobia and racism in the larger country. In turn, the social drama as performed entrenches same-sex marriage as a white institution concerned with the accumulation of capital and status. The lack of bisexual, transgendered, queer, and people of color raises concerns about who has been invited to play a role in the social drama of marriage equality.

Mary Bonauto, the lesbian attorney who argued on behalf of the plaintiffs, deserves brief mention here as the admirable face of LGBT advocacy. Openly gay, retired Congressman Barney Frank has called Bonauto “our Thurgood Marshall.”<sup>74</sup> Bonauto is married to a law professor and they have twin daughters. She orchestrated the legal victories in *Goodridge*, which legalized same-sex marriage in Massachusetts, and led the challenge to DOMA. In listening to the tapes of oral argument, Bonauto performs

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<sup>72</sup> Romero, Anthony. “Marriage Equality and Beyond: A Watershed Moment.” Princeton University LGBT Alumni Association Conference. Richardson Auditorium, Princeton University. 12 April 2013. Lecture. A recording is available online at <http://alumni.princeton.edu/learntravel/lectures/videodetail/index.xml?videoId=329>

<sup>73</sup> This legal strategy of effacing gay and lesbian sexuality was effective in winning the U.S. obscenity trial of Radclyffe Hall’s lesbian-themed book *The Well of Loneliness* (1928). Hall’s lawyer successfully muted depictions of lesbian sexuality in the book, much to Hall’s dismay. See Leslie Taylor, “‘I Made Up My Mind to Get It’: The American Trial of *The Well of Loneliness*,’ New York City, 1928-1929,” *Journal of the History of Sexuality* 10.2 (2001): 250-86, 276-77.

<sup>74</sup> Sheryl Stolberg, “In Fight for Marriage Rights, ‘She’s our Thurgood Marshall.’” *The New York Times*, 27 March 2013. Web. 28 July 2015.

admirably as the earnest, intelligent, and civil advocate for the cause. She is also effective as a character because she is not merely an attorney representing her client's cause, but the cause of all LGBT Americans who want to get married. Her words take on great resonance because they are delivered on behalf of millions of clients. LGBT audience members may imagine themselves delivering Bonauto's language during oral argument, or at least recognize that she is speaking about them, and that the Justices are listening and beginning to formulate a response to the plea made on their behalf. All interested LGBT citizens had their day in court, not just James Obergefell and the other plaintiffs.

In these Supreme Court cases, the Justices also become characters known mainly through the rhetorical strategies of their opinions, but also through their performance at oral argument and the announcement of the opinions, their disclosed personal history, and interviews. In terms of dramatic character, I hesitate to label a particular protagonist in *Obergefell*: it is more of an ensemble cast. Obviously, one's interpretation of the drama's central character might change depending on one's political beliefs. If we characterize gay and lesbian drama as a body of texts that over time attracted certain kinds of readers and spectators—LGBT and allies—several protagonists come to mind: the Liberal Justices (Sotomayor, Breyer, Kagan, Ginsberg), the crucial “Swing” Justice Kennedy, the gay and lesbian plaintiffs in the case. The antagonists emerge as the dissenting Justices, with Justice Scalia's particularly stinging dissent earning him the role of principal antagonist.

Very few Americans can name or identify all of the Supreme Court Justices; in fact, two-thirds of the country cannot name one Justice.<sup>75</sup> Most people only have a superficial sense of their personalities and rhetorical style. The characters of the Justices are mostly flat in the Supreme Court Theater. In contrast to elected representatives in the United States, they are not supposed to have public personalities. As a result, they attain “stock” characterizations, as Hariman suggests about judges generally in trials. Legal scholar Trevor Parry-Giles has written about the characters of the Justices. In his book *The Character of Justice: Rhetoric, Law, and Politics in the Supreme Court Confirmation Process* (2006), he argues that “The nominee comes to embody an ideological stance” (13). There are only a few main qualities that repeatedly surface in the popular media. Interestingly, the Justices become stereotyped as Liberal or Conservative, and identified with markers of identity: women, men, Catholic, Jewish, lesbian? (Kagan was initially “read” by conservative critics as lesbian when she was nominated<sup>76</sup>), African American, and a “wise Latina” in Justice Sotomayor.<sup>77</sup>

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<sup>75</sup> Steve Eder, “Most Americans Can’t Name a U.S. Supreme Court Justice, Survey Says.” *Wall Street Journal*, 20 August 2012. Web. 29 July 2015.

<sup>76</sup> *The Wall Street Journal* published a front-page story about Kagan in 2010 before her confirmation hearings that featured a photo of Kagan playing softball. “John Wright, of gay newspaper *Dallas Voice*, told Politico: ‘Personally I think the newspaper, which happens to have the largest circulation of any in the US, might as well have gone with a headline that said, ‘Lesbian or switch-hitter?’” Cathy Renna, a former spokesperson for the Gay and Lesbian Alliance Against Defamation, said: ‘It clearly is an allusion to her being gay. It’s just too easy a punch line.’ Alex Spilius, “Elena Kagan ‘outed’ as lesbian by Wall Street Journal softball picture.” *The Telegraph*, 13 May 2010. Web. 29 July 2015. Conservative critics were trying to spread rumors in order to not only embarrass Kagan, but to cast doubt on her impartiality on the issue of LGBT rights. The White House denied the rumors, and *The Wall Street Journal* denied a lesbian subtext to the photo, but the unsavory incident illustrates how Supreme Court Justices are pigeonholed into identity markers.

<sup>77</sup> Justice Sotomayor was asked repeatedly during her confirmation hearings over a statement she made during a 2001 speech at University of California, Berkeley Law School: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”

If you Google or Youtube the Justices, for example, the same general story will appear in various interviews. For example, Justice Kagan repeatedly tells a story of how she went hunting with Justice Scalia, in order to establish a perception of collegiality on the Court. Justices Ginsberg and Scalia often mention their unlikely friendship, considering their ideological antagonism.<sup>78</sup> These anecdotes from the Justices, about their relationships with each other and about certain aspects of the Court, like who answers the door and speaks first at Conference, form a folklore about the Supreme Court

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<sup>78</sup> Scalia and Ginsburg do seem to be genuinely fond of each other. Both are avid opera fans, and an opera recently premiered in honor of their unlikely friendship and different approaches to constitutional law. See “Scalia/Ginsburg: A (Gentle) Parody of Operatic Proportions. An American Comic Opera in one act by Derrick Wang, libretto by the composer, inspired by the opinions of U.S. Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia.” *Colum. J.L. & Arts* 38 (2014): 237-292. It is an actual opera that recently premiered at the Castleton Festival in July 2015 with the blessings of the two Justices, who wrote a preface to the opera published in the *Columbia Journal of Law & Arts*. The libretto has humorous and erudite footnotes with copious references to case law. Scalia at one point sings a rage aria. Here is an excerpt with footnotes omitted:

**SCALIA** (rage aria):

The Justices are blind!

How can they possibly spout this-?

The Constitution says absolutely nothing about this,

This right that they've enshrined -

When did the document sprout this?

The Framers wrote and signed

Words that endured without this;

The Constitution says absolutely nothing about this!

(*Reverent*)

We all know well what the Framers did say,

And (with certain amendments) their wording will stay,

And these words of our Fathers limit us,

For we are unelected,

And thus, when we interpret them,

Rigor is expected.

(*Bewildered*)

Oh, Ruth, can you read? You're aware of the text,

Yet so proudly you've failed to derive its true meaning,

And never were so few

Rights made so numerous-

It's almost humorous

What you construe! (241-242)

that superficially establishes transparency, but comes nowhere close. Nothing is ever really said of substance in the Justices' interviews, certainly not about the law or future cases, and very little about a given Justice's personality is revealed. As Lisa McElroy observes, "They purport to deconstruct the mysticism of the Court with occasional peeks into limited aspects of the institution. But what the Justices allow the public to see is nothing more than a façade; the Justices' outreach barely scratches the surface, allowing the public to see only what the Justices offer and nothing more" (1839). The Justices' inscrutability as personalities invites and ignites speculation and imagination about "who they really are," "how do they really interact with each other inside the Court," and "what are they like in real life." I think there is a certain cultural expectation that they play the part of judges, and the discipline of their performance requires mainly silence outside of strictly controlled environments.<sup>79</sup>

### **Act I: Oral Argument. Tuesday, April 28, 2015.**

Throughout *Obergefell*, most characters are static, but Justice Kennedy's performance as the "Swing Justice," and some of his statements during the oral argument, gave rise to suspense about which way he would vote. Although Kennedy wrote the majority opinions in *Lawrence* and *Windsor*, he is moderately conservative and inherently cautious. Laura Ray gives the Justices labels based on the quality of the

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<sup>79</sup> The State of the Union address features the Justices sitting in robes in the front row of what is a nakedly political theatre. The American public is allowed access to the interior of the speech's political theater in the Capitol, whereas the public is barred from the Supreme Court's legal theater. Justices are traditionally expected to be silent and refrain from showing political affiliations by standing or clapping when an obviously political point elicits applause from only one side of the aisle. Justice Alito broke this unspoken rule when President Obama began criticizing the *Citizens United* case in his 2010 State of the Union speech. Cameras recorded Alito mouthing "not true" in response. Immense praise and criticism of Alito followed, and he has never returned to a State of the Union speech.



rhetoric in their written opinions. She characterizes Kennedy's "judicial personality" as "agonized ambivalence" (223) and Scalia's as "indignant conversation" (226). Justice Kennedy admits to "agonizing" over decisions, and has often changed his mind in cases at the last minute.<sup>80</sup> To give a disconcerting example, according to Justice Blackmun's posthumously released papers, Kennedy had originally cast his vote at the Justice's Conference to overturn *Roe v. Wade* (1973) in *Planned Parenthood v. Casey* (1992). This would have reversed *Roe*'s ruling that the Constitution protects a woman's right to have an abortion within certain limits. Chief Justice Rehnquist was writing the majority opinion in *Planned Parenthood*, joined by Byron White, Antonin Scalia, Clarence Thomas, and Kennedy. Several weeks later, however, Kennedy changed his mind and sided with a compromise led by Justices O'Connor, Blackmun, and Souter, which in effect kept *Roe*'s central holding intact.<sup>81</sup>

Indeed, we can see internal conflict in Kennedy's performance during *Obergefell*'s oral argument. Early in the oral argument, he questioned Attorney Bonauto on the gravity of changing a social institution that had been defined for millennia in certain cultures as the union between one man and one woman. Suddenly, the trajectory of *Romer*, *Lawrence*, and *Windsor* did not seem to surely culminate in a ruling for same-sex marriage in *Obergefell*, as Kennedy expressed doubts:

Justice Kennedy: One -- one of the problems is when you think about these cases you think about words or cases, and -- and the word that keeps coming back to me

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<sup>80</sup> Jeffrey Rosen, "The Agonizer," *The New Yorker*, Nov. 11, 1996. Web. 20 July 2015.

<sup>81</sup> "Justices Almost Overturned *Roe v. Wade* in 1992." *USA Today*, 4 March 2004. Web. 22 July 2015. See also Tony Mauro, "Lifting the Veil: Justice Blackmun's Papers and the Public Perception of the Supreme Court," *Mo. L. Rev.* 70 (2005): 1037-1047: "[T]o see hard evidence in Justice Blackmun's papers tells us in pretty stark terms how close the nation came to having *Roe v. Wade* overturned" (1040).

in this case is -- is millennia ... I don't even know how to count the decimals when we talk about millennia. This definition has been with us for millennia.

And it's -- it's very difficult for the Court to say, oh, well, we -- we know better.

(*Obergefell* Oral Arg. Transcript 7)

Kennedy refused to grant the plaintiffs' call for a national right to same-sex marriage in *Perry v. Hollingsworth* in 2013, so deciding to declare such a right two years later was not a guaranteed proposition. The nature of his speech at *Obergefell*'s oral argument is full of stammerings and pauses, as he deliberates over which words to use; this cautiousness is strikingly juxtaposed with the polished, majestic, and confident prose of the final written opinion. His character underwent development in the drama, culminating in the final written opinion.

Oral arguments are never filmed, but an audio recording is made and released on the Supreme Court website several days later. Most people have to settle for listening to a recording of the argument, and/or reading the transcripts that are also made available, as well as viewing artistic sketches from the courtroom. SCOTUSblog also now offers "A View from the Court," which is a first-person account of a SCOTUSblog contributor who was in the courtroom for high-profile cases. As a result, Supreme Court performances are consumed through various media, and certain moments are effaced depending on the medium.

For example, after Attorney Bonauto finished her portion of the argument, the transcript indicates an "Interruption" in parenthesis. In fact, a man in the gallery stood up and began shouting. Mark Walsh, a reporter for SCOTUSblog inside the courtroom that day, describes the moment when a man stood up and began screaming: "A short, older

man with white hair slicked back and heavy muttonchops stood and began loudly yelling. ‘The Bible teaches that you will burn in hell for eternity ...’ he says, as Court officers drag him out of the courtroom. “Homosexuality is an abomination[!]”<sup>82</sup> Moments later, as documented in the transcript, Justice Scalia says, “It was rather refreshing, actually” and “Laughter” follows the line.

What a startling word to describe the outburst: “refreshing.” It was “refreshing” to break up the supposed hum-drum rhythms of the Court, Scalia indicates (he had been sitting in oral arguments since 1986), but in this moment, Scalia chooses to communicate with the outside world in such a way that ambiguously indicates an alliance with the protestor’s moral opprobrium of the plaintiffs in *Obergefell*. Admittedly, Scalia may have just been playing for laughs, but there is just enough ambiguity in the line to indicate he was subtly masking a sincere statement under a veneer of comedy. One might well hear in “refreshing” an honest condemnation of the *Obergefell* plaintiffs. The protestor’s speech is only recorded as a parenthetical “Interruption” in the transcript. Justice Scalia’s words are recorded in the transcript and become visible, albeit unstable in meaning and legally irrelevant. Only through reading the trial as a form of literature are we able to uncover a range of interpretive possibilities within such moments. As a legal matter, this was nothing more than an inconsequential interruption; seen as a piece of theatre, however, we more fully understand the complex ways in which subtext, actor/character motivation, and performance influence the outcomes of legal trials. Scalia’s disdain for the plaintiffs, and his colleagues in the majority, would directly

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<sup>82</sup> Mark Walsh, “A View from the Courtroom: Same-Sex Marriage Edition,” at <http://www.scotusblog.com/2015/04/a-view-from-the-courtroom-same-sex-marriage-edition/>. Accessed July 22, 2015.

manifest in his eventual written dissent. The full extent of *Obergefell*'s conflict would be revealed then.

## **Act II: The Invisible Conference; or, In the Hall of the Continental Principalities.**

**Friday, May 1, 2015.**

Soon after the oral arguments in a case, the Justices meet for their Conference in which they discuss their theories about how to resolve the case, and vote to establish a majority and possible dissenting minority. They discussed their theories of *Obergefell* on Friday, May 1, 2015. The Conference has attained mystique over the years as a highly ritualized process. Only Supreme Court Justices are allowed in the room. If someone knocks on the door with an urgent message, the most junior Justice must answer the door (that task now falls to Justice Kagan). The Conference has some of the following traditions and rituals:

When meeting to decide cases, the Justices sit in their Conference Room, where they also sit and speak in order of seniority. ... No one, not even a messenger or a law clerk, is allowed to enter the room when the Justices are in conference. The junior Justice is assigned to hand out notes or receive messages; Justice Breyer held this post for eleven years. The Justices sit in order of seniority around the conference room table, with the Chief Justice at the head; each seat includes supplies, including blotter paper, a long-standing tradition. (McElroy 1856-57)

Even when hidden from view, the Justices engage in these rituals that establish hierarchy and orderly treatment of the cases before them.

The Conference blends rituals of tradition with a theatrical conflict that plays out during the Conference, as the Justices negotiate some kind of decision. In an interview with C-Span, Justice Kennedy revealed that he gets nervous before these Conferences, and that the process takes on a mystical quality:

It's like being an attorney once again: you're arguing your case. I have eight colleagues who've studied very hard on the case, who may have some very fixed views, who may be tentative, depending on how they've thought the case through. And I have to give my point of view, and hopefully to persuade them. And I feel a sense of anticipation, what is it, an adrenaline rush, I don't know what they call it. But this is a big, big day for us. ... And I have to be professional, and accurate, and fair. And each of my colleagues feel the same way, so there's a little tension and excitement in the room, but we love it, we're lawyers, we're designed to do that. The job is no good if you can't argue. This is the first time in which we give our tentative views on the case. ... So as we go around the table, it can be quite fascinating to see how this case is unfolding. ... And if the case is close, 5-4, and let's say you're on the side that prevailed, the majority, there are not a lot of high fives and back slaps. There's a moment of quiet, a moment of respect, maybe even sometimes awe at the process. We realize that one of us is going to have to write out a decision which teaches and gives reasons for what we do...<sup>83</sup>

Because no one except the Justices is admitted to this central moment of the drama, spectatorship to this act is severely curtailed. The act is invisible and left to our imaginations. What is interesting is that the moment of central conflict among the

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<sup>83</sup> "Justice Kennedy Describes the Supreme Court Conference," available at <https://www.youtube.com/watch?v=SrrNQgbfIww>. Accessed 21 July 2015.

Justices is kept from the audience. What was said as the Justices went around the room, each discussing his or her theory of the case? Was there any dialogue, any break from tradition or breakdown in collegiality? Although we do not see this aspect of the conflict play out, the audience builds up anticipation after the Conference and as the release of the opinion draws near.

I will take this moment to make a digression of imagination, because that is what the Invisible Conference demands of spectators. Personally, I can't help but think of Tony Kushner's comedic representation of the Council of Angels in Heaven, as depicted in *Perestroika*, the second part of *Angels in America* (1992). In Chapter Three, I argued that *Angels* figuratively imagined the jurisprudential hermeneutics that would give rise to *Lawrence v. Texas* (2003), which decriminalized same-sex practices in the United States. Perhaps Kushner had the U.S. Supreme Court in mind when he imagined the Angelic Council. The Angels are comically depicted as grandiose but lost without God, who has deserted them. God provides Natural Law, but without access to God, Natural Law becomes inaccessible. The setting of the Supreme Court's Conference room and Courtroom are mirrored in the setting of Kushner's Continental Principalities:

In the Hall of the Continental Principalities; Heaven, a City Much Like San Francisco. Six of Seven Myriad Infinite Aggregate Angelic Entities in Attendance, May Their Glorious Names Be Praised Forever, and Ever, Hallelujah. Permanent Emergency Council is now in Session.

(The Continental Principalities sit around a table covered with a heavy tapestry on which is woven an ancient map of the world. The tabletop is covered with archaic and broken astronomical, astrological, mathematical and nautical objects of

measurement and calculation; heaps and heaps and heaps of books and files and bundles of yellowing newspapers; inkpots, clay tablets, styli and quill pens. The great chamber is dimly lit by candles and a single great bulb overhead, the light of which pulses to the audible rhythmic surgings and waverings of an unseen generator. (126)

I am offering this connection to Kushner's imagined Council of Angels because we only can imagine how *Obergefell*'s hidden climax was performed. Kushner's scene is a gay fantasia of what might transpire at the Supreme Court Conference: the Angels/Justices gather around a table with the symbols of power and knowledge surrounding and legitimizing them, but their trappings of authority, like old laws discriminating against gays and lesbians, are "archaic and broken." The walls of the actual Supreme Court Conference room are covered with bookshelves full of the Federal case law of the United States, but in the shadow of *Bowers v. Hardwick* and similar anti-gay rulings, these laws are figured as oppressive and unjust. Each Justice is responsible for one or several of the Federal Circuit courts, which encompass several states. This makes me think of the Angels' names symbolizing parts of the world: Asiatica, Australia, Africanii. A map of the world is laid in front of the Angels as they deliberate over the fate of gay and lesbian lives. Both Angels and Justices are equipped with "inkpots" and "quill pens" as they meet to write dictums onto the world, but it is a world constantly in motion, one that resists enclosure in proscriptive language. As Prior says, "The world only spins forward. We will be citizens" (*Perestroika* 146). Just like the other characters in *Angels in America*, the American public cannot see the Supreme Court Justices' intimate

interactions with one another; how they spoke of the *Obergefell* plaintiffs; if they ever departed from tradition. We can just imagine.<sup>84</sup>

The lack of transparency and spectatorship in the Supreme Court Conference partly gives legitimacy to the final ruling because the public cannot see the Justices negotiate and vote on the decision; we cannot see if and how they develop a theory of the case that garners a majority. We do not immediately know if and when a Justice changes his or her mind several weeks later, re-forming decisions, majorities, and dissents (sometimes we never know, unless there is a fortuitous release of a Justice's posthumous papers as with Blackmun's). The most important moments in the Supreme Court are inaccessible to an audience that must therefore utilize imagination and anticipation until the opinion is released on decision day. This legitimates constitutional law by making it appear removed from a Darwinian political process, but it also problematizes the final ruling because citizens are deprived of the opportunity to witness the actual moment of law-making. Instead, we must imagine and anticipate the final performance of the law in the announcement and dissemination of the opinion.

### **Act III: A Solemnization and Several Objections. Friday, June 26, 2015.**

Shoshana Felman's point about the repetition of trauma trials gains striking resonance when one considers the anniversary of the major gay and lesbian rights cases: *Lawrence v. Texas* on June 26, 2003; *U.S. v. Windsor* on June 26, 2013; *Obergefell v.*

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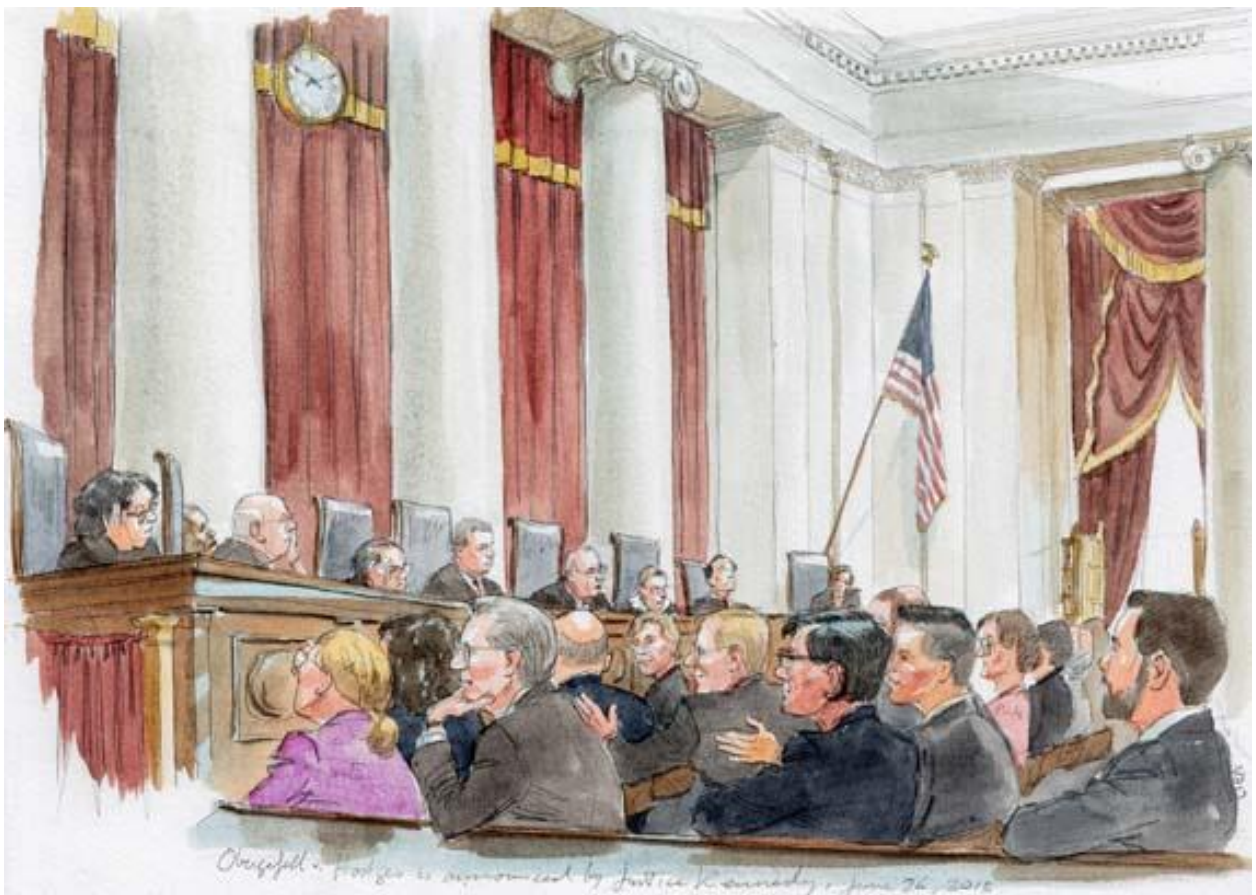
<sup>84</sup> Tony Kushner provides a central text in the tradition of gay legal theatre because his "gay fantasia on national themes" focuses on the power of artistically re-imagining the laws affecting gays and lesbians. As was the case with the British dramatists working at the threshold of passing the 1967 Sexual Offences Act, or Mart Crowley writing one year before the Stonewall riots, theatrical re-imagining often precedes actual revision of these laws. Imagination plays an integral role in our understanding of laws and legal processes.



*Hodges* on June 26, 2015. It is also worth noting that the weekend following each decision, the last weekend of June, always coincided with major gay pride parades around the country commemorating the Stonewall Riots on June 28, 1969. The rulings from the national theatre of Justice precipitated theatrical carnivals celebrating the rulings.

On the morning of Friday, June 26, 2015, at 10am the Justices gathered in open session to announce the opinions of the Court for that day. No one except the Justices, their clerks, and the Supreme Court staff ever knows what opinions are going to be announced on a particular day, until they are announced from the bench. The sessions are open to the public, but once again, spectatorship is curtailed. Some lucky people camp out and are able to attain a seat, but most people gather outside, watch television, or, more recently, follow a live feed on [scotusblog.com](http://scotusblog.com). Like thousands of other people, I “watched” the performance of Act III, the announcement of the opinions, by reading descriptions of it via a live blog feed on [scotusblog.com](http://scotusblog.com). Several Scotusblog staff attorneys described from inside and outside the Supreme Court what was transpiring. Anyone could type a question to the moderators: questions about the behavior and patterns of the Justices, guesses about what opinion might come down today, etc. The moderators would respond to different questions in real time. In this sense, *Obergefell* became a national performance that day, as hundreds of thousands of people somehow turned their attention to the Court. However, like many people, I could only imagine what was going on inside the courtroom.

The opinion in *Obergefell* was announced at 10:00 a.m. Justice Kennedy, who had written for the majority, delivered an oral summary of the opinion in live Court.<sup>85</sup> No video cameras were of course allowed that day. Most people have to settle for second-hand press accounts from people who were inside the courtroom, like in SCOTUSblog’s “A View from the Courtroom,” or through courtroom sketches, like the one below from Art Lien, depicting Kennedy’s announcement of the majority opinion in *Obergefell*:



--Art Lien, “Wide-shot of courtroom as Kennedy announces opinion.”<sup>86</sup>

<sup>85</sup> An audio recording of the opinion announcement is now available at [oyez.org](http://www.oyez.org). These recordings become available several months after the decision is announced.

<sup>86</sup> June 26, 2015. Available on [scotusblog.com](http://www.scotusblog.com), <http://www.scotusblog.com/2015/06/a-view-from-the-courtroom-a-marriage-celebration/>. Accessed 23 July 2015.

Justice Kennedy undergoes a certain amount of change as a character throughout the course of *Obergefell*. He expresses doubts, but over the course of the drama he reaches a conclusion to support the plaintiffs' cause. Kennedy delivered the Opinion for the Court, joined by Justices Breyer, Sotomayor, Kagan, and Ginsburg. Because he wrote the opinion, its rhetoric informs Kennedy's "character" in this drama.

If Act I, the Oral Argument, is centrally about the gay and lesbian plaintiffs' search for a wedding officiant, the majority opinion in Act III reveals that officiant through a poetic solemnization of same-sex marriage. The opening paragraph is grand in scope: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity" (1-2). The opinion builds to a majestic crescendo, and the last paragraph is the poetic solemnization of the marriages of the plaintiffs, and by extension the marriages of all gays and lesbians living in states that banned same-sex marriage:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The

Constitution grants them that right. The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.* (28)

This language in effect solemnized the marriages of the plaintiffs. It grants “equal dignity in the eyes of the law,” or, as legal scholar William Eskridge would note, equal gay citizenship. The majority opinion has moments of grand poetry and rhetoric; it is not purely a legal ruling devoid of aesthetic properties. The language is suffused with empathy and attention to “these men and women,” and repeatedly refers to “the[m]” and “their” stories and lives. This personalization of the plaintiffs serves in stark contrast to the various dissents that never mention particulars of the plaintiffs’ experiences. The passage is meant to elevate the moment of the case’s legal disposition to also constitute a moment of symbolic transfiguration for gays and lesbians: they are meant to be transformed by the opinion’s language into fully equal United States citizens. The plaintiffs are granted the right to marry; by extension, the American body politic is married to gays and lesbians. There had been tragic lives lost and squandered on the culture’s boundaries; now, Kennedy works to transform the gay and lesbian trauma trial into a wedding ritual: the narrative historically and structurally moves from tragedy to apparent comedy. Kennedy employs the heightened rhetoric to generate sympathy and emotional catharsis in the audience. The ending of the opinion is performative, just like a wedding: the language produces a reality. The Sixth Circuit is reversed; the plaintiffs are blessed<sup>87</sup>; the marriages are solemnized.

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<sup>87</sup> I think here again of *Perestroika* when Prior asks for a blessing from the Angel: “Bless me anyway. I want more life. I can’t help myself. I do” (133).

I do not include bisexual and transgender characters in my reading of this scene because those members of the LGBT community are conspicuously absent from the case's *dramatis personae* and the opinion's disposition. A queer reading of this scene would discern a moment of paradoxical exclusion for various gender and sexual minorities or anyone else whose relationships and families are not being recognized and given the legal benefits of marriage: "single parent households," "adult children living with and caring for their parents," "[c]lose friends and siblings who live together in long-term, committed, non-conjugal relationships, serving as each other's primary support and caregivers" ("Beyond Same-Sex Marriage"). In that sense, although *Obergefell* as theatre has a comic structure, ending as it does in a marriage for gays and lesbians, who may now be considered more fully integrated into the American family, the text also has an ironic undercurrent. The moment of grand poetry and victory is undermined by the exclusion and invisibility of people of color in the social drama's performance; of bisexuals and transgendered people; and of the many queer visions of family not recognized, and actually further marginalized, in a supposed victory of social justice.

The four dissenting Justices wrote separate dissents, which fractured their dissenting stance, although it indicated a strong disapproval of the decision. The characters of the dissenting Justices deserve close reading in this Act, but it is important to underscore that although the *Obergefell* opinion has literary qualities, simply reading it as a text does not do justice to its theatrical qualities. As theatre, it works differently than literary and legal prose, and people in the role of spectator consumed it differently. Few people read the entire *Obergefell* opinion, especially the four dissents after it. A substantial number of people read at least portions of the majority opinion, but the

dissents become long and often technical, especially Justices Thomas and Alito's dissents. As theatre, a select few were able to witness the oral summaries from the bench of the majority and the dissents. For everyone else, the media disseminated textual moments of conflict between the majority opinion and the dissents, particularly the dissents by Chief Justice Roberts and Justice Scalia.

There are two textual moments of intense rhetorical and theatrical conflict in the dissents, arising within the dissents of Chief Justice Roberts and Justice Scalia. Roberts provides a forceful, but empathetic and respectful dissent that rests on the need for judicial restraint. He tries to be diplomatic but firm; the result is rhetorically effective:

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision.

Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits.

But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent. (29)

The word “celebrate” is repeated only to ironize the wedding celebration at the dissent's conclusion; in this sense, Roberts works to provide an ironic substructure to *Obergefell*'s apparent comic trajectory ending in marriage. Yes, he suggests, there will be a joyous wedding, but it has no legal legitimacy. However, I think Roberts seems to acknowledge the inherent fairness in extending marriage benefits to same-sex couples. Although not as empathetic as Kennedy's, Roberts' opinion appreciates the sensitivity of the issue and the lives and desires of the plaintiffs. The Chief Justice further ironizes the moment by implying that although he does not discern a legal basis for same-sex marriage within the

Constitution, he is happy in the case's outcome. In this sense, Roberts establishes a credible rhetorical ethos that Scalia does not.<sup>88</sup> Roberts' opinion is focused on the Constitution, not on individual stories as is Kennedy's, but Roberts' ends with "I respectfully dissent." Figuratively speaking, I find that he chooses to decline an invitation to the wedding, but sends a gift and wishes the parties well.

In jarring contrast to Roberts' is Justice Scalia's dissent, which acts as a profanation of the wedding ritual. I am not alone in condemning Scalia's rhetoric in *Obergefell*. Legal scholar Erwin Chemerinsky critiques the tone as unprofessional, and has observed recently that his law students often write in imitation of Scalia, to the detriment of actual legal reasoning, the legal profession, and a civil society.<sup>89</sup> Scalia attacks Kennedy's style above everything else: "The opinion is couched in a style that is as pretentious as its content is egotistic" (slip. op. at 7). Scalia's twenty-second footnote conjures a startlingly antagonistic statement:

If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal

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<sup>88</sup> See Marie Falinger, "Not Mere Rhetoric: On Wasting or Claiming your Legacy, Justice Scalia." *U. Tol. L. Rev.* 34.3 (Spring 2003): 425-508. Falinger argues that Scalia is an unethical rhetor and documents the destructive patterns of sarcasm and hyperbole in his written opinions.

<sup>89</sup> Erwin Chemerinsky, "Scalia: Why He's a Bad Influence," *L.A. Times*, 14 July 2015. Web. 24 July 2015. For Chemerinsky's more scholarly critique of Scalia's philosophy and rhetoric, see "The Jurisprudence of Antonin Scalia: A Critical Appraisal," *U. Haw. L. Rev.* 22.2 (Winter 2002): 385-402. "[T]here is a disingenuousness to Justice Scalia's decisionmaking and a meanness to his judicial rhetoric that I believe are undesirable and inappropriate" (385).

reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie. (7)

This passage is buried in the twenty-second footnote of Scalia's opinion, but in a sense it is the center of his dissent. Scalia's rhetoric throughout *Obergefell* presents consistent interpretive challenges, as I tried to show with his choice of the word "refreshing" after the anti-gay outburst during oral argument. Justice Scalia with a bag over his head is another startling, ambiguous image. At first, it appears like a throwaway line, reminiscent of his "refreshing" comment during oral argument. But the image also evokes, subverts, and ironizes another image: a blindfolded Lady Justice. Rather than presenting an impartial Lady Justice, Scalia paints an image of himself needing to blind himself from the realities of the Court's jurisprudence: he does not want to see the law as it is enacted in this opinion. The line also evokes the image of a condemned man about to be executed; in a figurative reversal from the historical tradition of sodomy trials, he imagines himself, a married heterosexual man, as being condemned to death. The image also evokes the closet, giving the impression of an enclosed and darkened space, closed off from the world. The Court's majority decision puts Scalia's vision of the law in an enclosed space of containment. His image suggests this case should follow its logical precedent *Bowers v. Hardwick* (1986), which held homosexuality could be criminalized. Instead, Scalia's relegation to the dissent here suggests a rhetorical removal from legal legitimacy to the simply polemical.

Instead of ending with the traditional "I respectfully dissent," or even the more forceful "I dissent," which is used to indicate sharp disagreement, he ends his dissent



with another startling word choice that contains a veiled, barely discernible sexual innuendo: “With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the ‘reasoned judgment’ of a bare majority of this Court—we move one step closer to being reminded of our impotence” (9). The word “impotent” is an ambiguous word to use at the end of a dissent to a landmark national ruling for same-sex marriage. Obviously, Scalia is referring to the Court’s judicial over-reaching in the case, which might result in a backlash against its opinions. After all, the Judiciary cannot enforce its rulings; it depends on the Executive to do that; and it does not have the ability to fund itself as Congress has the power of the purse. “Impotent” here also implies an inability of Scalia’s masculine judicial persona to become at all interested in, excited, aroused, at the prospect of same-sex marriage.

Alan Barth observes, “Judicial dissent ... is, at its best, a form of prophecy in the Biblical sense of the term. It reflects, at least on occasion, not only a protest against what the dissenter deems error or injustice, but an Isaiah-like warning of unhappy consequences. Like a seer, the dissenter sometimes peers into the future. He will be accounted wise or foolish as the unfolding of events proves him right or wrong” (3). Dissents and majorities speak to each other over time, sometimes decades or even centuries later when a precedent is overturned or re-affirmed. Someone writing a dissent can see his opinion become the majority rule of law years later.

To a certain extent, Justice Scalia has fashioned himself as a “prophet” since his 2003 dissent in *Lawrence*, when he wrote, “Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-

called homosexual agenda...” (539 U.S. 558, 602). He warned in the dissent that the *Lawrence* majority opinion would give rise to the legalization of same-sex marriage, and indeed ten years later in *Windsor* he was partially vindicated at the Federal level when DOMA was struck down. In turn, his 2013 dissent in *Windsor* warned that the majority opinion would one day result in a fundamental right to same-sex marriage at both the Federal and state level. Indeed, this came to pass two years later, to the day, in *Obergefell*. Roberts might one day see his more dignified dissent become prophetic, in the venerable tradition of dissenters like Justice Harlan, whose prescient dissent in *Plessy v. Ferguson* (1896) was vindicated in the majority opinion in *Brown v. Board of Education* (1954) that reversed *Plessy*. If a new President appoints strict constructionists and the issues in *Obergefell* are revisited by the Court, Roberts could earn the status of what Alan Barth labels a “prophet with honor.” In contrast, Scalia’s cantankerous rhetoric reveals him to be the *senex iratus* character in comic drama: the irascible father figure whose refusal of the marriage, voiced with “rages and threats,” is overcome in the end.<sup>90</sup>

Justice Scalia’s dissent in *Obergefell* gives the decision its most salient theatrical quality because his rhetoric amplifies the agonistic nature of the drama. Taken in totality, the four separate dissents make it clear that the issue of same-sex marriage in the United States is not fully resolved, despite the current legal ruling in *Obergefell*. The legal decision is unstable and subject to future challenges, depending on which political direction the country takes. The Court could be in a position to

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<sup>90</sup> Northrop Frye, *Anatomy of Criticism* (Princeton: Princeton UP, 1957), 172.

address the issue at some point in the future, and will repeat its ritualized, theatrical approach to legal performance.

#### **Act IV and Chapter Conclusion: *Obergefell* goes Viral**

The last Act of *Obergefell* is evocative of Kushner's *Angels in America*, in which the United States is envisioned as an expanding space that welcomes and integrates LGBT citizens. Once it was issued, *Obergefell*'s ruling spread outward on print, internet, television broadcast, and social media.<sup>91</sup> Millions of people watched

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<sup>91</sup> *Obergefell* has already spawned literary reactions. Daniela Lapidous published "The SCOTUS Marriage Decision, In Haiku." *Timothy McSweeney's Internet Tendency*. Web. Accessed 29 July 2015. Available at <http://www.mcsweeneys.net/articles/the-scotus-marriage-decision-in-haiku>. Notice how Lapidous inverts the order of majority and dissent; by starting with the dissents, she reveals them to be cranky legal naysayers trumped by the circular logic of love in Kennedy's opinion:

*Roberts' dissent:*

I support you all  
No, really, I do, but this  
Isn't our problem.

*Alito's dissent:*

"Happiness is not  
the point of marriage, fools. It's  
BABIES," he whispered.

*Thomas' dissent:*

"Liberty" – this word,  
I do not think Locke means what  
You think it means. Sigh.

*Scalia's dissent:*

You're not a poet,  
Kennedy. And by the way,  
Democracy's dead.

news reporters stand in front of the Supreme Court building to deliver the news. In fact, many people began posting the majority opinion's last paragraph, which solemnized the marriages, on their Facebook pages and through Twitter and other social media. Facebook circulated a tool that allowed users to give their profile picture a rainbow background, and twenty-six million people did just that over the weekend.<sup>92</sup> LGBT and allies turned their profile pictures rainbow-colored. Because many people in 2015 spend several hours a day on social media like Facebook, it is significant that they saw the rainbow theme become a visual motif of the weekend. The day ended with the White House lighting up in rainbow colors, and many national and international monuments following suit. That weekend, gay pride parades spread throughout the country; the widespread use of the rainbow flag reinforced the rainbow motif spreading through social media. In his book *Anatomy of Criticism* (1957), Northrop Frye claims that "the movement of comedy is usually a movement from one kind of society to another. ... The appearance of this new society is frequently signaled by some kind of party or festive ritual, which either appears at the end of the play or is assumed to take place immediately afterward" (163). Large swaths of United States culture enacted this literary trope of traditional comedy with the gay pride parades and social media rainbow disseminations on the weekend following the decision.

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*Kennedy's majority decision:*

Hark! Love is love, and  
 love is love is love is love.  
 It is so ordered.

<sup>92</sup> "Facebook Rainbow Profiles Used by 26 Million." *CNN Money*. CNN.com, 30 June 2015. Web. 23 July 2015.

As the celebrations swept through the United States and around the world, the ironic substructure of *Obergefell* simultaneously revealed a fractured and contentious Court, whose majority opinion is legally tenuous because of the strong dissents.

(*Brown v. Board of Education* was a unanimous ruling, thus becoming much more settled law.) As a result, a sizeable portion of the national community reacted with dismay to the ruling.<sup>93</sup> Turner observes, “redressive means are taken by those who consider themselves or are considered the most legitimate or authoritative

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<sup>93</sup> Obviously, the language in the dissents helped to fuel this opposition. In addition to the highly circulated dissenting language I have been analyzing, Justices Alito and Thomas also contributed to the cultural backlash. In his dissent, Justice Alito warned that *Obergefell*’s ruling “will be used to vilify Americans who are unwilling to assent to the new orthodoxy” (Slip op. at 6). In the United States, conservative groups and politicians had varied reactions to the ruling: some expressed disagreement with the decision but vowed to respect the rule of law; others suggested the decision be ignored or overruled in the future. Republican Presidential Candidates Mike Huckabee and Rick Santorum likened the decision to the infamous 1857 *Dred Scott* decision that declared African Americans were not citizens as originally intended in the Constitution. See Amy Davidson, “What does Marriage Equality have to do with Dred Scott? *The New Yorker*, 8 July 2015. Web. 7 August 2015. See also Rod Dreher, “Democracy is Dying; Persecution is Coming.” *The American Conservative*, 26 June 2015. Web. 7 August 2015: “The warnings of the dissenting Justices about the radical challenge to our democracy, and the threats now faced by religious believers, are absolutely chilling — and indeed, prophetic. This is not the end of something. For Christians, because of the text of the decision and the means by which the Supreme Court majority arrived at it, this is only the beginning of some very dark and difficult days. It is time to confront this soberly but realistically, and prepare for the resistance.” Notice how Dreher characterizes the dissents as prophetic, already imagining and preparing for a strategy of “resistance” that will result in *Obergefell* being overruled. This reading of the case focuses on the dissents’ ironic substructure within the larger opinion in order to emphasize different meanings in *Obergefell*’s overall text and performance.

Others chose more colorful language in protest, as catalogued in part, and mocked, by *Rolling Stone*: “the anti-choice American Life League ... issued a statement on the decision, declaring, ‘Our nation has become like a dead body floating downstream, to what destination only the devil knows.’ Presidential hopeful Rick Santorum argued that the Supreme Court had ruined the ‘foundational unit of society.’ (Unmarried people don’t belong to society? Who knew.) Tim Wildmon, president of the American Family Association, kept it classy and called the decision ‘a spiritual 9/11.’ And Ted Cruz, another GOP presidential contender, noted that Friday marked ‘some of the darkest 24 hours in our nation’s history.’ Forget the Civil War or Pearl Harbor. Americans getting marriage certificates — that’s when things got really dark for our country.” Amanda Marcotte, “5 Conservative Freakouts about Last Week’s Supreme Court Rulings. *Rolling Stone*, 29 June 2015. Web. 7 August 2015.

representatives of the relevant community. Redress usually involves ritualized action, whether legal (in formal or informal courts), religious ... or military” (92). There are “alternative solutions to the problem. The first is *reconciliation* of the conflicting parties following judicial, ritual, or military processes; the second, *consensual recognition of irremediable breach*, usually followed by the spatial separation of the parties” (92). The opinion suggests that, using Victor Turner’s theory of social drama, there is currently a “consensual recognition of irremediable breach” with regards to same-sex marriage. The dissents argue that the nine Justices are absolutely not the most authoritative representatives for this issue, but in terms of settling a matter of law, they were given the last word, at least for now.<sup>94</sup> However, suspense is already building for future Court vacancies, new Presidents who can appoint them, and the next plaintiff who can set in motion another trial over this issue.<sup>95</sup> The social drama of LGBT rights is not over and will continue in new permutations of legal theatre.

Through the interconnected workings of law and drama, some of the old traumas inflicted on sexual minorities have been healed to a degree. Generally speaking, the sodomy trials have morphed into the same-sex wedding rituals of the twenty-first century, but these new rituals will be contested in the future. Despite its apparent comedic structure and happy ending for supporters of marriage equality, *Obergefell* has not fully resolved the social drama of LGBT rights, which will continue in the United States. It would only take a particular President and several Supreme

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<sup>94</sup> Chief Justice Roberts asks in his dissent, “Just who do we think we are?” (3). Scalia writes, “to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation” (6).

<sup>95</sup> Justice Scalia passed away unexpectedly on February 13, 2016, leaving a vacancy on the Court and initializing what could be a contentious nomination for his successor.

Court vacancies to put *Obergefell* and *Lawrence* in danger of being overturned. In other words, *Obergefell* may well prove a continually contested decision, much as has *Roe v. Wade* (1973). There will be new mutations of the *Obergefell* ritual in the years to come: new challenges will emerge, different actors will engage with the issues, and potentially surprising results will ensue. When the ritual is repeated again, drama and law will work closely together to create a cultural narrative that attempts to understand and contain the conflicts.

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