AMPLIFYING LGBTQIA+ PRESENCE THROUGH QUEER LEGAL WORLDMAKING: THE ROLE OF AFFECT IN RENEGOTIATING VALUE HIERARCHIES IN POLITICAL ARGUMENT

by

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ABSTRACT

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In this dissertation, I propose to better explain the argumentative processes by which communities are constituted in political crisis moments and how, within those moments, social movement and legal rhetorics co-create the rhetorical possibilities for queer legal worldmaking. Specifically, I argue that affect functions as an important tool within argumentative *loci* of presence (magnitude, proximity, and severity) and is intimately connected to value-warrants in political argument. When the affective resonance of polices exclusive of LGBTQIA+ persons is made present, deeply held values can be reappropriated in order to enact political change. Queer legal worldmaking is less about the creation of a single policy, but of a new rhetorical history and tradition that enables a worldview that honors the authenticity and legitimacy of queer lives. A queered legal rhetoric necessitates several argumentative processes ranging from redefinition, renegotiation of value hierarchies and community boundaries.

Public and legal deliberation tends to be conservative and resist change, but my analysis proves that social movements can engage these seemingly stagnate sites of influence with arguments built around fulcrums of shared experiences. This dissertation includes three case studies that reveal *how* members of marginalized communities and their legal representatives can translate protest into policy-making. Through *loci* of presence, advocates in the case studies

rhetorically embodied the threat posed to LGBTQIA+ individuals and broader communities by heteronormative policy, thereby making that threat legally relevant. As only one piece of a much larger constellation of rhetorical practices, legal rhetorical theory alone inadequately encapsulates the process by which progressive advocates argue for the public recognition of queer partnerships and families. I develop the dialectical relationship between social movement and legal rhetorical theory in order to propose a prescriptive vision for queer legal worldmaking. The vehicles with which these discourses impact one another enlighten the process of community formation and public advocacy in the realm of political transformation.

Keywords: Queer legal worldmaking, *loci* of presence, affect, value hierarchies, political argument, social movements, constituting community

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For the brave ones, past and present.

For the brave ones yet to come.

E Pluribus Unum

Out of many, one.

Queer Legal Worldmaking:

Intersections between Legal and Social Movement Rhetorics

Perhaps no court case regarding the expansion of LGBTQIA+ socio-political rights is more proximal in public memory than *Obergefell v. Hodges* (*Obergefell*).[1] In June of 2015, the U.S. Supreme Court ruled in a controversial decision to guarantee to same-sex couples the fundamental right to marry under the Equal Protection and Due Process clauses of the U.S. Constitution.[2] The culmination of six separate lawsuits in federal district courts in Kentucky, Michigan, Ohio, and Tennessee, *Obergefell* constituted a turning point in the fight for marriage

[1] The acronym LGBTQIA+ encompasses many queer and gender non-conforming sexual identifications. Standing for lesbian, gay, bisexual, transgender, queer, intersex, asexual, the acronym suits my argument, which contends that many of the legal debates regarding the expansion of rights for those in non-heterosexual relationships are instrumental in developing the rhetorical tools for broader legal debate concerning the expansion of rights for non-heterosexual identities, lifeways, and families. That said there will be times in this dissertation when I use the words gay and lesbian or queer instead. In such cases, I refer to particular legal contexts in which the scope of the debate extended only to gay and lesbian couples or the discourse engaged with queer theory, specifically.

[2] The case *Loving vs. Virginia* is one of the legal precursors to the *Obergefell* decision in 2015. U.S. Supreme Court heard *Loving* in on April 10, 1967. Mildred Jeter, a black woman, and Richard Loving, a white man, were married in 1957 in the District of Columbia. After returning to their state of residence, Virginia, the Lovings were charged with violating Virginia's anti-miscegenation statute, which banned inter-racial marriages. After being found guilty, the U.S. Supreme Court unanimously overruled. The Court held that anti-miscegenation laws violated the Equal Protection and Due Process Clauses under the Fourteenth Amendment. The Court rejected Virginia's argument that "the statute was legitimate because it applied equally to both blacks and whites." The Court's decision marked a significant moment in legal argument by bestowing the power to choose a marriage partner with the individual, not with the state. For more information on *Loving* see Loving vs. Virginia, No. 395 (United States Supreme Court June 12, 1967).
In addition, *Zablocki vs. Redhail* was useful legal precedent for those arguing for marriage equality in *Obergefell*. The U.S. Supreme Court heard the case on October 4, 1977. Milwaukee County Clerk Thomas E. Zablocki declined to issue the license to Roger C. Redhail under a state statute because Redhail owed more than $3,700 in child support. After a federal district court ruled against Zablocki, he appealed to the U.S. Supreme Court who held that Wisconsin's statute violated the Equal Protection Clause. The Court's decision reaffirmed that marriage was a fundamental right, echoing the Loving decision that affirmed that the state does not have an interest in restricting the right to marriage. For more information on *Zablocki vs. Redhail* see Zablocki vs. Redhail, No. 76-879 (United States Supreme Court January 18, 1978).

equality. No longer would individual state legislatures, courts, and voters determine how and when same-sex unions would be publically recognized as legitimate marital relationships. In the majority opinion, authored by Justice Anthony Kennedy, the High Court acknowledged, "states have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order," yet "there is no difference between same- and opposite-sex couples with respect to this principle."[3] As such, the nation's highest Court ordered the "constellation of benefits" denied to same-sex couples by states unwilling to recognize their marriages be extended to these families.

The *Obergefell* decision was cumulative as it was monumental. Well known and highly publicized, *Obergefell* was the capstone on a collective push for marriage equality in the nation.[4] Each related court case and legislative action that led to *Obergefell* revitalized the question of marriage, partnership, and family in legal and public discourse and marked a moment wherein communities defined through marriage and family could be reconstituted to include LGBTQIA+ individuals. Within each state where the issue was legally debated, voters, legislators, and judges responded, deliberating who would be allowed to participate in state-sanctioned marriage and family, and what those choices meant for those already included in that community. Before *Obergefell* and beyond the scope of marriage alone, public deliberation and legal debate about same-sex partnership and public life had been vigorous, with several cases coming before the U.S. Supreme Court. *Bowers v. Hardwick*, *Romer v. Evans*, and *Lawrence v. Texas,* to name a few, all played key roles in establishing a legal discursive history on the topic of homosexuality

[3] Anthony Kennedy, Opinion of the Court (US Supreme Court June 26, 2015).
[4] Prior to the ruling, thirty-six states had legalized same-sex marriage after heated legislative battles.

in private and public sectors of life.[5] Yet, progress was dependent on legal and public discourse. A case must be brought to the Court for consideration *and* public advocates must renegotiate the boundaries of what relationships, identities, lifeways, and families "count" as recognizable by the State. In the cases that led up to the *Obergefell* decision, progressive advocates worked from the ground up, organizing grassroots movements geared toward swaying public opinion in favor of expanding rights to gay and lesbian couples. In the process, advocates in and out of the courtroom confronted and renegotiated discursive boundaries that separate partners from spouses, guardians from parents, houses from homes. Far from a top-down model of political action, progressive LGBTQIA+ advocacy and activism in the U.S. has continually seized the opportunity afforded by each successive deliberative moment.

The efforts of progressive advocates illustrate the dialectical relationship between social movements and the law. Social movement discourses have historically influenced the formation of policy and policy has both hampered and enabled the rhetorical choices available to public advocates. The vehicles with which these discourses impact one another enlighten the process of community formation and dialectic negotiation in the realm of political transformation. I propose to better explain the argumentative processes by which communities are constituted in political crisis moments and how, within those moments, social movement and legal rhetorics co-create the rhetorical possibilities for queer legal worldmaking. More specifically, I argue that affect

[5] *Bowers* was a case brought to the Supreme Court in 1986. The Court upheld the constitutionality of a Georgia law criminalized homosexual sodomy. *Bowers* was eventually overturned in a later case. I will discuss *Bowers* in detail in Chapter 3 of this dissertation. *Romer* was a case brought to the Supreme Court in 1996. The Court invalidated an amendment to Colorado's Constitution that prevent the State from protecting persons against discrimination based on sexual orientation. *Lawrence* was a case brought to the Supreme Court in 2003. In their decision, the Court overruled *Bowers*, contending that criminalizing homosexual relations violated the Due Process and Equal Protection Clauses of the U.S. Constitution. I will discuss *Lawrence* in detail in Chapter 3 of this dissertation.

functions as an important tool within argumentative *loci* of presence (magnitude, proximity, and severity) and is intimately connected value-warrants in political argument. When LGBTQIA+ persons and their allies are rhetorically embodied in arguments against exclusive policies, deeply held values can be reappropriated in order to enact political change.

The interaction between legal and social movement rhetorics necessitates an assertion of similarity of particulars across contexts. Several scholars have proffered the concomitant processes of amplification and analogy as central to creating presence for premises in argumentation.[6] Chaim Perelman discusses the basic purpose of rational legal discourse as a process wherein similar situations should meet with similar argumentative premises and conclusions.[7] Ultimately, to achieve justice, which is the core motivator behind legal debate, similarities must be determined as a key facet of "equality of treatment."[8] Postulating further the notion of justice, Perelman contends that a fundamental aspect must be "to each the same thing," that

> All people taken into account must be treated in the same way, without regard to any of their distinguishing particularities. Young or old, well or sick, rich or poor, virtuous or criminal, aristocrat or boor, white or black, guilty or innocent – it is just that all be treated in the same way, without any discrimination or differentiation.[9]

Thus, as no one situation is identical in particulars to one that came before, analogous reasoning

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[6] Chaim Perelman, *The Realm of Rhetoric* (University of Notre Dame Press, 1990); Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, vol. 142 (Boston: D. Reidel Publishing Company, 1980); Chaim Perelman, *The Idea of Justice and the Problem of Argument*, First (Routledge, 1963); Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, Translated by John Wilkinson and Purcell Weaver (Notre Dame, IN: University of Notre Dame, 1969); John M. Murphy, "Presence, Analogy, and Earth in the Balance," *Argumentation & Advocacy* 31 (1994): 1–16.
[7] Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, 142:x.
[8] Ibid., 142:xi.
[9] Ibid., 142:2–3.

is a useful rhetorical tool with which to establish similarity as a pathway toward achieving justice in a legal context. Echoing Perelman's assertions about the utility of analogy, John Murphy argues that analogic reasoning enabled Al Gore to create a more powerful text in his book, *Earth in the Balance*. Through three analogies in particular, Gore illustrated the connective tissue between environmental catastrophes and the man-made ravages of nuclear war and provides the necessary language with which to adequately encapsulate the magnitude of the problem.[10] Through analogy, Gore accomplished two rhetorical outcomes. First, he amplified the existence of the problem of environmental degradation while also establishing similarity to other catastrophic occurrences. This dissertation adds to these prior works by investigating the process of amplification and analogous reasoning within the legal context of LGBTQIA+ rights discourses, specifically. Amplifying the rhetorical existence of same-sex couples and their children, while also analogizing queer families and lifeways to those of their heterosexual counterparts, have been vital processes within progressive legal rhetoric.

Notably, the constitution of community is a vital process by which social movement and legal discourses interact. A primary project of queer discourses has been to unseat the perceived naturalness of the heteronormative paradigm, and one of the primary vehicles for that project has been a transformation in language. Queer persons have worked to transform the ways in which bodies can be named, read, and behave in order to create more inclusive communities that embrace queer identities, lifeways, and families. Translating the project of queer worldmaking into a legal context has indeed been, according to James Boyd White, "something we do with our minds, with language, and with each other."[11] Queer *legal* worldmaking is less about the creation

[10] Murphy, "Presence, Analogy, and Earth in the Balance."
[11] James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison WI: University of Wisconsin Press, 1985), ix.

of a single policy, but of a new rhetorical history and tradition that enables a worldview that honors the authenticity and legitimacy of queer lives.[12] A queered legal rhetoric necessitates several argumentative processes ranging from redefinition, renegotiation of value hierarchies and community boundaries, and the affective experiences that when rhetorically embodied, make those efforts persuasive.

Through several case studies of LGBTQIA+ advocacy, this dissertation contributes to an investigation of *how* members of marginalized communities and their legal representatives translate protest into policy-making. More foundationally, I investigate how these parties claim the authority to reframe public deliberation around privacy, marriage, and family to suit a queered reality. As a step toward deeper understanding, I develop the linkage between social movement and legal rhetorical theory in order to propose a prescriptive vision for queer legal worldmaking. In the pages that follow, I illustrate the rhetorical problem for LGBTQIA+ advocates by providing a brief overview of how activists in the homophile era sought political agency through legal and extra-legal channels and set the stage for the rhetorical options available to advocates in the courtroom. As only one piece of a much larger constellation of

[12] John M. Sloop and Charles E. Morris III, "'What Lips These Lips Have Kissed': Refiguring the Politics of Queer Public Kissing," *Communication and Critical/Cultural Studies* 3, no. 1 (2006): 1–26; Charles E. Morris III, "Sunder the Children: Abraham Lincoln's Queer Rhetorical Pedagogy.," *Quarterly Journal of Speech* 99, no. 4 (2013): 1–28; Charles E. Morris III, "Context's Critic, Invisible Traditions, and Queering Rhetorical History," *Quarterly Journal of Speech* 101, no. 1 (2015): 225–43; Sarah Mann, "'You're Just a Stripper That Came Out of a Time Machine': Operation Snatch's Queer World-Making and Sex-Working Class Politics," *Canadian Theatre Review* 158, no. 1 (2014): 50–53; Isaac West, "Queer Generosities," *Western Journal of Communication* 77, no. 5 (2013): 538–41; Dustin Bradley Goltz and Jason Zingsheim, eds., *Queer Praxis : Questions for LGBTQ Worldmaking* (New York, NY: Peter Lang Publishing, Inc., 2015); Peter Odell Campbell, "The Procedural Queer: Substantive Due Process, Lawrence v. Texas , and Queer Rhetorical Futures," *Quarterly Journal of Speech* 98, no. 2 (2012): 203–29; Kyra Pearson and Nina Maria Lozano-Reich, "Cultivating Queer Publics with an Uncivil Tongue: Queer Eye 'S Critical Performances of Desire.," *Text and Performance Quarterly* 29, no. 4 (2009): 383–402.

rhetorical practices, legal rhetorical theory alone inadequately encapsulates the process by which progressive advocates argue for the public recognition of queer partnerships and families. Leaning heavily on value warrants in legal argumentation, progressive queer advocacy in legal contexts also challenges the hierarchical relationship between value clusters associated with "privacy," "marriage and family," and "the home." The final part of this chapter previews three case studies that illustrate the ways in which the process of renegotiating these value clusters contribute to the formation of communities within the context of progressive LGBTQIA+ advocacy in a post-Homophile era.[13] As exemplars of queer legal worldmaking, the case studies included in this dissertation demonstrate the dialectic relationship between social movements and the law as advocates attempt to make queer partnerships and families more present in political discourse.

Homophile Era Activism and the Law

The pursuit of socio-political equality for LGBTQIA+ individuals and communities can be traced to the early 20th Century in the United States, when gay and lesbian individuals worked to gain public visibility. It was dangerous to be "out and proud" as many gay and lesbian people who did reveal their sexual orientation experienced discrimination and violence. Thus, queer communication networks necessitated a level of informal organization. As early as the 1930s informal communication networks, with the help of subaltern activist media, contributed to the formulation of medical, legal, and educational discourses pertaining to gay and lesbian rights.[14] These disparate discourses began to counter dominant cultural narratives and the pervading

[13] The term homophile, which in many ways is a precursor to the terms homosexual, gay, lesbian, etc., can be defined as a love of (or positive affinity toward) those with same-sex attractions. The Homophile movement gained prominence in the U.S. in the early twentieth century.

[14] Martin Meeker, *Contacts Desired: Gay and Lesbian Communications and Community, 1940s-1970s* (Chicago: University of Chicago Press, 2006), 3.

psychiatric wisdom of the time that characterized homosexuality as a mental disorder.

In the 1950s, the homophile movement emerged in the U.S. as a coalition of organizations who sought equal rights for gays and lesbians. The movement flourished into the 1960s. LGBTQIA+ individuals created communities wherein they could live their lives more openly and create families. Armed with isolated political successes in subsequent decades, homophile advocacy groups gained momentum through the 1960s and 70s and brought awareness to the burgeoning gay liberation movement in order to craft a collective mission aimed toward social justice. The 1960s and 70s were marked by pervasive social and political transformation, coupled with painful setbacks. Even though the medical community de-pathologized homosexuality in 1973, pervasive cultural narratives that staunchly defended the privilege of hegemonic communities often stymied queer activists in these decades.[15] Fraught with identitarian political conflict that travelled from the streets of Compton and the Tenderloin, to the Stonewall Inn in Greenwich Village, LGBTQIA+ and allied advocates in these decades worked arduously to legitimate queer sex/gender identities and protect rights for gays, lesbians and to a certain extent, trans persons who were subjected to endemic socio-economic and legal inequality.[16]

The subaltern ideologies of the homophile and gay liberation movements made gender, sex and sexuality of argumentative relevance in legal discourses, yet formal modes of legal advocacy would be slower to form. As far back as the Civil War era, the law sought to preserve

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[15] The Committee on Nomenclature and Statistics of the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Second (Washington D.C.: American Psychiatric Association, 1974). Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders in 1974. The second edition (DSM-II) was reprinted for the sixth time in 1974.

[16] Alexander Galloway, "Networks," in *Critical Terms for Media Studies*, ed. W.J.T. Mitchell and Mark Hansen (Chicago: University of Chicago Press, 2010), 283.

heteronormative sex and gender norms, the perceived natural order, and punished any deviance from that model as malignant and damaging. Despite the hegemonic roots of the law, progressive models of gender roles and sexual preferences have begun to supplant this "natural law" model for the legal system.[17] Joining the burgeoning progressive social movement predicated upon the independence of gender, sexuality, and sex from the body,

> feminists, lesbian and gay activists, and trans advocates and their allies, maintained that variation in gender, sexuality, and even sex is typically benign. That is, significant and increasing sexual, gender, and sex variation is not necessarily a matter for normalizing state interventions.[18]

To a certain degree the American system of law followed this concept of benign sexuality and gender, operating in alliance with the presumption that "the state has no business coercing or perhaps even encouraging people to adhere to a collectively determined ideal of standardized gender roles and sexualities."[19] The presumption that sexual variance was benign has extended to such legal debates as marriage and adoption, both contentious discourses that will be further discussed in later chapters. Nevertheless, such discourses have served to slowly transform the law such that the State should secure equal freedom and opportunity to LGBTQIA+ individuals rather than work to preserve archaic notions of "natural law."

Decades of slow struggle have wrought a philosophy of law typically referred to as Sexual Orientation and the Law, which is founded on the premise that "legal rules and standards pervasively reflect, regulate, and are undermined by the diversity gender roles, sexual practices,

[17] William N. Eskridge Jr., "Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive," *UCLA Law Review* 57, no. 5 (June 2010): 1334.
[18] Ibid.
[19] Ibid., 1334–1335.

and gender or sexual identities in a society."[20] Some scholars have traced the development of the LGBTQIA+-friendly legal philosophy to the groundbreaking law review symposium, published in the Hastings Law Journal in 1979.[21] This symposium, which stood in stark contrast to the academy's silence on these issues, contained comprehensive overviews of how statutory and common law unfairly discriminated against LGBTQIA+ individuals. Though this endemic discrimination impacted the lives of many people, some of whom belonged to the legal academy, sex, sexuality and the law was a subject few were brave enough to write or speak about until the symposium.[22] Several legal academics, including Jeffrey Sherman, David Richards, and Rhonda Rivera "were academic trailblazers who risked their careers so that the upcoming generation of law students, lawyers, and law professors would have a framework for understanding the legal oppression of gay men and lesbians and advocating for necessary change."[23] The 1979 symposium and the work that followed brought constitutional privacy rights to the fore, connecting the notion of equal protection to social justice and making sex relevant in conversations related to the First Amendment.[24] Yet the progressive victories related to

[20] William N. Eskridge Jr., "Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive," *UCLA Law Review* 57, no. 5 (June 2010): 1333–1334; See also William N. Eskridge Jr. and Nan D. Hunter, *Sexuality, Gender, and the Law*, 3rd ed., University Casebook Series (Foundation Press, 2011); Catharine A. MacKinnon, *Sex Equality*, 2nd ed., University Casebook Series (Foundation Press, 2007); Mary Becker, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously*, 3rd ed., American Casebook Series (Thompson West, 2007); William B. Rubenstein, Carlos Ball, and Jane S. Schacter, *Cases and Materials on Sexual Orientation and the Law*, 4th ed., American Casebook Series (West, n.d.).

[21] The N.Y.U. Journal of Law and Social Change published conference proceedings at around the same time and the articles published complemented the mission and purpose of the Hastings Law Journal publication in 1979.

[22] Christopher R. Leslie, "The Evolution of Academic Discourse on Sexual Orientation and the Law: An Introduction to a Festschrift in Honor of Jeffrey Sherman," *Chicago-Kent Law Review* 84, no. 2 (n.d.): 367.

[23] Ibid., 369.

[24] Eskridge Jr., "Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive," 1335.

LGBTQIA+ rights also spawned a "traditional family values countermovement" that has since worked to undermine the frame of "gay equality" as a threat to "the privacy and *free* speech rights of religious persons, many of whom now see themselves as an embattled minority oppressed by the state."[25] It is on these fertile grounds that the contemporary controversies surrounding the expansion of gay rights, like those covered in this dissertation, have sprouted.

Political gains made in the homophile era have influenced the trajectory of legal discourse and created opportunity for deliberation by publicizing queer identities and lifeways into the present-day. LGBTQIA+ legal scholars, academics and professionals tended to keep private their sexual identities, and desires, which hampered inclusive political philosophies out of the courtrooms and, in turn, out of public policy. Despite this, "liberal and progressive discourses flowing from [homophile] social movements have […] profoundly affected constitutional law doctrine."[26] In the 1950s, 60s, and 70s there was no body of literature in the academy to support gay litigants, which foreclosed the available "persuasive authority" upon which to base a "pro-gay opinion."[27] However, the move by progressive legal scholars and activists to publicly disclose their experiences led to instrumental changes in municipal, state, and federal statutes.[28] As the movements associated with LGBTQIA+ activism have grown and evolved, so too has the legal discourse pertaining to privacy, equal protection, free speech, and access to resources and spaces. Because of the ground that was gained by legal and grassroots advocates in the homophile era, the realm of law is currently much more inclusive to LGBTQIA+ individuals. Changes to policy have granted these marginalized communities a greater degree of agency

[25] Ibid.
[26] Leslie, "The Evolution of Academic Discourse on Sexual Orientation and the Law: An Introduction to a Festschrift in Honor of Jeffrey Sherman," 364.
[27] Ibid.
[28] Leslie, "The Evolution of Academic Discourse on Sexual Orientation and the Law: An Introduction to a Festschrift in Honor of Jeffrey Sherman."

when arguing on their own behalf on numerous levels of public and political participation, from the streets of the Tenderloin to the U.S. Supreme Court, and everywhere in between.

What remains unclear however is how LGBTQIA+ individuals and their allies have made their positions persuasive relative to status quo arguments about "traditional" partnership, marriage, and family. Increasing friction in and among some allied progressive activist coalitions has complicated the quest to expand rights for LGBTQIA+ individuals, obfuscated the mission and strategy of queer politics in an era of diversification, and increased political agency within marginalized groups.[29] As queer communities have been created, rejuvenated, splintered, and reconfigured, the movements to which they claim allegiance do not and cannot encapsulate the universal interests of its entire membership. For this reason, the constitution and renegotiation of queer and allied communities, and communities hostile to progressive politics, is integral to understanding queer legal worldmaking. Homophile activists made these arguments relevant, but this dissertation will explain, in part, by what means these arguments can become authoritative, legitimate positions in legal discourse and compelling sources of evidence with regard to establishing and challenging legal precedent.

Intersections with Related Social Movement Discourses

Along with homophile-era advocacy, related Civil Rights activism complicated the intersections and divergences among progressive social justice advocates. In order to better account for the non-traditional methods of protest that had emerged during the 1950s, 60s, and 70s, as well as the changes to formal channels of political advantage, social movement scholars

[29] Within the context of marriage, specifically, some queer and allied activists see marriage as a heteronormative institution that further disciplines queer sex/gender identity and desire and thus, do not support the legal expansion of marriage rights for queer persons.

in this time sought to redefine social movements and the characterizations of their function.[30] The trends of social movement scholarship in the 1960s and early 70s highlight the ways in which diffuse leadership can be cultivated to facilitate a more fluid dispersal of power rather than strictly top-down. In the 60s, social movement scholars expanded their purview to include modes of protest beyond the verbal.[31] Embodied forms of protest such as sit-ins, picketing, and mass marches came to the fore during this time of increased radicalization, and some of these strategies were taken up by LGBTQIA+ activists.[32] Notably, these forms of protest were significant for the places they were carried out. Picketing was no longer limited to outside the courthouse, but occurred at individual homes, and mass marches took place through hostile territory. The forms of protest were also significant because of the particular *bodies* that carried

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[30] Franklyn S. Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Considerations," *Quarterly Journal of Speech* 53, no. 2 (1967): 99–114; Robert L. Scott and Donald K. Smith, "The Rhetoric of Confrontation," *Quarterly Journal of Speech* 55, no. 1 (February 1969): 1–8. See also Herbert W. Simons, "Requirements, Problems, and Strategies: A Theory of Persuasion for Social Movements," *Quarterly Journal of Speech* 56, no. 1 (February 1970): 1–11.
In 1970, Herbert W. Simons defined social movements as un-institutionalized collectivities that mobilize in order to implement systematic changes for the reconstitution of social norms or values. Simons carefully distinguishes social movements from other more nebulous or erratic instances of conflict (such as panics, fads or hostile outbursts), and characterizes social movements by their coherence of purpose. Simons also distinguishes the form and function of social movements from the actions of institutionalized bodies such as labor unions, government agencies or corporations, which are generally codified by formal policies and procedures.

[31] Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Considerations." See also Scott and Smith, "The Rhetoric of Confrontation."
This analytical move was largely predicated on shifting conversation about social privilege and the agency with which "have nots" could alter their positionality in relation to the "haves." The language of "haves" and "have nots" in this context refers to a multitude of things, from wealth and goods to social privilege and opportunity. Nevertheless, the old language of "haves" and "have nots" is problematic as it underemphasizes the depth and complexity of the division between the two parties. Throughout the 60s, trust waned that the "haves" would altruistically care for the "have nots." As the tide shifted, "have nots" who found themselves in the margins no longer accepted their designation as an inert mass waiting and hoping to receive what they lacked from the "haves." Rather the "have nots" began to formulate a more active and radical collective identity which not only divided them from status quo society, but also enabled them to question the limitations and fundamental purpose of public benevolence.

[32] Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Considerations."

them out.[33]

A social movement is made up of several disparate bits of communication that coalesce into a persuasive, constitutive force that binds communities together based on specific fulcrums of agreement. As Herbert A. Simons notes, "It is frequently impossible to separate detractors from supporters of a social movement, let alone discern rhetorical intentions, to distinguish between rhetorical acts and coercive acts, or to estimate the effects of messages on the many audiences to which they must inevitably be addressed."[34] Moreover, the temporal span of social movements, often encompassing several stages and potentially transitioning leaders further complicates the endeavor to account for the multiple and at times conflicting needs of those who claim allegiance to a movement.

Certainly, movements advocating for the expansion of rights and privileges for LGBTQIA+ communities fit Simons' description.[35] For example, the premises from which activists fight for the right to privacy or marriage for same-sex couples are somewhat different from the premises from which activists argue for trans persons' right to access public bathroom and changing facilities that align with their gender self-identification. In the case for marriage, progressive advocates argue that committed same-sex couples are largely the same as heterosexual married couples, deserving of equal recognition and equal privileges. On the other

[33] This dissertation build from the theoretical perspectives mentioned above toward a discussion of rhetorical embodiment. Though the material presence and performance of bodies aren't relevant to a discussion of rhetorical embodiment, the case studies in this dissertation do elaborate on the affective impact of the discursively represented presence of particular persons (i.e., LGBTQIA+ folks) within legal argument.

[34] Simons, "Requirements, Problems, and Strategies: A Theory of Persuasion for Social Movements," 1.

[35] The marriage case study included in this dissertation illustrates this tension. In Hawaii, LGBTQIA+ individuals rallied behind the campaign to strike down the amendment that would have enabled the state to outlaw same-sex marriage regardless of whether or not they themselves saw the value in marriage. The amendment was read as a threat to all LGBTQIA+ people and so became a rallying point for queer communities.

hand, advocates fight for trans persons' rights on the basis of the authenticity of trans identity – on the very assumption of difference from a heteronormative standard. As such, attempts to change policy in favor of LGBTQIA+ rights have necessarily entailed targeted, specialized arguments designed for and by *particular* stakeholders in response to *particular* injustices and have been predicated on unique argumentative premises.

The specificity of queer argumentation makes it well suited for the courtroom, a rhetorical context in which arguments are often made inductively. Edward H. Levi distinguishes between case law and the application of statues in legal reasoning, the former typically carried out through inductive arguments, the latter carried out through deductive reasoning.[36] Initially, concepts and premises "can be created out of particular instances," the reasoning process moving from particular toward the general.[37] Once codified, the application of the statute depends on the interpretive process of establishing commonality between general principles to the particular, new instances are weighed with the old "and the remaking of the concept word itself is apparent."[38] The inevitable partnership between inductive and deductive reasoning process also enables transformation in concepts and premises. As the statute is formulated from one particular and likened with others in future contexts, related connotative and contextual features alter the concepts and premises that undergirded the statute to begin with. In this way, legal reasoning enables the destabilization and malleability of concepts that queer rhetorics demand. In line with queer theoretical frameworks that resist static codification, trending instead toward the process of (de)construction of possibilities, queer legal reasoning "(re)constructs ethics, and the criminal

[36] Edward H. Levi, *An Introduction to Legal Reasoning*, Second (Chicago, IL: The University of Chicago Press, 2013), 27.
[37] Ibid.
[38] Ibid.

law, through the prism of queer lived experience(s)."[39] Inductive queer legal reasoning creates arguments imbued with a presence that "exert[s] a pressure in our lives and thinking" and enables the creation of statutes that can be applied in future contexts.[40]

Preview of Case Studies

This dissertation will analyze the ways in which advocates and coalition advocacy groups engaged argument in legal and public contexts to expand socio-political rights for LGBTQIA+ persons in specific policy deliberations. To do so, I will analyze three case studies wherein progressives tapped into the affective features that characterize privacy, marriage and family, and the home as representative of communities predicated on these shared values (and value hierarchies). For the first case study, I have chosen to examine arguments presented by Lambda Legal during *Lawrence and Garner v. Texas (Lawrence),* which urged the U.S. Supreme Court to overturn Texas' Homosexual Conduct law in 1998. Prior to *Lawrence*, thirteen states still had anti-sodomy laws on the books, some of which criminalized conduct between partners of the same sex. Lambda Legal is a national legal organization that has worked to gain "full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work."[41] After years of fierce litigation during which Lambda Legal attempted to exonerate Lawrence and Garner, the state of Texas

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[39] Chris Ashford, "Barebacking and the 'Cult of Violence': Queering the Criminal Law," *The Journal of Criminal Law* 74 (2010): 342, doi:10.1350/jcla.2010.74.4.647; See also Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, Second (New York: Routledge, 2007); Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993); Judith (Jack) Halberstam, *Female Masculinity* (Durham, NC: Duke University Press, 1998).

[40] Eve Kosofsky Sedgwick, "Melanie Klein and the Difference Affect Makes," *South Atlantic Quarterly* 106, no. 3 (Summer 2007): 625, doi:10.1215/00382876-2007-020.

[41] Lambda Legal: Making the Case for Equality, "About Us," 2016, http://www.lambdalegal.org/about-us. Para 1.

refused to overturn the conviction.[42] Unsatisfied with Texas' ruling, Lambda Legal took their case to the U.S. Supreme Court where they attempted not only to secure the same fundamental right to privacy and sexual intimacy for gay and lesbian individuals that is granted to heterosexual persons, but also to overturn the precedent set by *Bowers v. Hardwick* (*Bowers)*.[43]

The legal documents and oral arguments presented to the U.S. Supreme Court by Lambda Legal are an apt text through which to examine progressive argument strategies used to secure privacy rights for LGBTQIA+ persons for three main reasons. First, the outcome of *Lawrence* was a landmark victory for progressive queer advocacy. *Lawrence* established that queer persons were deserving of the same rights and liberties in their private lives as heterosexual persons, and representatives of Lambda Legal were the primary progressive advocates involved with that case. The brief represents the argumentative premises by which the case for privacy was made present by an advocacy group that had been involved with the case on both state and federal levels. In addition, the outcome of *Lawrence* was representative of a larger shift in legal discourse, which put "a human face on the clinical and foreign label 'homosexual'."[44] Combined with the increasing visibility of gay persons in the public eye that concurrently impacted legal discourse as early as the 1970s, the outcome of *Lawrence* made it difficult for "heterosexual society to view gay people as 'sexual psychopaths' worthy of contempt and legal condemnation."[45] Third, and on a related note, the outcome of *Lawrence* reset the legal precedent previously established through the *Bowers* case for the treatment of LGBTQIA+ individuals with

[42] Ibid. Para 1.
[43] Lambda Legal: Making the Case for Equality, "Lawrence v. Texas," 2016, http://www.lambdalegal.org/in-court/cases/lawrence-v-texas. The U.S. Supreme Court decided *Bowers* in 1986. The decision that determined that sodomy laws were constitutional.
[44] Leslie, "The Evolution of Academic Discourse on Sexual Orientation and the Law: An Introduction to a Festschrift in Honor of Jeffrey Sherman," 372.
[45] Ibid.

regard to privacy. Reversing *Bowers* was instrumental for progressive advocates because "a large body of federal cases relied on *Bowers* to deny the legal claims of gay men and lesbians, especially those based on equal protection arguments – despite the fact that *Bowers* was not an equal protection case."[46] *Bowers* was "infectious" in judicial thinking, therefore striking it down also called into question the outcomes of a series of related cases that had been based on the *Bowers* decision.[47]

Examining the progressive arguments that were deployed during the *Lawrence* case is a solid foundation from which to assess the ways in which anti-sodomy laws were framed as a threat against all intimate relationships, not just same-sex couples, thereby making the magnitude of that threat more present. Lambda's arguments were cited as effective in the majority opinion, authored by Justice Anthony Kennedy. In his opinion, Kennedy emphasized the arguments specifically related to privacy that were made by Lambda in their initial writ and during oral arguments:

> We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holdings in *Bowers*.[48]

As the Court echoed similar arguments to due process and personal liberty, Kennedy cited the same court cases that were used by Lambda to circumvent the precedential connection between *Bowers* and *Lawrence*.

[46] Ibid., 376.
[47] Ibid.
[48] Anthony Kennedy, "Opinion of the Court, Lawrence and Garner v. Texas, 539 U.S. 558 (2003)," June 26, 2003, 564.

For the second case study, I will examine legal discourse outside of the courtroom in the progressive Vote NO campaign's televised media spots in their effort to secure same-sex marriage rights for residents of Minnesota. In 2012, Minnesota legislators voted to include on the ballot an amendment to the state's constitution that would have defined marriage as a union between one man and one woman. Since the 90s, marriage amendments have been proposed in thirty-one states, and as of 2012 when Minnesota proposed Amendment One, similar amendments passed in each of the thirty-one states in which they were considered. These amendments, though not identical to one another, accomplished at least one of the following: preempted the legalization of same-sex marriage in those states or prevented the recognition of all other legally recognized same-sex unions, like civil unions or domestic partnerships. In the effort to avoid becoming "state number thirty-two," grassroots coalitions, headed by *Minnesotans United for All Families*, waged the Vote NO campaign. Through a series of television spots, print ads, and billboards, Vote NO was a unified platform from which progressive advocates banded together in the effort to stop passage of Amendment One.

The Vote NO campaign in Minnesota is an apt text for study for three main reasons. First, the vote in 2012 marks the first time wherein a state-proposed amendment to prevent the legal recognition of same-sex partnerships did not pass. While *Obergefell*[49] ultimately rendered unenforceable state laws and constitutional amendments banning same-sex marriage, the victory of progressive advocates in Minnesota was a significant milestone in the fight for public opinion, which remains a key resource for advocates arguing for the overturning of legal precedent in

[49] On June 26, 2015, the U.S. Supreme Court ruled on the *Obergefell* case, which was a case comprised of several state-level Supreme Court cases brought by same-sex couples petitioning for their right to legally recognized unions. The outcome of Obergefell guaranteed the right to marry for same-sex couples under the Due Process Clause and the Equal Protection Clause of the 14th Amendment.

courtrooms. Second, advocates in the Vote NO campaign deployed the power of affect to make the threat of Amendment One more proximal to voters. This argumentative strategy was unique to their compatriot campaigns in other states. For example, progressive advocates in Wisconsin, largely headed by *Fair Wisconsin* fought against the passage of Referendum One in 2006 by arguing that marriage equality was simply "common sense."[50] In addition, *Fair Wisconsin's* campaign focused on the economic and legal impacts of marriage equality such as "sharing health insurance, having visitation rights in hospitals, raising children together, accessing family medical leave benefits and even filing joint tax returns."[51] These arguments, while valid, did little to motivate Wisconsin's electorate to accept a progressive vision for marriage, and the referendum ultimately passed. The Vote NO campaign, on the other hand, tapped into the affective resonance of marriage and family as American values shared by conservatives and progressives alike. In terms of reestablishing a community united around the dignity of marriage, Vote NO disarmed their political opposition and won hearts and minds in Minnesota.

Third, as mentioned previously, there has been debate within gay communities between "those who [favor] same-sex marriage and those who [fear] the perceived assimilation into an institution created by a dominant culture that had been hostile to both gay people and the equal treatment of women."[52] Yet the upsurge of statewide constitutional marriage amendments pushed to the background many of the nuanced arguments within the LGBTQIA+ community against the merits of marriage. Because "opponents of equal rights for gay Americans made same-sex

[50] Megin McDonell and Jenni Dye, "Anniversary of Marriage Equality Decision a Powerful Example of Why Courts Matter," *Fair Wisconsin*, June 28, 2016, para 1. http://fairwisconsin.com/anniversary-of-marriage-equality-decision-a-powerful-example-of-why-courts-matter/.
[51] Ibid., para 4.
[52] Leslie, "The Evolution of Academic Discourse on Sexual Orientation and the Law: An Introduction to a Festschrift in Honor of Jeffrey Sherman," 374.

marriage the primary battleground over gay rights more broadly," the public face of the gay liberation movement was unified in support of same-sex marriage.[53] As such, the voters' rejection of Amendment One, which made Minnesota the first state to vote down a constitutional measure prohibiting the legal recognition of same-sex marital unions, is a rich case study of presence in grassroots, coalition advocacy.

The third case study examines the lawsuit filed in August of 2015 by the Campaign for Southern Equality, the Family Equality Council, and four same-sex couples in Mississippi to expand adoption rights to same-sex couples in that state.[54] At the time of the lawsuit, Mississippi was the only state in the union to uphold its prohibition of legal joint adoption rights for GLBT couples. Though Mississippi was hardly the only state to have had statutes restricting the adoption of children by same-sex couples on their books, *Obergefell* eliminated a roadblock that had hindered same-sex couples in many states from adopting. Despite the ruling however, Mississippi did not reverse a law that was passed in 2000 that prohibited same-sex couples from adopting jointly in the state, regardless of marital status. As a targeted argument against a very specific claim (i.e., that same-sex couples, married or unmarried, were unfit to be parents), the documents filed by the plaintiffs in the 2015 lawsuit mirrors the prior two case studies in the sense that values associated with "the home" necessarily needed to be renegotiated to accommodate same-sex couples. Similar to the previous two case studies, *Campaign for Southern Equality* constitutes a culmination of prior legal arguments made to overturn prior policies that restrict freedoms for LGBTQIA+ individuals. Each case study makes present the threat against queer couples and families through *loci* of magnitude, proximity, and severity,

[53] Ibid., 374–375.
[54] The plaintiffs will be subsumed under the Campaign for Southern Equality, who led the suit. The abbreviation CSE will signify the collective.

respectively. Taken together, the case studies I have selected provide a focused analysis on both legal and public deliberation wherein vested parties negotiated the terms and stakes of policy formation. This dissertation enables a deeper understanding of the ways in which progressives at all levels of policy-making have established a model for American values that suits an increasingly queered socio-legalscape.

Though similar in topical and theoretical focus, key differences between each case study highlight the unique challenges that progressive advocates have necessarily encountered in creating LGBTQIA+-inclusive policy. Namely, outmoded legal precedent, hegemonic cultural narratives that sway public opinion, and the negation of the plasticity of values in legal argument. When arguing on behalf of Lawrence and Garner, Lambda Legal was tasked not only with arguing for the merits of their suit, but also in overturning prior legal precedent in *Bowers*. With history not on their side, Lambda's argument strategy amplified the magnitude of the harms brought about by *Bowers'* outmoded logic and widened the scope of who was harmed by the supposed precedent. *Minnesotans United* faced other difficulties, fighting against a tide of hostile public opinion in their efforts to convince Minnesotans to "vote no." Battling against established religious tropes centered on freedom and moral rightness, Vote NO worked to circumvent abstracted appeals to morality by making the key issues at stake more proximal to voters. *Minnesotans United* made concrete the rhetorical embodiment of personal experience in order to sway public opinion. Finally, *Campaign* amplified the severity of the problem of child displacement by contending that displaced children were particularly vulnerable and in need of stability, dignity, and suitable homes. Doing so shifted the field of argument away from the moral fitness of same-sex couples as parents and toward a discussion of what constitutes a safe and loving home. Advocates working on behalf of Campaign for Southern Equality (CSE)

emphasized stability, love, nurturance, and physical, mental and emotional health as abstract values reflected in the concrete value of the home.

Each of the three case studies speak to the legacy of LGBTQIA+ advocacy and illustrate the ways in which arguments have been made in response to perceived attacks on the queer community. Demonstrating the dialectic between grassroots and judicial contexts, all three case studies show the breadth and depth of advocacy in this context while also examining the influence of affect through *loci* of presence on the process of renegotiating value hierarchies and the communities built around them. Through this robust analysis to follow, I will extrapolate several practical takeaways for progressive advocates and advocacy coalitions seeking to impact policy and the expansion of queer rights. In addition, this project will advance theoretical conclusions about the role of rhetorical embodiment within *loci* of presence in bringing about legal and cultural change. The following section will treat each of these theoretical foundations in the context of the three case studies mentioned above and more broadly, with regard to progressive queer legal worldmaking.

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Affect, Presence, Social Movements, and Values:

A Look Beyond Legal Reasoning to the Full Scope of Policy Making

Laws that defend a heteronormative status quo are inadequate and work against the interest of LGBTQIA+ communities. Advocates who want to change laws must also redraw communities to include queer members and families. In the co-creative process of queer legal worldmaking, justices, lawyers and voters alike are audiences that may be swayed. Values (and relative hierarchical position of those values) shared by vested audiences are influential factors in establishing community ties and creating policy inclusive to queer folks. Specifically, progressive value arguments in these case studies move between abstract and concrete representations of privacy, marriage and family in order to shift what those values mean. As the meaning of those values shift, queer partnerships and families create authentic, legitimate resources for legal argument. Changing the law requires a shift in community boundaries and the affective ties that define them. Taken together, the following brings into view the ways in which audience and advocate, values and argument intersect to create policy inclusive of LGBTQIA+ partnerships and families.

As was detailed in the previous chapter, this dissertation will analyze how rhetorical embodiment through *loci* of presence enabled the process of renegotiating values in legal decision-making. The three case studies included in this project examine the role of value warrants and hierarchies, and the process of renegotiating communities within the context of queer legal worldmaking. As such, it is first necessary to explore the theoretical components that contextualize the argumentative process of redefining key terms and establishing the field of argument. As legal reasoning does not alone encapsulate this process, the following will first provide a brief discussion of legal reasoning and how legal precedent is established before

discussing in greater depth the relevant literature related to the various channels through which legal discourse and social movements impact public policy.[55] This review highlights the importance of capturing *how* this process occurs. A primary goal of this dissertation is to fill that gap in knowledge by extending the notion of presence. As embodied rhetorics were key in constituting cohesive queer social movements during the homophile era and into contemporary queer activism, I will explore the influence of rhetorical embodiment within verbal argumentation in making more present the harms of policies exclusive of queer partnerships and families. Affect, as a tool of presence, is a productive strategy by which to establish a progressive field of argument in legal discourse and rework value hierarchies in order to alter status quo politics toward a more inclusive model of public policy.

Resisting Conservatism in Legal Discourse

Advocates in the LGBTQIA+ community and their allies have achieved political and socio-economic progress in the last several decades. Much of this progress can be credited to the ways in which social movement discourses have been integrated within the law and legal discourse. Legal discourses tend to be conservative and resist change. The law is often thought of as a business of "clarity, objectivity, rigor, and toughmindedness," a static institution of statutes wherein there is a right answer and a claim that can be proven. This is in large part due to the "plain English" approach to legal language.[56] Frances J. Ranney explains that in its heyday, the "plain English" was much more concerned with preserving what might have been interpreted as

[55] Each case study chapter will include a discussion of the relevant historical context specific to each case. In this chapter, I will limit my discussion to the homophile movement, the primary social movement that called forth the particular instances of LGBTQIA+ legal activism in the present day.

[56] Gerald B. Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," *Virginia Law Review* 76, no. 1 (1990): 1545.

the overly esoteric features of legal language.[57] Yet, scholars such as Wayne C. Booth, Kenneth Burke, Chaim Perelman, Stephen Toulmin, and James Boyd White have demonstrated that the law is primarily rhetorical; it is malleable, intangible, and embodies the possibilities and is subject to the constraints of rhetorical action.[58] During the Civil Rights era, the "law and literature" movement developed in contrast to "plain English," with the influence of scholars like White, to "bring the humanities into the study of law."[59] By focusing more intently on making legal language accessible to non-practitioners, the "law and literature" movement in legal discourse and scholarship is "therefore concerned not so much with legal writing as it is with

[57] Read: pre-Civil Rights era. More about Ranney's body of work can be found in Wetlaufer, "Rhetoric and Its Denial in Legal Discourse."

[58] Kenneth Burke, *Permanence and Change: An Anatomy of Purpose*, 3rd ed. (Berkeley CA: University of California Press, 1984); Kenneth Burke, *Language as Symbolic Action: Essays on Life, Literature, and Method* (Berkeley CA: University of California Press, 1966); Kenneth Burke, *A Grammar of Motives* (Berkeley CA: University of California Press, 1969); Wayne C. Booth, *Modern Dogma and the Rhetoric of Assent*, vol. 5 (Chicago: The University of Chicago Press, 1974); Wayne C. Booth, *A Rhetoric of Irony* (Chicago: The University of Chicago Press, 1974); Wayne C. Booth, *The Rhetoric of Fiction*, Second (Chicago: The University of Chicago Press, 1983); Wayne C. Booth, "The Revival of Rhetoric," *PMLA* 80, no. 2 (1965): 8–12, doi:10.2307/1261264; Chaim Perelman, *The Realm of Rhetoric* (University of Notre Dame Press, 1990); Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, vol. 142 (Boston: D. Reidel Publishing Company, 1980); Chaim Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications*, vol. 140 (Boston: D. Reidel Publishing Company, 1979); Chaim Perelman, *The Idea of Justice and the Problem of Argument*, First (Routledge, 1963); Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, Translated by John Wilkinson and Purcell Weaver (Notre Dame, IN: University of Notre Dame, 1969); James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison WI: University of Wisconsin Press, 1985); James Boyd White, *The Legal Imagination, Abridged Edition* (Chicago: University of Chicago Press, 1985); James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990); James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: The University of Chicago Press, 1984); Stephen E. Toulmin, *The Uses of Argument*, Updated (Cambridge: Cambridge University Press, 2003); Stephen E. Toulmin, "The Construal of Reality: Criticism in Modern and Postmodern Science," *Critical Inquiry* 9, no. 1 (1982): 93–111; Stephen E. Toulmin, Richard Rieke, and Allan Janik, *An Introduction to Reasoning*, Second (Pearson, 1984).

[59] Frances J. Ranney, "Reading, Writing, and Rhetoric: An Inquiry into the Art of Legal Language," *Business Communication Quarterly* 62, no. 2 (1999): 105.

legal *reading*, and focuses not on consumer documents but on arguably 'literary' judicial opinions."[60] By integrating the "humanities" into the law, thereby blending the technical and public spheres of discourse, the law was placed in context, crafted to be easily consumable in both legal and extralegal contexts.

The law as fundamentally rhetorical is not a new invention. Realist, critical, postmodern and semiotic approaches to the law have long rejected the received legal view of cases.[61] Situating law as discourse, Chris Heffer notes that what is commonly thought of as "language in action" is more accurately a form of ritualized practices that are "historically constituted, locally situated, and are laden with social and political value."[62] As such, the pragmatic, social, historical, political and rhetorical aspects of the law must be taken into account when attempting to uncover a full understanding of how the law intersects with the individuals who uphold, defend and even violate it.[63] Furthermore, it is necessary to consider the ethical stakes of multiple potential outcomes and what members of a community "can say to one another … about our own desires and those of others, about who we are and who we want to be, who [we become and who we risk becoming], when one tack or another is taken."[64] The interaction between dynamic ethical, socio-political and historical features embedded within the law has thereby

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[60] Ibid. Italics mine.
[61] Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Basingstoke: MacMillan, 1987); Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990); White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*.
[62] Heffer, "Revelation and Rhetoric: A Critical Model of Forensic Discourse," 462, citing Stephen Levinson, "Activity Types and Language," in *Talk at Work: Interaction in Institutional Settings*, ed. Paul Drew and John Heritage (Cambridge: Cambridge University Press, 1992), 66–100.; See also V.N. Voloshinov, *Marxism and the Philosophy of Language* (Cambridge: Harvard University Press, 1986); Richard Bauman and Charles L. Briggs, "Poetics and Performance as Critical Perspectives on Language and Social Life," *Annual Review of Anthropology* 19 (1990): 59–88; Pierre Bourdieu, *The Logic of Practice*, trans. Richard Nice (Cambridge: Polity, 1990).
[63] Heffer, "Revelation and Rhetoric: A Critical Model of Forensic Discourse," 462.
[64] White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, 4.

complicated the notion of objective truth with regard to how laws are written and interpreted across multiple contexts.

Perhaps another way of considering the ethical and contextual lenses through which the law can be filtered is through a more detailed dissection of the notion of truth. Heffer notes that nowadays, the law is "an account based on verisimilitude (the quality of seeming true) rather than veracity (the unadorned truth)," which can co-create the reality that it would appear to merely reflect.[65] The notion that those who practice the law may reveal the truth, or tell the whole story is a powerful rhetorical strategy designed to persuade decision-makers in court.[66] When verisimilitude is the Rosetta Stone for interpreting the veracity of a legal ruling or interpretation, the practices of framing, argumentation, and developing narrative appeal within a body of data become key rhetorical functions that preempt the production of objective truth. Indeed, such rhetorical practices call into question the relevance and utility of seeking objective truth at all. Those who practice law inevitably deploy communication strategies that present facts that are quite adorned. Ultimately, legal practitioners have the responsibility to make facts sensible for those who are tasked with handing down a decision; "the rhetor, like a magician, lifts the veils of time and space that obscure the jury's view of events so that they can see clearly what really happened."[67] As such, the law can be constitutive as it is persuasive, and speaks more to the ways in which we co-create our language and cultural capital than the simple "dos" and "don'ts" of a society.

Legal rhetoric impacts how communities are created and transformed. Not merely a "system of rules (or rules and principles), nor reducible to policy choices or class interests," the

[65] Heffer, "Revelation and Rhetoric: A Critical Model of Forensic Discourse," 460.
[66] Ibid.
[67] Ibid.

law is a cultural context within which one party seeks to persuade another toward a particular position.[68] The greatest and most basic power of the law is not in particular judiciary rulings and decisions, but "in the coercive aspect of its rhetoric – in the way it structures sensibility and vision."[69] In other words, the law shapes knowledge and brings together the reader, writer and the text, all of which co-create a cultural language.[70] Understanding the collaborative process of legal discourse is key to understanding how the law is created and through the integral function of narrative, is interpreted through various legal and extralegal contexts. As Karen Griggs notes, the law is not only a product of the technical sphere, but of the public sphere. Before the "law and literature" movement, much study of the law in both academic and nonacademic writing pursued either the language of attorneys or the rhetorical techniques used by other parties, namely in the realm of business and technical communication, as exclusive to one another. Yet contemporary rhetoric and composition scholarship has called for a refocusing of our scholarly attention on the social pressures that impact "how laws are produced, how writers and audiences interact in socially constructing laws, and how writing occurs in the public sector."[71] In other words, contemporary approaches to studying legal discourse position the law as a dynamic text, reliant on social norms, expectations, and interactions. As scholars in the fields of rhetoric and the law developed overlapping theories, the language of the law has been continually (re)translated such that lay readers can participate actively both in the creation and consumption

[68] White, *The Legal Imagination, Abridged Edition*. p. xiii.
[69] Ibid. p. xiii.
[70] Berger, "Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context," 157; See also Anthony R. Petrosky, "From Story to Essay: Reading and Writing," *College Composition and Communication* 33, no. 1 (1982): 19–36; David Bartholomae and Anthony R. Petrosky, *Facts, Artifacts, and Counterfacts: Theory and Method for a Reading and Writing Course* (Upper Montclair: Heinemann, 1986).
[71] Karen Griggs, "A Legal Discourse Community: Text Centered and Interdisciplinary in Social and Political Context," *Journal of Business and Technical Communication* 10, no. 2 (1996): 251.

of legal rhetoric.

Methodological Considerations of Reading Law and Legal Discourse

As has been discussed at length in the paragraphs above, the process of creating and reading law and participating in legal discourse is not as cut and dry as words on the page. The "law and literature" movement brought about an era of legal discourse as open to interpretation, housed within social and historical contexts and the paradigm of literary-critical thought. The eventuality of legal rhetoric as *rhetoric*, as prophesized by Peter Brooks and to a certain extent, Richard Posner, signaled the inherent textuality of American law.[72] In other words, the implications of law reach beyond the measure of legal precedent and into the fabric of culture in the U.S. and the socio-economic systems that define Americans. What can be read within the law is much richer than the policy it codifies.

The courtroom then is a productive arena within which to study legal worldmaking. The process of inductive and deductive thought, along with the interaction of rhetorical tropes and subjectivities, demands a concession of dialectical space between legal and extralegal discourses. Common tropes overlap between legal and extralegal rhetoric. Extralegal tropes like tragedy and justice, which are associated with social justice and human compassion, may be applied when legal scholars, practitioners and judges adjust their interpretations and rulings in order to "become more sensitive to the human consequences of legal actions."[73] It is in this spirit that this dissertation approaches the law, legal discourse, and public reaction to and co-formation of

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[72] Peter Brooks, "Literature as Law's Other," *Yale Journal of Law & the Humanities* 22, no. 2 (2010): 349–67; Richard A. Posner, *Law and Literature: A Misunderstood Relation*, First (Cambridge: Harvard University Press, 1988). Posner warned against the blending of humanistic and legal philosophies. Brooks did not take such a firm stand against law and literature, but conceded that the stakes of textual law were high, the autonomy of law being uncertain.

[73] Brooks, "Literature as Law's Other," 350.
In his discussion of legal tropes as seen in law, Peter Brooks includes citations to Aeschylus's *The Oresteia, Dickens's Bleak House,* Melville's *Billy Budd,* or Kafka's *The Trial* as examples.

policy specifically within the context of queer worldmaking.

Within this context, legal and social texts are linked in their contribution to the ways in which the American socio-political landscape is formed and reformed. Progressive activism in the 80s, 90s and early 2000s in the U.S., brought about isolated policy changes designed to increase the quality of life available to LGBTQIA+ persons, some of which included the barring of Don't Ask, Don't Tell (DADT) in 2011 and the nationwide expansion of marriage equality by the U.S. Supreme Court in the 2015 *Obergefell* decision. Despite these isolated successes, ideological opposition to the expansion of queer rights remains evident in certain contexts, and it is for this reason that scholars must more adeptly develop the rhetorical linkages between legal and extralegal channels.[74] As the Human Rights Campaign confirms, there are still thirty-two states in the U.S. that

> lack clear, fully-inclusive non-discrimination protections for LGBTQ people, meaning that despite the [Supreme Court's] ruling, LGBTQ Americans can get legally married but still be at risk of being denied services for who they are or risk being fired simply for getting married and wearing their wedding ring to the office the next day.[75]

Since the initial passage of the Equality Act in 1974, changes in public opinion and discourse have played a role in bringing about substantive policy changes that have positively impacted members of the LGBTQIA+ community.[76] Thus, any reading of law and legal rhetoric must

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[74] Marriage and trans sex/gender self-identification, among other things, remain controversial in the current political landscape.

[75] "Why the Equality Act?," *Human Rights Campaign*, 2016, http://www.hrc.org/resources/why-the-equality-act., para 1.

[76] Ibid., para 3.

To combat discrimination against LGBTQIA+ folks, U.S. Senators Jeff Merkley, Tammy Baldwin, and Cory Booker, and Representatives David Cicilline and John Lewis, introduced the Equality Act which was meant to establish "explicit, permanent protections against discrimination based on an individual's sexual orientation or gender identity in matters of employment, housing, access to public places, federal funding, credit, education and jury

attend to the cultural values that create and constrain rhetorical options for progressive advocates.

Values and Value Hierarchies in Legal and Public Argument

Methods of reading law are rhetorical. As such, it is important to account for the ways in which values can be argued in legal and public contexts. A product of legal and extra-legal rhetorics in the law, value warrants and hierarchies aid in developing the rhetorical options necessary for queer legal worldmaking. Scholars have discussed at length the utility and function of values as argumentative warrants, and the negotiation of values in argument.[77] As Chaim Perelman and L. Olbrechts-Tyteca argue, values are suasory devices that not only represent a point of identification, but can also prescribe one as superior to others.

> Agreement with regard to a value means an admission that an object, a being, or an ideal must have a specific influence on action and on disposition toward action and that one can make use of this influence in an argument, although the point of view represented is not regarded as binding on everybody.[78]

In other words, asserting a value judgment as superior to others enables a person to argue not

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service." The Equality Act also had provisions to prohibit discrimination against individuals based on sex with regard to access to public spaces, a provision that I will return to in my later discussion about trans men and women's access to public restrooms that align with their gender self-identification.

[77] Greg B. Walker and Malcolm O. Sillars, "Where Is Argument? Perelman's Theory of Values," in *Perspectives on Argumentation*, ed. R Trapp and J. Schuetz (Prospect Heights, IL: Waveland Press, 1990); Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*; Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications*; Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*; Malcolm O. Sillars and Patricia Ganer, "Values and Beliefs: A Systematic Basis for Argumentation," in *Advances in Argumentation Theory and Research*, ed. J. Robert Cox and Charles Arthur Willard (Carbondale, IL: Southern Illinois University Press, 1982); E. Steele, "Social Values in Public Address," *Western Speech* 22 (1958): 38–42; Milton Rokeach, *The Nature of Human Values* (New York: Free Press, 1973).

[78] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 74.

only for a particular action, as a reflection of a certain point of view, but also to assert the superiority of arguing from that point of view. Through this process, point of view is an element of the argumentative warrant. The valuation itself assigns importance to the object, person, or ideal in dispute and invites the audience to assume a similar point of view. Perelman and Olbrechts-Tyteca also note that "values enter, at some stage or other, into every argument" and that the utility of appealing to values is in their capacity "to induce the hearer to make certain choices rather than others and, most of all, to justify those choices so that they may be accepted and approved by others."[79] Not a substitute for argument itself, values and appeals based on values remain powerful supplements that create an invitation to assume a particular worldview and through that assumption, justify its relevance and advantageousness.

Distinctions between types of values are by no means mutually exclusive, but there are productive ways to delineate the function of values within arguments. In the scholarly tradition set forth by Milton Rokeach in the 1970's, there are instrumental values and terminal values.[80] Instrumental values consist of positive or negative assessments of behavior, such as honesty and dishonesty. When a person lies, there is a negative value judgment assigned to that behavior whereas telling the truth is generally viewed positively. Terminal values refer to desirable states of being. The notion of terminal values is reflected in Aristotle's theorization that happiness is the end all, be all (telos) of human existence.[81] Other scholars align with Donald Walhout who distinguished between personal values, such as health and friendship, and social and political values, which are those that refer to those shared values within communities, such as freedom

[79] Ibid., 75.
[80] Rokeach, *The Nature of Human Values*.
[81] Ibid.

and liberty.[82] These distinctions are theoretically useful in parsing out the ways in which values function argumentatively. However, each of the scholarly traditions mentioned above distinguish values and value types in a topical fashion, referring to the subject matter being valued rather than the relationship between value types. As such, they are less productive in discussions pertaining to how one can argumentatively resolve a conflict among values that are deeply held.

Perelman and Olbrechts-Tyteca propose abstract and concrete values as a satisfying means of resolving value-driven arguments. A concrete value is "one attaching to a living being, a specific group, or a particular object, considered as a unique entity."[83] Abstract values, on the other hand, are general and transcend specific circumstances, which make them particularly useful as they "provide criteria for one wishing to change the established order."[84] Because abstract values are not inherently connected to any one instance or experience, one can argue for their connection to concrete values in order to reframe the meaning of either. Once the connection is made, a particular value may be reframed to suit more universal contexts, and universal values can be made more specific.[85] Deploying abstract values in arguments "manifest a revolutionary spirit," and are particularly useful in criticism because they are irrespective of individual persons; rather, abstract values more closely reflect systems of power than they do individuals who enjoy power.[86] Individuals may claim allegiance to any number of concrete values, which can exist as harmonious co-habitators of their psyche. One can easily value both

[82] Donald Walhout, *The Good and the Realm of Values* (Notre Dame, IN: University of Notre Dame Press, 1978). For more detailed explanation of the distinctions between values, see also James Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*, ed. Herbert W. Simons, vol. 4, Rhetoric and Society Series (Thousand Oaks, CA: Sage Publications, Inc., 2001).
[83] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 77.
[84] Ibid., 79.
[85] Ibid., 76.
[86] Ibid., 79.

family and professional integrity, and negotiating those values is something that many people manage to do on a daily basis. Yet it is difficult to reconcile abstract values without the argumentative process of establishing similarities through particulars. When carried to extremes, abstract values are irreconcilable.[87] As such, arguing from the abstract to the particular, and vice versa, is a useful method for reconciling abstract values that may run counter to one another.

Arguing in this fashion is inherent to legal discourse, and subsequently, queer legal worldmaking.[88] Myriad values inevitably find their way into legal argument, and the abstracted values are often translated into concrete terms. Once the connection is made between abstract and concrete values, particulars may be reframed to suit more universal contexts, and the universal can be made more specific.[89] When used in argument, abstract values can be tools for revolution and concrete values, tools for community building. Abstract values such as privacy, love and commitment, and the ethic of care can make concrete values like family and the home more inclusive. Similarly, the affective resonance of concrete values when paired with the abstract, impacts the relative importance of abstract values. What the cases in this dissertation ultimately illustrate is that progressive argumentation in a legal context necessitates both a hierarchical reordering of values and an assertion of concrete values as reflective of their more universally accepted, abstract counterparts. Shifting both the relative value hierarchies and the associations between abstract and concrete values can reconcile contradicting value arguments and redrawing community lines around shared values. The role of values in legal argument ought not be reduced to that of particular *types* of claims, but rather as *warrant* for an argument.[90]

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[87] Ibid.
[88] Levi, *An Introduction to Legal Reasoning.*
[89] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation,* 76.
[90] Sillars and Ganer, "Values and Beliefs: A Systematic Basis for Argumentation"; Frans H. van Eemeren, Rob Grootendorst, and Francisca Snoeck Henkemans, *Fundamentals of Argumentation*

The process of engaging values through argument, the process of negotiating one's "value orientation," reveals values as warrants that can reframe abstract values.[91] Edward S. Inch and Barbara Warnick point to what they call stock topics of policy discourse that enable the process of value renegotiation in argumentation. The stock topics include: definition, field, criteria, application and hierarchies.[92] Of particular relevance to this dissertation is the stock topic of the argument field, which refers to the "perspective within which the value object will be evaluated."[93] Consider the following example: An individual who recently moved to a new city asks a friend which is the best deli in town. Before the friend could adequately respond, both parties must agree upon how best to weigh the options. Looking from a purely financial field, the friend may suggest the least expensive deli as the best one in town. If, however, the friend is speaking from an ethnic field, the friend may opt to recommend the deli that serves the most ethnically authentic food in town, regardless of price. Both parties must proceed from the same argumentative field before there can be an understanding between them. Even in those cases, wherein both parties agree on what argumentative field to use, they can still disagree on any of the many field-dependent criteria that ultimately set the terms of the argument and determine how the valuation will proceed. The interpretive process of applying criteria is every bit as important as the definitional and field choices that are made prior to the discussion. In other words, what one values more dearly will draw the field of argument away from that which is valued less dearly.

Often arguments premised on value judgments may run counter to one another. In such

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Theory: A Handbook of Historical Backgrounds and Contemporary Developments (Mahwah, NJ: Lawrence Erlbaum, 1996).

[91] Sillars and Ganer, "Values and Beliefs: A Systematic Basis for Argumentation," 195–196.

[92] Edward S. Inch and Barbara H. Warnick, *Critical Thinking and Communication: The Use of Reason in Argument*, 3rd ed. (Boston: Allyn & Bacon, 1998), 252–256.

[93] Ibid., 253.

cases, when value conflicts are at the center of a discourse, those conflicts can be resolved by negotiating value hierarchies, or the importance assigned to given values, relative to one another. As explained by Perelman and Olbrechts-Tyteca, "when a value is in question, a person may disqualify it, subordinate it to others, or interpret it but may not reject all values as a whole."[94] Many people can create and sustain value hierarchies with respect to their own ideological formations, but if a person

> wants to justify this primacy to others or even to [themself], [they] must acknowledge the other values marshaled against it in order to be able to fight them. In this respect, values are comparable to facts: for, when one of the interlocutors puts forward a value, one must argue to get rid of it, under pain of refusing the discussion; and in general, the argument will imply that other values are accepted.[95]

In this way, value hierarchies enable the negotiation of values across social contexts and are integral to the process of creating and interpreting legal precedent. For example, in cases wherein decisions were made that reflect social and political values those values can be interpreted and reframed in later decisions in ways that either affirm or challenge the value assessment that was made. The following section continues this line of thinking, considering the ways in which values work to establish community bonds, as well as the constitutive role of affect in drawing individuals together through common allegiance to specific value clusters.

The Constitutive Role of Affect and Community Values

Though values and value hierarchies are useful constructs in argument, particularly when challenging the status quo, the success of these arguments depends largely on the "stickiness" or perceived relevance for vested audiences. As such, deliberative moments wherein values are

[94] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 75.
[95] Ibid.

renegotiated, or reasserted as hierarchically superior or inferior relative to one another, constitute a kairotic moment for communities bound by shared affiliation to those values. Speaking specifically to the role of emotion in public deliberation, Daniel J. Kapust and Michelle A. Schwarze argue that there exists a "mutually constitutive relationship between reason and affect."[96] Though debate remains as to whether or not reason functions in deliberation apart from emotion or affective content, many scholars argue that emotions perform a vital role in deliberation and that "certain features of speakers' characters might play a critical role in creating epistemic trust between them and audiences."[97] In this dissertation, I extend that paradigm and embrace the tandem function of reason and affect in legal argument that relies on value-driven warrants.

There are two primary precursors to the "affective turn" in rhetorical studies: an increased focus on the rhetorical function of the body and an exploration of emotions as constitutive forces.[98] The former relates closely to the ways in which the material body through

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[96] Daniel J. Kapust and Michelle A. Schwarze, "The Rhetoric of Sincerity: Cicero and Smith on Propriety and Political Context," *The American Political Science Review* 110, no. 1 (February 2016): 101.

[97] Ibid., 100; Arash Abizadeh, "On the Philosophy/Rhetoric Binaries: Or, Is Habermasian Discourse Motivationally Impotent?," *Philosophy and Social Criticism* 33, no. 4 (2007): 445–72; Danielle Allen, *Talking to Strangers: Anxieties of Citizenship since Brown v. Board of Education* (Chicago, IL: University of Chicago Press, 2006); Bryan Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment.* (Cambridge: Harvard University Press, 2006); Bryan Garsten, "The Rhetoric Revival in Political Theory," *Annual Review of Political Science* 14 (2011): 159–80; John O'Neill, "The Rhetoric of Deliberation: Some Problems in Kantian Theories of Deliberative Democracy," *Res Publica* 8 (2002): 249–68; Bernard Yack, "Rhetoric and Public Reasoning: An Aristotelian Understanding of Political Deliberation," *Political Theory* 34, no. 4 (2006): 417–38.

[98] Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, NC: Duke University Press, 1997); Ann Cvetkovich, *Mixed Feelings: Feminism, Mass Culture, and Victorian Sensationalism* (New Brunswick: Rutgers University Press, 1992); Michael Hardt, "Foreword: What Affects Are Good for," in *The Affective Turn: Theorizing the Social*, ed. Patricia Ticineto Clough and Jean Halley (Durham, NC: Duke University Press, 2007); Anu Koivunen, "Preface: The Affective Turn?," in *Affective Encounters: Rethinking Embodiment in Feminist Media Studies*, ed. Anu Koivunen and Susanna

its presence, behavior, and adornment can be rhetorical. The latter leads to a discussion of rhetorical embodiment, or the ways in which rhetors use bodies as a means for creating presence in verbal argument. This dissertation builds from that latter discussion to consider rhetorical embodiment within verbal argument. Any discussion of affect must begin with the concession that emotions and the bodies that interpolate them impact our power as human beings to "affect the world around us and our power to be affected by it, along with the relationship between these two powers."[99] Rhetorical embodiment draws from the resonance of the body's ability to affect and be affected.

> The mind's power to think corresponds to its receptivity to external ideas; and the body's power to act corresponds to its sensitivity to other bodies. The greater our power to be affected […] the greater our power to act.[100]

Each time a critic pauses to consider the mind's power to think and create meaning, they must also consider the body's power to act and be affected.

Rhetorical embodiment is a powerful constitutive force in the formation of communities, particularly communities of protest. Emotions can constitute alternative materializations of identity that may be politically useful, and the rhetorical embodiment translates material experiences into discursive symbols.[101] Coalition queer activism in the present-day illustrates the

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Paasonen (Finland: University of Turku Press, 2000); Linda Nicholson, *The Play of Reason: From the Modern to the Postmodern* (Buckingham, UK: Open University Press, 1999); Barbara Tomlinson, *Feminism and Affect at the Scene of Argument: Beyond the Trope of the Angry Feminist* (Philadelphia, PA: Temple University Press, 2010); Kathleen Woodward, "Global Cooling and Academic Warming: Long-Term Shifts in Emotional Weather," *American Literary History* 8, no. 4 (Winter 1996): 759–79.

[99] Hardt, "Foreword: What Affects Are Good for." p. ix

[100] Ibid., p x

[101] Sara Ahmed, "Affective Economies," *Social Text 79* 22, no. 2 (n.d.): 121; Butler, *Bodies That Matter: On the Discursive Limits of "Sex."*

integral relationship between the material and the rhetorical.[102] Rhetoric is rooted in the body; it is experienced through the body, and may gain coherence insofar as bodies, message, movement, and affect align. However, in contexts such as legal argument wherein rhetors do not have access to embodied protest as an argumentative appeal, they may rely on symbolic representation of bodies. Robert Hariman and John Lucaites support this conclusion through their analysis of the power of visual rhetorical artifacts. The authors note that encountering, observing and/or participating in others' emotions has a greater affective impact than the interior experience of emotion.[103] Emotions can work to establish a "commonness" that is felt when individuals work together against a common threat or toward a common goal. In other words, emotions mediate the relationship between individuals and the collective they constitute and formulate the "stickiness" that binds individuals together.[104] It is through affect that individual subjects come into being as agents of the collective.

Creating Affective Presence through Magnitude, Proximity and Severity

The previous section detailed the process by which rhetorical embodiment can function as a constitutive force for LGBTQIA+ communities. Armed with the resources made available

[102] As was discussed in the previous section, advocates in the homophile LGBTQIA+ era who were excluded from participation in formal legal channels deployed the constitutive power of their shared ideology and embodied forms of dissent to unite disparate queer communities under a unified banner. Affect has been evident in LGBTQIA+ activism throughout homophile and contemporary stages of the movement. In campaigns like ACT UP, wherein activists used their bodies and performances to formulate a powerful protest against the obfuscation of the AIDS epidemic, affect functioned to reconstitute queer persons as agents of change rather than silent victims. Emotions became a rhetorical force that operated in and among the individuals who experienced them, compounding on each other and shaping the materialization of bodies and worlds through their accumulating affective value. The methods of argument discussed in this dissertation are distinct from these historical embodied protests in that they rely on rhetorical embodiment.

[103] Robert Hariman and John Louis Lucaites, "Performing Civic Identity: The Iconic Photograph of the Flag Raising on Iwo Jima," *Quarterly Journal of Speech* 88, no. 4 (2002): 367.

[104] Ahmed, "Affective Economies," 119.

through shared ideologies and the embodied experience of inhabiting a queer body, post-homophile era activist communities have deployed affect to bring about the expansion of socio-political rights for queer persons through verbal argument. There is a gap however between the rhetorical opportunities made available by social movements and the channels that facilitate legal change. This rhetorical problem, mirroring the constraints faced by activists during the homophile era, has been exacerbated by the necessity to create space for rhetorical embodiment within legal reasoning. Each of the three case studies in this dissertation, *Lawrence and Garner v. Texas*, Vote NO, and *Campaign for Southern Equality* aligns with the trends in social movements identified by scholars in the 60s, while offering critical insight into how rhetorical embodiment can be translated to a mode suitable for the courtroom or legal debate. Yet, this discussion is incomplete without a consideration of how arguments for the legitimacy of queer partnerships and families gain traction in the legal sphere, as well as how the reassertion of values and value clusters associated with privacy, marriage, family, and the home achieve their "stickiness" across both legal and social movement discourses.

Within the realm of verbal argumentation, marginalized identities, experiences and lifeways are deployed through affective channels not dependent on bodily presence, but rather "words, phrases, figurative images, and other discursive strategies" that can accomplish two interrelated things: 1) make something present that had previously been absent and 2) "increase the presence of something that already has been brought to the audience's attention."[105] In selecting certain elements over others to present as evidence in an argument, the relative importance and pertinence of those elements is elevated as well.[106] Scholars have discussed

[105] Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*, 4:456; See also Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*.
[106] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 116.

presence as a "discursive effect," a way of making a "phenomenon, idea, concept, process, or person [more] vivid, tangible, and /or proximate to an audience."[107] Louise A. Karon explains presence as a quality first felt in the auditor's consciousness.

> This quality, created by the rhetor's 'verbal magic,' enables [them] to impress upon the consciousness of [their] audience whatever [they deem] important. Second, presence fixes the audience's attention while altering its perceptions and perspectives. Third, its strongest agent is the imagination. Fourth, its purpose is to initiate action or to dispose the audience toward an action or judgment.[108]

As an instrumental technique of argumentation, which often elicits emotional responses geared toward initiating a change in an audience's attitudes or behavior, presence is persuasive and speaks to experiential existence.[109] Argumentation, particularly in a legal context, is necessarily incomplete, and relies on the process of selection when determining legal precedent. As Perelman and Olbrechts-Tyteca note, "except where a formalized field which can be completely isolated is involved, the aggregate of things admitted is fluid and remains open. […] In any case, it provides each audience with a frame of reference by means of which arguments can be tested."[110] In choosing certain elements above others, one makes those elements present, which changes the field of argument such that "it cannot avoid being open to accusations of incompleteness and hence of partiality and tendentiousness."[111] An important step then in legal

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[107] Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*, 4:456; See also John M. Murphy, "Presence, Analogy, and Earth in the Balance," *Argumentation & Advocacy* 31 (1994): 1–16.
[108] Louise A. Karon, "Presence in The New Rhetoric," *Philosophy and Rhetoric* 9 (n.d.): 97.
[109] See Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*; T.F. Mader, "On Presence in Rhetoric," *College Composition and Communication* 24 (1973): 375–81.
[110] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 115–116.
[111] Ibid., 119.

argumentation is identifying a method or technique with which to make the argument compelling.

According to Perelman and Olbrechts-Tyteca, flexibility and extension are two common techniques for arguing for the plasticity of ideas that are useful in this context. Flexibility, which enables concepts to be removed from their original usage, lends itself to arguments asserting that the status quo has been "outmoded." With this strategy, concepts appear to be "living" and "adaptable" and therefore "up to date."[112] Extension, on the other hand, consists of "enlarging or restricting the sphere of a notion so that it does or does not embrace certain beings, things, ideas, or situations."[113] Both of these strategies are instrumental when challenging the fixedness of arguments. Plasticity of concepts is vital within the context of queer legal worldmaking. In such contexts, progressive advocates are tasked with reordering the hierarchical relationship in and amongst values, as well as the abstract and concrete associations that define the value itself. Because the assumption of fixedness is easier to refute, progressives can establish flexibility and/or extension of the value clusters associated with privacy, marriage and family, and the home in order to argue that current policies regarding same-sex partnerships and families are outmoded and therefore inadequate. Nevertheless, such arguments are likely to be interpreted by hostile audiences as "a sign of misunderstanding or insincerity," as was evident in the each of the three case studies included in this dissertation.[114] For the flexibility and/or extension of values in legal argument to be more widely acceptable, there must also be a shift in what counts as shared or common experience.

Symbolic connection is precarious as it is emotionally evocative; "symbols have an

[112] Ibid., 139.
[113] Ibid.
[114] Ibid.

indisputable effect on those who recognize the symbolic connection, but none at all on others."[115] As such, the process of making values more present is not simply an emotional process, but affective. Presence "acts directly on our sensibility."[116] Illustrations that amplify or analogize experiences and values contribute to the affective impact of presence. Making vivid and specific that which is abstract, amplification leads to the transposition of the material into the discursive sphere.[117] Acting first upon the psyche and the body via emotional resonance, amplification and analogy facilitate the presence of values and hierarchies, which are essential elements in argumentation.[118] Thus, figurative tropes facilitate affect in order to supplement verbal argument in similar fashion to a concrete, physical object. In the same way as "Caesar's bloody tunic which Antony waves in front of the Roman populace, or the children of the accused brought before his judges in order to arouse their pity," physical things may be transubstantiated and made rhetorically present by their descriptor.[119] Presence is a means of preserving the affective resonance of embodied protest strategies used by queer activists in the 80s and 90s because "the effort to make something present to the consciousness can relate not only to real objects, but also to a judgment or an entire argumentative development."[120] The act of making something present through verbal argument fills the hearers' consciousness, which imbues it with added importance. Not only do such arguments make certain premises of superior relevance, but should those premises be primarily affective, they also work to establish affective arguments as superior in and of themselves.

Presence is the vehicle through which progressive advocates in each of the three case

[115] Ibid., 335.
[116] Ibid., 116.
[117] Ibid., 360.
[118] Ibid., 117.
[119] Ibid.
[120] Ibid., 118.

studies to follow renegotiate the field of argument and the values associated with privacy, marriage and family, and the home. Though arguments in each of the case studies feature affective qualities, they also rely on *loci* that are useful for creating presence, which include: magnitude, proximity, and severity.[121] These three *loci* stem from Perelman and Olbrechts-Tyteca's prior work, in which they proffered time, place, relation, and personal interest as relevant *loci* to presence.[122] *Loci* of magnitude, proximity, and severity are most relevant to the case studies included in this dissertation as they relate closely to arguments grounded in the assertion of common experience between rhetor and audience. By amplifying the shared experiences of same-sex couples to those of heterosexual couples, progressive advocates in each of the case studies made discursively present the negative effects of the exigencies of policies not inclusive of LGBTQIA+ partnerships and families. Furthermore, each of the case studies exemplifies the power of amplification, of illustrations that increase the presence of abstracted concepts and values through a particular case, in transpositioning what families can look and feel like. Such arguments seize the rhetorical opportunities made available by the kairotic moment, thereby redrawing community lines around whose partnerships and families "count" as recognizable under the law to include same-sex couples and their families.

Queer legal worldmaking necessarily involves the co-creation of laws by people

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[121] Using loci of *magnitude*, advocates can demonstrate that present exigencies will affect a large number of people or that the negative outcome(s) will result in quantifiably greater damage. Using loci of *proximity*, advocates can demonstrate that the negative outcomes resulting from a problem will "hit close to home," impacting those closest to them. Using loci of *severity*, advocates can demonstrate that even if the exigence is lacking in terms of magnitude, the resultant damage is so great or extreme as to warrant prevention. In addition to the three mentioned here, there are loci of urgency and duration, which will not be discussed in depth in this dissertation.
For more explanation of loci related to presence, see Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*; Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*.

[122] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*.

operating through legal and extralegal channels. When creating laws about intimate partnership, marriage, and family, policy-makers find their interests analogous to those of the communities they seek to govern. Policy change occurs when the status quo no longer represents the interests and lifeways of those within the community. As such, a more inclusive model of partnership, marriage, or family must begin with a renegotiation of community boundaries around common values. If value-driven arguments are a process through which communities can be constituted, then rhetorical embodiment is the gatekeeper and conduit through which extra-legal discourse influences the law. In the chapters to follow, I dissect the function of *loci* of presence as vehicles for rhetorical embodiment as they facilitate the negotiation of values and value hierarchies associated with privacy, marriage and family, and the home. Through presence, affect can shift the field of argument in legal and extra-legal contexts to reflect the increasingly queered cultural landscape in the United States.

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Lawrence and Garner v. Texas and "The Right to be Left Alone": Making Privacy Affectively Resonant Through *Loci* of Magnitude

Just outside of Houston, Texas, on September 17, 1998, Tyron Garner and Robert Eubanks visited the home of John Lawrence. Eubanks, who had a somewhat tempestuous romantic relationship with Garner, was reportedly angry that Lawrence and Garner had been flirting. He left Lawrence's apartment and called the police to report that a "black man with a gun was going crazy" at Lawrence's apartment.[123] Although false, Garner's report gave the police due cause to enter Lawrence's apartment, after which, Joseph Quinn, one of the responding officers, claimed that he found Lawrence and Garner engaged in sexual intercourse in the bedroom. The other responding officers disputed Quinn's claim, some claiming to have witnessed oral sex but not sexual intercourse and others reporting that they witnessed no sex at all. However, Quinn's testimony provided enough justification to jail the two men overnight, after which they were charged with and eventually convicted of "homosexual conduct," a Class C misdemeanor under the Texas Homosexual Conduct Law.[124]

Lawrence and Garner's arrest provided the opportunity to revisit what had become a stagnant conversation with presumed agreement across the U.S. In 1998, several states, Texas included, had anti-sodomy statutes on the books.[125] The wording of the Texas Homosexual Conduct Law defined sex between same-sex partners as a "deviate sexual act," and effectively

[123] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari (n.d.).
[124] For more information about the chain of events that led to Lawrence and Garner's arrest and the subsequent trial, see Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas* (New York: W. W. Norton & Company, 2012).
[125] States with anti-sodomy legislation in place were Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Texas, Utah and Virginia.

classified "homosexual conduct" as a criminal action.[126] For this reason, Lawrence and Garner's arrest attracted the interest of lawyers from Lambda Legal, who encouraged Lawrence and Garner to plead no contest in their initial trial in order to petition for appeal in the higher courts. The men would provide the opportunity to challenge the constitutionality of anti-sodomy legislation, which had been upheld by the U.S. Supreme Court in *Bowers v. Hardwick* (*Bowers*) in 1986.[127] After Lawrence and Garner's initial conviction, Lambda Legal appealed to the Harris County Criminal Court, where Lawrence and Garner again pled no contest and their conviction was upheld. The case then moved to the Texas Fourteenth Court of Appeals, where, as had happened in the lower Courts, Lawrence and Garner's conviction was upheld, and the constitutionality of the Texas Homosexual Conduct Law was affirmed. Finally, upon being denied a hearing by the Texas Court of Criminal Appeals, the highest appellate Court in the state, Lambda Legal petitioned for a hearing with the U.S. Supreme Court in 2002. The High Court agreed to hear the case. Sixteen years since the Court had upheld the constitutionality of sodomy legislation in *Bowers,* a discourse that had lain dormant since 1986 was brought back to the fore.

The conviction of Lawrence and Garner served as a kairotic moment in which to reenergize a cultural conversation about homosexuality in the U.S. and make that conversation *legally* relevant. Similar to other moments in our nation's history wherein the State unjustly discriminated against marginalized communities, *Lawrence* was seen by progressive advocates as an opportunity to correct a prior wrong. By using equal protection arguments, Lambda lawyers drew connections between outmoded and overturned court decisions that upheld state-sanctioned discrimination, specifically with respect to race. Lambda lawyers' comparisons to

[126] "Homosexual Conduct Law," Texas Penal Code § 21.06. Homosexual Conduct § (1973).
[127] The *Bowers v. Hardwick* decision upheld the constitutionality of sodomy legislation. There will be more detailed information about *Bowers* in later pages.

racial injustice, which had been previously sanctioned and subsequently overturned by the Court, extended the reach of equal protection arguments beyond the gay community and elevated the relative importance of values related to privacy above moral arguments about sexuality. Indeed, the case shifted the meaning of morality altogether, rerouting conversation away from the moral imperative of sexual expression and toward the moral imperative to honor the freedoms codified in the Constitution. In their defense of Lawrence and Garner, Lambda Legal lawyers used argumentative *loci* of magnitude to make present 1) the depth of impact of anti-sodomy legislation and 2) the full scope of those affected by such laws. While anti-sodomy laws like the Texas Homosexual Conduct Law inevitably target queer communities, particularly gay men, Lambda lawyers argued that such laws also set a legal precedent that would limit privacy for all U.S. citizens.

Moreover, through figurative allusions to government's "prying eyes," Lambda lawyers created the possibility for affective resonance with respect to government intrusion. Privacy as an abstract value was argumentatively linked with the lived experience of intimacy, which created a concrete value association directly tied to the relationships and experiences that characterize private life. As this analysis illustrates, *loci* of magnitude can facilitate a shift in value hierarchies in legal argument. Making prominent the threat of privacy infringement in this case, Lambda established the full scope of the harm brought about by the Texas Homosexual Conduct Law and disrupted the assumed connection between immorality and homosexual sodomy, which enabled a reshuffling of values associated with private, intimate relationships to embrace a non-heteronormative paradigm. Rather than argue for or against the morality of homosexuality, which constituted many of the arguments in favor of anti-sodomy legislation, Lambda shifted the field of argument toward arguments pertaining to how American liberties are constructed and

embodied. Relating the injustices experienced by Black Americans to those experienced by Lawrence and Garner through rhetorical embodiment, these arguments created the rhetorical space necessary to challenge the constitutionality of anti-sodomy legislation.

In this chapter, I first discuss the relevant aspects of *Bowers v. Hardwick* echoed by the State of Texas during the *Lawrence* hearing as contextual elements that both enabled and restricted Lambda's rhetorical options in arguing on behalf of Lawrence and Garner. I then elaborate on the prior court cases in which race-based discrimination was debated. Arguing specifically against state-sanctioned discrimination, Lambda's lawyers analogized legal arguments about sexual desire with those about race, hearkening to the nation's shameful past with racial discrimination. By establishing the full depth of harm through *loci* of magnitude, they made present the problems associated with anti-sodomy legislation.

The second portion of the analysis illustrates how arguments related to privacy (by way of equal protection) extended the sphere of vested individuals beyond targeted and marginalized communities. Lambda's argument demonstrated that a legal conversation about private intimacy extended beyond homosexual couples to *all* Americans with a vested interest in protection from government intrusion. By demonstrating the impact of the issue beyond those who had been deemed "immoral" by their engagement in homosexual sodomy, vested stakeholders in the case were constituted much more broadly to include those who value privacy and the right to due process. As has been illustrated in previous chapters, arguments that "ring true" are often those that justify the status quo; audiences have a tendency to gravitate emotionally toward that which is familiar. However, as this case study demonstrates, the affective resonance of liberty and intrusion (both related to privacy) as antithetical value warrants are powerful forces that ultimately empowered the High Court to overturn *Bowers*.

The Influence of *Bowers* as Legal Precedent in *Lawrence and Garner v. Texas*

As with many legal rulings, arguments made during the *Lawrence* case were in opposition to prior legal precedent. In this case, *Bowers* was the primary legal ruling that set the precedent against which litigators representing the state of Texas argued. The *Bowers* case was brought in 1982 after a police officer, who had been fulfilling a warrant for Michael Hardwick's arrest for failing to appear in court on the charge of public drinking, witnessed him engaging in sex with another man in his home. Both men were charged for violating the Georgia statute that criminalized sodomy, even in a private dwelling. The case was first brought against the Atlanta police commissioner and Georgia's attorney general in the Federal District Court in order to challenge the constitutionality of Georgia's anti-sodomy statute. After the District Court initially refused to hear the case, the Court of Appeals overruled, contending that the statute violated Hardwick's right to privacy under the Ninth Amendment and under the Due Process Clause of the Fourteenth Amendment.[128] The Court further held that in light of other prior precedent, the constitutionality of the statute would have required Bowers to demonstrate that the law served a "compelling state interest" and that it was the "most narrowly tailored means of achieving what ever that state interest might be."[129] Ultimately however the case was brought to the U.S. Supreme Court where justices ruled against Hardwick and upheld the constitutionality of anti-sodomy laws.

Values and value hierarchies played an integral role in the interpretation of relevant legal precedent as the Court deliberated *Bowers*. For example, values associated with privacy and due

[128] The Ninth Amendment protects fundamental rights not specifically enumerated in the prior eight amendments. The due process clause of the Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property, without due process of the law.
[129] Bowers vs. Hardwick, No. 760 F.2d 1202. (United States Court of Appeals for the Eleventh Circuit May 21, 1985).

process, which served to substantiate the Hardwick's claim, were subordinated to values associated with both Christian morality and Constitutional purity in this case. The *Bowers* decision had uncoupled sodomy and homosexual sodomy as inherently different behaviors and assigned a moral judgment that was intimately tied to the identity of those who engaged the behavior. In 1986, discourses that challenged power and privilege with regard to gender and sexuality were still gaining public recognition. As such, it was assumed that the moral justification that undergirded *Bowers* was generally supported by mainstream cultural discourses at the time. Sixteen years later in 2002, representatives for the State of Texas in *Lawrence* leaned heavily on *Bowers* when asserting the distinction between morality, homosexuality, and intimate partnership, and used these assumptions to substantiate their claim to have pursued legitimate state interest. The hierarchical relationship between privacy and morality as values would need to be renegotiated before *Bowers* could be overturned and the assumed constitutionality of anti-sodomy legislation challenged.

As *Lawrence* made its way through the lower courts, the State of Texas repeatedly argued that its only aim was to advance "legitimate state interest" and the "enforcement of principles of morality and the promotion of family values," albeit strategic versions of morality and family values.[130] Representatives for the State of Texas built their argument around the assumption that homosexuality and, thus, homosexual sodomy was aberrant and immoral. These arguments were somewhat narrowly drawn and relied on the Liberty Counsel[131] and representatives from other southern states, who advised the Court that homosexuals were self-destructive, disease-prone, and promiscuous and that homosexual sodomy had "severe physical, emotional, psychological

[130] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 7.
[131] Founded in 1989, the Liberty Counsel is a coalition that promotes litigation and policy formation in line with evangelical Christian values on the local, state, and national levels.

and spiritual consequences."[132] As such, Texas' primary justification for upholding the Homosexual Conduct Law was the assumption that the statute stood for moral righteousness, and this decision would symbolize the moral compass of the nation.

The majority opinion in the 1986 *Bowers* case was invoked in several ways by the State of Texas to justify the constitutionality of anti-sodomy laws. The first argument lifted from *Bowers* and reappropriated in *Lawrence* was that the Constitution does not grant a fundamental right upon homosexual citizens to engage in sodomy as prior cases dealt with family relationships, marriage, and/or procreation, which was argued bore no resemblance to *Bowers* or *Lawrence*. As it was portrayed by Texas, the image of the American family was still firmly heteronormative. On a related note, the majority opinion in *Bowers*, authored by Justice Byron White, argued that it was unsupportable to assume that any form of private sexual conduct between consenting adults would be constitutionally insulated from state scrutiny.[133] White's argument is notable for the way in which it narrowly defined the central issue of the case as a question of whether or not the Constitution confers a fundamental right upon *homosexual* citizens to engage in sodomy, not whether or not citizens had a fundamental right to privacy. White's opinion was predicated on the assumption that the mode of sexual intercourse made homosexual and heterosexual relationships fundamentally different. White contended that homosexuality and the American family were not compatible.

Moreover, White's opinion argued against the assertion that the due process clause of the Fifth or Fourteenth Amendment protected the right to engage in sodomy because such conduct is not "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history

[132] Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas*, 203–06.
[133] J. White, Bowers v. Hardwick, No. 85-140 (Eleventh Circuit Supreme Court June 30, 1986).

and tradition." To claim otherwise, he argued would be "facetious."[134] White resisted the argument to extend the reach of Due Process to include homosexual sodomy, which was not represented in the language of the Constitution. He warned that it could potentially grant the Court authority to govern the country without direct constitutional authority.[135] White's argument explicitly argued that any interpretation of "liberty" must be represented specifically in the language of our nation's founding documents. However, as has been noted in prior chapters, the process of interpretation is integral to constitutional law, and many constitutional scholars envision the Constitution as a living document, one that requires constant revitalization.[136] As

[134] Byron White, Majority Opinion, Bowers v. Hardwick, No. 478 U.S. 186 (United States Supreme Court June 30, 1986).
[135] White, Bowers v. Hardwick at 194–195.
[136] Kenneth Burke, *Permanence and Change: An Anatomy of Purpose*, 3rd ed. (Berkeley CA: University of California Press, 1984); Kenneth Burke, *Language as Symbolic Action: Essays on Life, Literature, and Method* (Berkeley CA: University of California Press, 1966); Kenneth Burke, *A Grammar of Motives* (Berkeley CA: University of California Press, 1969); Wayne C. Booth, *Modern Dogma and the Rhetoric of Assent*, vol. 5 (Chicago: The University of Chicago Press, 1974); Wayne C. Booth, *A Rhetoric of Irony* (Chicago: The University of Chicago Press, 1974); Wayne C. Booth, *The Rhetoric of Fiction*, Second (Chicago: The University of Chicago Press, 1983); Wayne C. Booth, "The Revival of Rhetoric," *PMLA* 80, no. 2 (1965): 8–12, doi:10.2307/1261264; Chaim Perelman, *The Realm of Rhetoric* (University of Notre Dame Press, 1990); Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, vol. 142 (Boston: D. Reidel Publishing Company, 1980); Chaim Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications*, vol. 140 (Boston: D. Reidel Publishing Company, 1979); Chaim Perelman, *The Idea of Justice and the Problem of Argument*, First (Routledge, 1963); Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, Translated by John Wilkinson and Purcell Weaver (Notre Dame, IN: University of Notre Dame, 1969); James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison WI: University of Wisconsin Press, 1985); James Boyd White, *The Legal Imagination, Abridged Edition* (Chicago: University of Chicago Press, 1985); James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990); James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: The University of Chicago Press, 1984); Stephen E. Toulmin, *The Uses of Argument*, Updated (Cambridge: Cambridge University Press, 2003); Stephen E. Toulmin, "The Construal of Reality: Criticism in Modern and Postmodern Science," *Critical Inquiry* 9, no. 1 (1982): 93–111; Stephen E. Toulmin, Richard Rieke, and Allan Janik, *An Introduction to Reasoning*, Second (Pearson, 1984).

such, White's argument that linguistic integrity should be the touchstone for preventing an overreaching by the Court to secure certain liberties was vulnerable to reinterpretation. Moreover, White argued that anti-sodomy laws should not be invalidated on the grounds that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[137] Because the statute did not infringe on a fundamental right and because the majority of the electorate supposedly viewed sodomy as unacceptable, White argued that the law served a legitimate government purpose and was thus, constitutional. White's opinion was echoed by Chief Justice Warren Burger who stated in his concurring opinion that recognizing a fundamental right to engage in homosexual sodomy would "cast aside millennia of moral teaching."[138]

In emphasizing the importance of "history and tradition" and "moral teaching," the majority opinion in *Bowers* created the opportunity for petitioners in the *Lawrence* case to reframe the applicability of the Court's decision in *Bowers*. Justices White and Burger deployed history and tradition as concrete values, with specific ties to the Constitution. As an abstract value, morality was tied to "history" and "tradition" in 1986 and served particular argumentative ends that enabled White and Burger to substantiate their claims. However, as petitioners in *Lawrence* demonstrated, when linked to other concrete values or when history and tradition are effectively reframed, abstract values can be deployed to support a persuasive counter argument with which to challenge the applicability and soundness of legal precedent, like *Bowers*.

As was seen in this case, a shift in value orientation and the hierarchical relationships among values can facilitate a shift in the field of argument itself. Justice Harry Blackmun, in

[137] White, Bowers v. Hardwick at 196.
[138] Warren Burger, Concurring opinion, Bowers v. Hardwick, No. 478 U.S. 186 (United States Supreme Court June 30, 1986).

writing a dissenting opinion on *Bowers*, left important breadcrumbs to be followed by lawyers at Lambda Legal in 2002. In his opinion, Blackmun accused the majority of the Court of distorting the central issue of the case (along with those of prior relevant precedent) by focusing on *behavior* (i.e., sodomy and "homosexual activity") instead of underlying *principle* of privacy. Citing from two precedential court rulings, Blackmun argued that *Bowers* was no more about

> a fundamental right to engage in homosexual sodomy" than *Stanley* v. *Georgia* [1969] protected the "fundamental right to watch obscene movies," or *Katz* v. *United States* [1967] protected the "fundamental right to place interstate bets from a telephone booth."[139]

Rather, he argued, Bowers was at its core about "the most comprehensive of rights and the right most valued by civilized men," which was "the right to be let alone."[140] Blackmun contended that the majority's opinion in *Bowers* was not singularly related to the refusal to recognize the right to engage in homosexual sodomy, as they had claimed, but that the ruling also refused to recognize the fundamental right and interest of all individuals to control the nature of their intimate relationships. In the *Lawrence* case, Lambda lawyers reappropriated Blackmun's argument that sodomy, as a behavior, was not on trial; rather the act of *homosexual* sodomy, which was defined not by action itself but by the identity of the individuals carrying it out.

Building from Blackmun's opinion, lawyers at Lambda re-envisioned liberty itself, revisited relevant value hierarchies to challenge *Bowers*-era assumptions about morality, and renegotiated the field of argument. Lambda leaned heavily on the assumption that culture had evolved and that American morality and family as values could accommodate an alternative

[139] Harry Blackmun, Dissenting opinion, Bowers v. Hardwick, No. 478 U.S. 186 (United States Supreme Court June 30, 1986).
[140] Ibid.

frame of reference; homosexuality was simply a reality of American life rather than a threat to it. The argument was multi-faceted, and was accompanied by briefs submitted not just by Lambda Legal, but also the American Bar Association, the American Psychological Association, the American Public Health Association, the Cato Institute, and the Log Cabin Republicans, among others, who incorporated extralegal evidence to substantiate their position.[141] Diversifying the issue at hand beyond a discussion of homosexual sodomy, Lambda developed troubling imagery of government intrusion, which minimized the perceived relevance of moral arguments with regard to homosexuality alone. To challenge *Bowers*, which contended that anti-sodomy laws were, in fact, constitutional because prior cases had concerned privacy within the contexts of child rearing, family relationships, procreation, marriage, contraception, and abortion, lawyers for Lambda built an argument that the unique qualities of the *Lawrence* case aligned favorably with the unique qualities of legal decision(s) apart from *Bowers*; that privacy was a relevant premise on which to assert the unconstitutionality of anti-sodomy laws.

For the remainder of this chapter, I draw from a transcript of the oral arguments presented during the hearing of *Lawrence and Garner v. Texas*, along with supporting passages of the writ of certiorari submitted by Lambda Legal that urged the High Court to hear the case. Both documents illustrate the progressive arguments that justified the hearing to exonerate Lawrence and Garner, effectively overturning *Bowers*. The transcript of oral arguments also provides an adequate encapsulation of the arguments made on behalf of the state of Texas, which lawyers at Lambda Legal sought to undermine and reframe. The first portion of the analysis

[141] Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas*. The Cato Institute is a libertarian think tank that promotes policy based on individual liberty and limited government, the importance of free markets to national interest and peaceful international relations. The Log Cabin Republicans is an organization that works with the Republican Party to advance rights for LGBTQIA+ communities.

discusses the ways in which Lambda lawyers took advantage of the rhetorical options made available by the accumulation of three primary tenets. First, Lambda argued that *Bowers* represented state-sanctioned discrimination. Second, they argued that the kind of discrimination in *Bowers* and in *Lawrence* reflected other shameful moments in U.S. history wherein the state discriminated on the basis of race. Finally, the depth of the harm that anti-sodomy statutes bring to targeted groups is grounds for their dismissal. *Loci* of magnitude that emphasize the depth of harm done unto a particular party create the possibility for affective arguments, which in this case amplified the threat of privacy infringement.

"Gay" is a Four-Letter Word

Historically, cases that have dealt with issues of discrimination have been argued on the basis of the Equal Protection and Due Process Clauses to the 14th Amendment of the U.S. Constitution. Section One of Amendment XIV reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*.[142]

Contrary to what had been upheld in the *Bowers* decision, lawyers at Lambda interpreted the law to argue that an infringement on a homosexual person's right to private intimate relations while sparing non-homosexual persons who engaged in the same behavior was a direct violation of equal protection. The frame of view asserted by Lambda rested on one primary assumption: that

[142] National Archives, "The Constitution: Amendments 11-27, A Transcription," October 6, 2016, https://www.archives.gov/founding-docs/amendments-11-27. Italics mine.

criminality in this case was determined by identity, not by action, and violated the fundamental right for all adult couples, same-sex or otherwise, to "be free from unwarranted State intrusion into their personal decisions about their preferred forms of sexual expression."[143]

In terms of freedom of expression, there were direct and indirect harms imposed by the Texas Homosexual Conduct Law, which made the law a "glaring affront to the Constitution's guarantee of equal protection.[144]

> As a matter of equal protection, bare condemnation of one group of people – whether termed a moral judgment, a value judgment, or simple dislike – cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny. This equal protection question is separate and independent from the privacy claim also urged here, and confusion in equal protection law independently warrants the Court's intervention."[145]

Lambda attempted to call into question the ways in which the Equal Protection Clause was appropriated in *Bowers* in order to make the case that making a similar decision, which was a mistake then, would constitute a similar mistake now.

Contrary to the majority opinion in *Bowers* that asserted that homosexual sodomy was not inherently connected to the development and maintenance of intimate relationships, Lambda argued that decoupling sodomy from homosexual sodomy gave legal grounding to the rhetorical practice of "othering" gay and lesbian individuals from the norm. Whereas on paper, the definition of sodomy and homosexual sodomy is virtually the same with regard to the practice

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[143] Paul M. Smith and Charles A. Rosenthal, "In the Supreme Court of the United States John Geddes Lawrence and Tyron Garner, Petitioners v. Texas. Oral Arguments," Pub. L. No. 02-102, 52 (2003), 4.
[144] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 9.
[145] Ibid.

itself, Lambda lawyers argued that "today, 'sodomy' has become a 'code word' for homosexuality, regardless of statutory definition."[146] This unusual quality of Texas' law singled out same-sex couples rather than sodomy as an act. The redefinition of homosexual sodomy and sodomy, and its relevance to the American family, was a vital rhetorical process that enabled petitioners for Lawrence and Garner to call into question *Bowers'* relevance as primary legal precedent. Key terms like "infectious" and "criminal" were important touchstones that facilitated a renegotiation of the field of argument and subsequently the value hierarchies that made each argument (progressive and conservative) affectively powerful.

In challenging the appropriateness of *Bowers* as legal precedent for *Lawrence*, Lambda developed stronger interpretive ties to other cases that highlighted values that had been subordinated in *Bowers*. Lambda intimated that there are necessarily layers of cultural history that blend with the function of legal precedent, that "history is a starting point, not the end point of this analysis."[147] Rather than isolate *Bowers* as the touchstone in determining the outcome of *Lawrence*, Lambda urged for a more holistic view of legal history to avoid one of the errors made in the *Bowers* decision, which was negating "the right of everyone to decide for themselves about consensual private sexual intimacy."[148] History painted a much more complicated picture.

In each of the cases cited by Lambda, the identity of those who had broken the law was paramount to the actions that were carried out. In their arguments during *Lawrence*, Lambda lawyers amplified comparable affective qualities between *Bowers* and other case decisions that, in their view, got it wrong with respect to the Equal Protection Clause.[149] In other words, in

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[146] Ibid., 16.
[147] Smith and Rosenthal, In the Supreme Court of the United States John Geddes Lawrence and Tyron Garner, Petitioners v. Texas. Oral arguments, 5.
[148] Ibid.
[149] *Romer*, *Cleburne*, and *Eisenstadt*. See footnote.

declining to address equal protection issues in favor of upholding the State's "morality justification," *Bowers* was comparable to the cluster of prior cases that discriminated against marginalized communities, which made them unfavorable sources of legal precedent.[150]

Illustrated by the U.S.' legal history with upholding state-sanctioned racial discrimination, the word of the Supreme Court is far from infallible and the history of overturning wrongful decisions was well established before *Bowers* and the litany of cases cited directly by Lambda Legal in the *Lawrence* case. A prime example is *Dred Scott v. Sandford*. Considered one of the worst decisions to be handed down by the High Court in American legal history, *Dred Scott* upheld that a "negro" enslaved or free was not and could not be an American citizen and therefor had no right to sue in federal court.[151] Chief Justice Roger B. Taney authored the majority opinion and cited the founders as having never intended to consider those of Negro decent as members of the American people.

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.[152]

While the Constitution clearly guaranteed that "all men are created equal," it was argued that the accommodation of the practice of slavery by the founders indicated their views that slaves and their descendants were not then nor are they now considered people. Rather, "the unhappy black race" was marked as separate from the white race, "and were never thought of or spoken of

[150] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 17.
[151] Dred Scott v. Sanford, No. 60 U.S. 393 (1856) (U.S. Supreme Court March 6, 1857).
[152] Ibid., 415.

except as property, and when the claims of the owner or the profit of the trader were supposed to need protection."[153] The decision was not unanimous, however. Justices John McLean and Benjamin Robbins Curtis dissented. McLean objected to the Court's decision citing that Black men were eligible to vote in five of the thirteen states when the Constitution was ratified. For that reason, he argued they were citizens not only of their respective state but of the nation. Justice Curtis objected to the Court's decision on the merits of the majority decision itself, which nullified Scott's ability to file his lawsuit. Since the Court had decided that Scott's right to citizenship was void, so too was the Court's jurisdiction to hear the case. The appropriate action, he argued, would have been to dismiss the case entirely.

Since the decision in 1857, *Dred Scott* has been broadly denounced as "the Court's greatest self-inflicted wound."[154] Beyond signifying an abuse of judicial power, the *Dred Scott* decision contributed to the further polarization of the nation.[155] The decision had specific implications for advocates belonging to the abolition movement, who had long striven to secure slaves' freedom. Rather than answer the question of slavery once and for all, *Dred Scott* contributed to the eventual bloody conflict between the pro- and anti-slavery factions of the country. As a battle for Constitutionally guaranteed individual autonomy and over the role of government in determining and protecting personhood, *Dred Scott* represents a touchstone moment wherein social movement rhetorics were implicated as legally relevant. Hearkening also to the eventual argument made by litigants in *Bowers* and *Lawrence* that the privacy of gay men was less protected by the Constitution, *Dred Scott* also represents a touchstone moment in legal

[153] Ibid., 416.
[154] Chief Justice Hughes, cited in Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law* (New York, NY: Oxford University Press, 1997), 70.
[155] Because Dred Scott was a resident of Missouri, then a territory, the Court's decision denied the power of Congress to regulate the practice of slavery in the territories, which was perceived as an overreach of judicial power.

history in which identity and citizenship were inextricably linked.

A few decades after the *Dred Scott* decision and after the conclusion of the Civil War in the U.S., the Supreme Court once again issued a controversial ruling regarding racial discrimination. *Plessey v. Ferguson* was decided in 1896 and upheld the "separate but equal" doctrine that effectively sanctioned racial segregation in public facilities.[156] The result of a pre-arranged incident wherein Homer Plessey, a free man of mixed decent, boarded the "whites only" train car in Louisiana. After being convicted and sentenced by Judge John Howard Ferguson in Louisiana, Plessey appealed, eventually bringing his case (then against the State of Louisiana, now against Ferguson himself) before the High Court. In a 7-1 decision, the Court upheld Ferguson's initial ruling and contended that separation of the races did not violate the Fourteenth Amendment, as it did not imply the inferiority of African Americans.[157] Ultimately, the Court argued that the principle being debated in the case (i.e., that separation of the races invariably contributed to a denigration of a people on the basis of race) did not implicate the Fourteenth Amendment. However, as was documented across the nation, segregated facilities were rarely of equal quality, and those reserved for African Americans were routinely of far lesser quality.[158] Justice John Marshall Harlan, the only Justice to dissent in the case, warned that the Court's decision in *Plessey* clearly violated not just the Fourteenth Amendment, but the Thirteenth as well. Harlan foreshadowed that *Plessey* would come to be as disreputable as *Dred Scott* had become should the Court operate beyond the bounds of the Bill of Rights. As a set of "notable additions" to "fundamental law," Harlan contended the Bill of Rights as an effort by

[156] Plessey v. Ferguson, No. 163 U.S. 537 (U.S. Supreme Court May 18, 1896).
[157] Ibid.; See also David W. Bishop, "Plessy v. Ferguson: A Reinterpretation," *The Journal of Negro History* 62, no. 2 (April 1977): 125–33.
[158] Harvey Fireside, *Separate and Unequal: Homer Plessy and the Supreme Court Decision That Legalized Racism* (New York, NY: Carroll & Graf, 2004).

"friends of liberty" to purge the United States' government of racial discrimination that had poisoned the Court's prior decisions to do with race.[159] Though the Thirteenth and Fourteenth Amendments had not been ratified at the time of *Dred Scott*, Harlan felt the precedent set by *Dred Scott* did not apply within a legal context that granted to "a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy."[160] Equality, he argued, was not merely something written into law. The extra-legal factors that contribute to quality of life, while not directly secured through legal means, become of legal relevance when one considers the spirit of the Constitution. Harlan argued that without properly taking into account various extralegal prestige, achievements, education, or wealth, the relative power enjoyed by the "dominant race" would mirror a caste system, which would limit liberties for those Americans not belonging to the "dominant race."

> In view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. […] It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[161]

Speaking directly to what he perceived as an overreach and a direct attack on a particular group of citizens on the basis of race, Harlan foreshadowed the legal arguments that would be heard in *Lawrence*. Namely, that extra-legal consequences resulting from being marked as a criminal on the basis of identity are legally relevant and valid resources for argumentation. Even as the

[159] Plessey v. Ferguson at 555.
[160] Ibid.
[161] Ibid., 559.

majority decision in *Plessey* justified "separate but equal" policy as useful means of preserving freedom for privately owned businesses from governmental interference, Harlan's voice of dissent challenged the assumption that separation on the basis of identity, particularly aspects of identity like race that have been historically used to marginalize communities, would always limit liberty and equality.

Dred Scott and *Plessey*, both decisions from the High Court that have since been overturned, brought identity and the extra-legal consequences of government overreach under the purview of legal argument. These themes became of greater relevance in legal proceedings during the Civil Rights era, particularly in *Loving v. Virginia*. After being jailed for entering an interracial marriage, which violated the State of Virginia's anti-miscegenation laws, Mildred Loving (born Jeter) and Richard Loving filed a lawsuit that was eventually heard by the High Court. Contrary to the outcomes in *Dred Scott* and *Plessey*, the Court ruled in favor of the Lovings and overturned a prior decision, *Pace v. Alabama*, which had previously upheld the constitutionality of anti-miscegenation laws.[162] In addition to overturning *Pace*, the *Loving* decision also upheld the Court's decision in *McLaughlin*, which maintained that statutes that prevent interracial couples from cohabitating were unconstitutional.[163] Since 1967, the *Loving* decision has become a touchstone case for progressive legal argument, particularly for marriage equality advocates, even serving as a primary resource for argument in *Obergefell v. Hodges*. *Loving* challenged prior decisions from the U.S. Supreme Court that had authorized state-sanctioned discrimination on the basis of race. More importantly, however, *Loving* served as a precedent for the overturning of such decisions that had subsequently been deemed

[162] Stephen Johnson Field, Pace v. Alabama, No. 106 U.S. 583 (1883) (U.S. Supreme Court January 29, 1883).
[163] Byron White, McLaughlin v. Florida, No. 379 U.S. 184 (1964) (U.S. Supreme Court December 7, 1964).

unconstitutional and which public opinion had come to reject over time.

As was the case with *Dred Scott, Plessey* and *Loving, Lawrence* was, at its root, about identity. And so, Lambda lawyers drew connections between *Lawrence* and those prior legal arguments that came to bear on rulings that upheld legislation that discriminated on the basis of race. Specifically referring to *McLaughlin*,[164] Lambda referenced the injustice of assigning a "specially heightened penalty to cohabitation, but only when it involves a white person with a black person."[165] Similar to *Lawrence*, wherein the State of Texas was drawing a comparison to *Bowers'* assumption that sodomy was different from homosexual sodomy, *McLaughlin* contended that interracial cohabitation was somehow different from the practice of cohabitation between two partners of the same race. Petitioners in *McLaughlin* argued that they were merely regulating "a particular form of conduct," yet the Court ultimately decided that cohabitation, interracial or otherwise was fundamentally the same and that any decision to the contrary would classify people, not practice. In decisions since, the Court has maintained that "a mere disapproval of one group of people, whether it is the hippie communes in Moreno or the mentally retarded in Cleburne, or indeed gay people" cannot be sustained without rational justification.[166]

Leaning on the assumption that these prior decisions had since been deemed antiquated by the Court and running counter to pubic interest, Lambda urged the Court to understand the ways in which rejecting the rational basis standard would be "insensitive to the reality of what the world is like, and to the fact that some groups of – some classifications tend to be involving

[164] In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Supreme Court ruled that a cohabitation law in Florida, which was part of the state's anti-miscegenation laws, was unconstitutional.
[165] Stephen Johnson Field, Pace v. Alabama, No. 106 U.S. 583 (1883) (U.S. Supreme Court January 29, 1883).
[166] Ibid.

minorities that have had histories of discrimination against them and that the overall effect of some line-drawing can be very harmful."[167] Though the cases mentioned by Lambda were based on the disapproval of some people or some conduct, the Equal Protection Clause positions the role of the Court as a bulwark against *arbitrary* government intrusion when there is no rational justification for whatever line being drawn.[168] In reframing which cases *Lawrence* aligned with, Lambda developed connective tissue between *Bowers* and the several prior cases that were overturned on the basis that they couldn't survive rational basis scrutiny. Cases that had done undo harm to communities made vulnerable for myriad identity characteristics created unjust consequences that when deployed as legal precedent, spawned further injustice, and therefore could not stand.

The depth of harm brought about by statutes like Texas' Homosexual Conduct Law onto historically marginalized communities justified their removal. Alluding to previous decisions, Lambda argued that the potential magnitude of injustice was simply a risk the Court could not afford.[169] According to Lambda's case brief, the State of Texas had not justified the Homosexual Conduct Law beyond "we want these people to be excluded. We'd had a distaste for them. We disapprove of them. It's mere disapproval, or hostility, however historically based, is not sufficient."[170] Lambda's argument alluded to what Levi describes as the infectious quality of legal decisions and precedent.[171] As Levi explains, "Laws come to express the ideas of the community and even when written for general terms, in statute or constitution, are molded for the specific case."[172] Within the context of Lambda's argument, the "ideas of the community,"

[167] Ibid., 20.
[168] Ibid., 18.
[169] Previous cases, including *Romer*, *Cleburne*, and *Eisenstadt*.
[170] Ibid., 19.
[171] Levi, *An Introduction to Legal Reasoning*.
[172] Ibid., 4.

namely that homosexual sodomy was criminal and supposedly immoral, which was represented in Texas' Homosexual Conduct Law, had broader consequences that would diminish quality of life for gay and lesbian citizens. This foundation provided Lambda with the rhetorical options to establish the affective resonance of the case for individuals beyond homosexual couples. If one statute could create implications that leaked into other aspects of life in this case, then other cases would inevitably follow. Lambda carried forth this argument, noting that the Texas Homosexuality Conduct Law imposed a "discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not."[173] This prohibition would potentially have detrimental consequences for gay and lesbian individuals that extended beyond their relationships by stigmatizing "loving behavior that others can engage in without the brand of 'lawbreaker.'"[174]

Important for Lambda's case was the stipulation that only *homosexual* sodomy should be criminalized in Texas. By way of committing homosexual sodomy, homosexual individuals were constituted as criminals and thus, discriminatorily sanctioned "in a variety of ways unrelated to the criminal law."[175] Outlawing homosexual sodomy, it was argued, sends a powerful message to the public that being homosexual was condemned by the State and that perceived condemnation could then be used to "justify discrimination against gay men and lesbians in parenting, employment, access to civil rights laws, and many other aspects of everyday life."[176] Lambda referred to this problem as "legislative line drawing" and argued that in this case, the line that legislators had drawn was irrational and arbitrary.[177]

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[173] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 8.
[174] Ibid.
[175] Ibid., 14.
[176] Ibid., 8.
[177] Ibid., 19.

Speaking specifically to the threat against liberty during oral arguments, Lambda asserted that American families had evolved since *Bowers* was decided in 1986, and that the reality of gay parents, or parents with gay children, were a pervasive actuality in American society.

> And certainly while it may not have been shown in that case or even apparent to the Court in 1986, I submit that it has to be apparent to the Court now that there are gay families that family relationships are established, that there are hundreds of thousands of people registered in the Census in the 2000 census who have formed gay families, gay partnerships, many of them raising children.[178]

Resultant inequities for gay and lesbian Americans would be "collateral effects" that forecasted a bleak vision of what it would be like to live in states that regulate sodomy. In such states, gay and lesbian individuals could be shackled with the label of criminal and denied visitation and custody of their own children, denied public employment, denied private employment, all because they've been identified as homosexuals.[179] Putting a finer point on it, Lambda argued that the behavior of sodomy itself was not considered criminal under the law.

> The practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized… The issue here is *not* whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished *solely on the basis of sexual preference*."[180]

Rather than serving as an apt legal precedent by which to judge subsequent cases dealing with sodomy charged fairly and justly, Lambda's argument repositioned *Bowers* as infectious, as a

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[178] Smith and Rosenthal, In the Supreme Court of the United States John Geddes Lawrence and Tyron Garner, Petitioners v. Texas. Oral arguments, 23.
[179] Ibid., 20.
[180] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 19–20.

poison that had infused public discourse with harmful assumptions about gays and lesbians.

On trial in this case was the notion of morality itself. Having shifted the field of argument away from questions of sexual deviance, Lambda devoted much of their argument to overtly undermining Texas' law and the appropriateness of *Bowers* as legal precedent, on the grounds that they were antiquated and ill suited to bring about identitarian justice. Lambda drew connections between *Lawrence* and other cases wherein the Court voted to uphold fundamental rights guaranteed by the Fourteenth Amendment, regardless of identity classifications.[181] In so doing, Lambda reframed the ways in which American morality was interpreted, debated, and ultimately defined in this case, which circumvented antiquated social principles that designated homosexuality as deviant and immoral, and which made such principles legally relevant in this case.

Protecting Americans' Privacy from the "Prying Eyes" of the Government

One of the primary constraints working in Lambda's favor was that Lawrence and Garner were arrested for consensual sexual conduct that took place in a *private* dwelling. As such, prior

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[181] Three court cases were prevalent in Lambda's argument. First, *Romer v. Evans*, 517 U.S. 620 (1996), was the first Supreme Court case to address gay rights since *Bowers*. The Court ruled that Colorado's statute preventing protected status based upon homosexuality or bisexuality violated the Equal Protection Clause. The majority opinion in *Romer* highlighted the failure of the statute to meet the "rational basis" test, the governing standard for the Equal Protection Clause. Second, *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), was filed after Cleburne Living Center, Inc. submitted a permit application to operate a home for mentally disabled individuals, which was denied by the city council of Cleburne. The Court unanimously held that the city's denial was premised on an irrational prejudice against those with mental disabilities, and was unconstitutional under the Equal Protection Clause. Finally, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), was filed after William Baird was charged with a felony for distributing contraceptives at Boston University. The Court ruled in favor of Baird and struck down a Massachusetts law that prohibited the distribution of contraceptives to unmarried individuals for the purpose of preventing pregnancy. Like the previously mentioned cases, the Court's justification for their ruling was rooted in the Equal Protection Clause of the Constitution.

cases that dealt with public exposure or disorderly conduct were not legally relevant. Only those cases that dealt with the question of equal protection and due process with regard to privacy could fall within the purview of legal precedent. Lawyers at Lambda affirmed repeatedly that the "charges rested solely on consensual, adult sexual relations with a partner of the same sex in the privacy of Lawrence's home."[182] In addition, Lambda often referenced the various decisions that had been handed down since 1986 that "employed substantive due process analyses that are less rigidly determined by history and … articulated strong spatial privacy values, particularly in the home."[183] In other words, the home was the figurative bulwark against government overreach. Contrary to the majority decision in *Bowers*, the Court's primary duty is to serve as a bulwark against arbitrary governmental intrusion, and the home was a physical marker that defined the extent to which government intrusion could be considered arbitrary.

As had been the trend in legal decisions since *Bowers*, Lambda's argument in *Lawrence* emphasized the importance of protecting privacy in the home. Lambda evoked the imagery of intrusion with a metonymic description to government's "prying eyes" noting, "Since Bowers, the Court has more forcefully recognized the constitutional dimension of privacy in the home and comparable settings [wherein] *all* details are intimate details, because the entire area is held safe from prying government eyes."[184] As has been the case in multiple case outcomes, privacy and private spaces have been jealously guarded American treasures. In its effort to outlaw homosexual sodomy on the basis of moral arguments, Texas had trampled on the "entrenched expectations of privacy that are central to personal dignity and are deeply valued and broadly

[182] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 5.
[183] Ibid., 9.
[184] See also *Kyllo v. United States*, 533 U.S. 27, 37 (2001). Italics in original.

shared – even by those who disapprove of the conduct outlawed by the statute."[185] The Fourteenth Amendment provided Lambda with the rhetorical tools to renegotiate the relative importance of moral arguments against homosexual sodomy. Tied intimately to the freedoms guaranteed in the Fourteenth Amendment, privacy was presented as a foundational American value.

Though Christianity predated the Declaration of Independence and the Bill of Rights temporally, Lambda argued that the right to privacy guaranteed to U.S. citizens should be paramount. More to the point, Lambda averred that the Court had been convened to uphold the law of the land as it is codified in the Constitution, not to make moral commentary. When forced to hierarchically rank the values, Lambda asserted that privacy would trump morality; in fact the only moral decision the Court could make would be to ensure that the right to privacy would not be infringed upon through arbitrary governmental intrusion.

This line of argument, which engaged the hierarchical relationship between privacy and morality as abstract values in the United States, operated through *loci* of magnitude by illustrating the full scope of implicated audiences. Not only was the depth of harm to marginalized communities justification for the removal of anti-sodomy legislation, but so too was the full scope of harm for all U.S. citizens. The Equal Protection and Due Process clauses enabled Lambda to extend the implications of the outcome of this case to all those who value privacy and who fear government intrusion. The magnitude of the problem posed to the Court was both deep and wide.

To illustrate the full magnitude of the Texas Homosexual Conduct Law as a problem, Lambda entwined the extra-legal aspects (i.e., the "prying eyes" of government and arbitrary

[185] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 22–23.

intrusion) with the legal justification for overturning precedent (i.e., the justification for overturning *Bowers* as the Court had for other prior decisions). Levi explains that the applicability of the law/legal precedent is determined through the interpretive process of controlling what comparable qualities are salient between a prior case and the current one.[186] Illustrating this case through *loci* of magnitude was dependent on the extent to which Lambda could accomplish two things. First, Lambda needed to draw connections between prior decisions later deemed wrongful, which they did through direct references to *McLaughlin* and other cases to do with state-sanctioned racial discrimination. Second, Lambda needed to account for and adequately refute Texas' claim that *Bowers* served as adequate and just legal precedent for the present case. During oral arguments, Lambda asserted that the *Bowers* decision itself was wrong for three major reasons, which allowed them to question the case as authoritative precedent: 1) the question it posed was too narrowly drawn because it only focused on homosexual sodomy, "which is just one of the moral choices that couples ought to have;" 2) its analysis of history was inadequate, taking little account for the cultural developments that have taken place between 19th century laws regarding marriage, family and fornication; and 3) the assumptions made by the Court in 1986 did not fully represent the "realities of gay lives and gay relationships."[187] For these reasons, Lambda argued, implicated audiences were actually much broader than *Bowers* and other cases would allow for.

Through *loci* of magnitude Texas' Homosexuality Conduct Law represented an exigence that would be "felt by a large number of people," or other quantifiable aspects of the exigence's impact.[188] To make such arguments, Lambda redefined important terms within the case through a

[186] Levi, *An Introduction to Legal Reasoning*.
[187] Smith and Rosenthal, In the Supreme Court of the United States John Geddes Lawrence and Tyron Garner, Petitioners v. Texas. Oral arguments, 22–23.
[188] Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*, 4:457.

negotiation of abstract and concrete values and move the field of argument away from questions of morality and sexual identity. Importantly, Lambda asserted the imperative for the Court to recognize, not only the existence and dignity of gay families, but also that

> for those people, *the opportunity to engage in sexual expression as they will in the privacy of their own homes performs much the same function that it does in the marital context*, that you can't protect one without the other, that it doesn't make sense to draw a line there and that you should protect it for everyone. That this is a fundamental matter of American values.[189]

In the process, Lambda redefined the nature of the problem (or question) before the Court and asserted the prominence of privacy and self-determination as integral to rights that were under threat. The disease of *Bowers*, institutionalized in the Texas Homosexual Conduct Law and its tangible collateral effects, reflected a negative cultural influence that would adversely affect people beyond same-sex couples.

The *Bowers* decision created a legal precedent that was dangerous for everyone, as it inherently discriminated against particular people for an indiscriminate behavior. The *Bowers* ruling and Texas' case in *Lawrence* threatened sexual intimacy as a "basic component of stable, healthy relationships" for all couples, gay or straight.[190] Lambda reiterated that the Constitution explicitly protected the following:

> those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal

[189] Smith and Rosenthal, In the Supreme Court of the United States John Geddes Lawrence and Tyron Garner, Petitioners v. Texas. Oral arguments, 23. Italics mine.
[190] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 29.

aspects of one's life.[191]

Tapping directly into the personal relationships and experiences that define one's personal life, Lambda elevated affective appeals to a point of legal relevance. This lent authority to the assertion that the implications of Texas' Homosexual Conduct Law on the day-to-day lives of gay and lesbian persons as U.S. citizens would be justification to strike it down. By criminalizing "private consensual adult sexual conduct when engaged in by same-sex couples, but not identical conduct by different-sex couples," same-sex-only sodomy prohibitions attached "a badge of criminality" to the intimate sexual relations of one group of people.[192] Texas' attempt to govern in the best interest of the State, or to govern in keeping with American morality, perhaps inadvertently and even unintentionally targeted a specific group of people (gays and lesbians). As an answer to this problem, Lambda proffered that the moral decision with respect to Lawrence and Garner would be to correct the wrong that had been brought about through *Bowers* and to honor the dignity of their citizenship and the covenant extended to them by the Constitution to privacy and due process.

By asserting the existence and dignity of gay and lesbian couples and their families as vital representations of liberty, Lambda concomitantly coupled the notion of privacy with the affective resonance of hearth and home. Rather than take on the question of whether or not the Constitution guaranteed the fundamental right to engage in homosexual sodomy, which would have been in line with the first primary argument put forth by *Bowers* and reiterated by Texas, Lambda exalted privacy as a more prominent American value, which when threatened and would impact a greater number of people. Lambda illustrated the full magnitude of how Texas' Homosexual Conduct Law impacted Americans, gay or straight. As a statute that restricted the

[191] Ibid.
[192] Ibid., 13.

formation of intimate partnership, Texas' law implicated a larger community of individuals irrespective of their sexual activity and orientation. Relying on the plasticity of liberty as an abstract value that must be revitalized through particulars, Lambda reframed what was at stake in *Lawrence*.

Elucidating the "infectiousness" of the logic reflected in *Bowers*, Lambda likened the practice of line drawing as a disease on our American legal landscape that must be cured: "In Texas and other states with a same-sex-only crime, a *federal remedy* is especially necessary…."[193] The word "remedy" analogizes the Homosexual Conduct Law as a disease, a disease that was allowed to propagate since the *Bowers* decision and which could "spread" to legal reasoning beyond the bounds of anti-sodomy legislation. Though culturally much had changed since the Bowers decision, "same-sex and broader sodomy laws persist – and have resisted full *eradication*."[194] Within this narrative depiction, the decision to overturn *Bowers* would be the cure that could eradicate a dangerous cultural disease that impacts straight and gay people alike.

In likening the Homosexual Conduct Law as an infectious and harmful disease on the cultural-legal landscape in the U.S., Lambda emphasized the multiple impacts such policies had within the communities subjected to them. By amplifying magnitude, both in terms of the number of people who would be negatively impacted by the upholding of Texas' Homosexual Conduct Law and the multiple levels on which those harms would be experienced, Lambda shifted the relative hierarchical position of morality and privacy as value warrants, and also argued for the superiority of arguments predicated on the protection of privacy as a question of morality. To accomplish this, Lambda positioned the *Bowers* decision as an "infectious disease,"

[193] Ibid., 16., italics mine
[194] Ibid., 30. Italics mine

challenged the assumption of homosexual-as-criminal, and asserted the relevance of (homosexual) sodomy to the integrity of the American family. By way of redefinition, Lambda challenged the relative hierarchical position of privacy, moral rightness and the right to Due Process in order to undermine and ultimately argue to overturn *Bowers*.

The figurative imagery of hearth and home, the bedroom, and intimate relationships was infused with affective timbre. Without legitimate and rational justification under the Equal Protection Clause of the 14th Amendment, Lambda argued that the Homosexual Conduct Law "regulates forms of sexual intimacy that are permitted in the State only for same-sex couples, thereby creating a kind of second class citizenship to that group of people."[195] As was the case in *Dred Scott*, *Plessey*, *Loving*, and *McLaughlin*, this argument warns against

> the idea that a State may enter into American bedrooms and closely inspect the most intimate and private physical interactions, or give its police officers unbridled discretion to arrest disfavored minorities for engaging in consensual sexual activity, is a stark affront to fundamental liberty that the Court should end.[196]

Turning to the imagery evoked by the State entering American bedrooms to "closely inspect" private, intimate relations, Lambda developed a negative affective association with the Texas Homosexual Conduct Law. Moreover, as the statute had been previously linked with American morality, Lambda's defamation of such policy necessitated that morality be redefined if it is to be valued. Thus privacy, which would protect against the intrusion of the State into U.S. bedrooms, became a more concrete version of the abstract value of morality. In other words, privacy would and should be valued more highly in the public sphere than "old world"

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[195] Smith and Rosenthal, In the Supreme Court of the United States John Geddes Lawrence and Tyron Garner, Petitioners v. Texas. Oral arguments, 4.
[196] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 30.

assumptions about sexual deviance, assumptions that undergirded *Bowers* and represented an "intrusion" and an "invasion" into citizens' personal dignity.

Co-creating a Queered Legalscape, a Cure for the Disease

Lambda's argument was inundated with references to intrusion as humiliation and negation of individual dignity on multiple levels, which functioned through *loci* of magnitude and were imbued with affective resonance. As a statute that outlawed the practice of homosexual sodomy "based on nothing more than the identity of their chosen partners in private sexual relations," the arrest of Lawrence and Garner and the subsequent day they were held in custody represented a "a humiliating invasion of personal dignity."[197] Lambda further argued that this humiliation could easily extend beyond the bounds of homosexual sodomy, as prior case history has shown. Americans had become complacent, moving on to the point that the right to "engage in consensual sexual intimacy in the privacy of their home" is taken for granted.[198] Most Americans "would be shocked to find out that their decision to engage in sexual intimacy with another person in their own home might lead to a knock on the door [and] a criminal prosecution."[199] As the Court's decision in *Bowers* does not well account for the reality that most Americans expect that their private sexual exploits will be left alone, Lambda asserted that the time had come for the Court to settle what had been left "unanswered" for nearly thirty years, that question being whether anyone has the right to privacy in their own home.

In exalting privacy above outmoded tropes of Christian morality that were no longer reflective of American lifeways, Lambda made arguments for due process and equal protection concrete and legally relevant. As Lambda argued, "consensus expectations about the limits of

[197] Ibid., 12.
[198] Smith and Rosenthal, In the Supreme Court of the United States John Geddes Lawrence and Tyron Garner, Petitioners v. Texas. Oral arguments, 24.
[199] Ibid.

government intrusion into private, adult sexual intimacies, especially in the home, provide the kind of 'objective considerations' […] that undergird a principled approach to the Due Process Clause."[200] And so, on the basis of both primary arguments, 1) that criminality in this case was determined by identity, not by action, and 2) that privacy was a fundamental American right to be valued above irrational justifications for a law that regulates forms of sexual intimacy for same-sex couples, *Lawrence* challenged *Bowers*. In so doing, morality came to be associated more so with privacy and the right of all citizens to Due Process under the law rather than sexuality and sexual deviance, thereby diminishing the relative hierarchical position of such arguments altogether.

Loci of magnitude enabled Lambda Legal to amplify the ways in which the Texas Homosexual Conduct Law constituted an exigence that would be "felt by a large number of people" and on a multitude of levels.[201] *Bowers* was dangerous when deployed as legal precedent. The assumptions that undergirded *Bowers* no longer adequately reflected intimate partnership in America; they arguably never did. As was noted by Lambda:

> Bowers does not have any of the unique qualities of cases like *Miranda v. Arizona*, 384 U.S. 436 (1966), that have become imbedded in our 'national culture.' […] To the contrary, Bowers is out of step with the vast majority of the States. […] The unmistakable trend … nationally … is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom.[202]

In turning to the imagery of government invasion, Lambda cast the Texas Homosexual Conduct

[200] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 27. See also *Lewis*, 523 U.S. at 858; *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold*, 381 U.S. at 484.
[201] Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*, 4:457.
[202] Counsel for Petitioners, John Geddes Lawrence and Tyron Garner v. State of Texas, Petition for Writ of Certiorari at 23–24.

Law and *Bowers* as "humiliating invasions" that diminished the fundamentally American value of privacy.

Though *Bowers* leaned on a version of morality that was supposedly reflected in the majority of Americans, that paradigm was shaken by the renegotiation of key terms and concepts in this case, namely "infectious criminality." In a pre-*Lawrence* legalscape, the infectious criminal was still the homosexual, capable of spreading the disease of sexual deviance. A post-*Lawrence* legalscape however, more adequately reflected intimate partnership in America by embracing queer partnerships and lifeways as deserving of equal protection. Justice for Lawrence and Garner also exonerated gay couples from their criminal status and co-created a cultural narrative that cast *Bowers*-era legal logic as an infectious disease in desperate need of a remedy. Having dispensed with *Bowers*, Lambda created rhetorical space wherein privacy was upheld as a fundamental right for all Americans, superior to outdated models of American morality.

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"It's OK to take a second look":

Reframing the Family through *Loci* of Proximity in the Fight against Minnesota's Amendment One

On May 11, 2011, the Minnesota state legislature proposed an amendment, then called Amendment One, to the state constitution that if passed would define marriage as the union between one man and one woman in the state of Minnesota. This constitutional marriage amendment, similar to amendments that had previously passed in Arizona, California, Florida, Massachusetts, and Wisconsin, instigated a socio-political firestorm in Minnesota from which two major political activist campaigns emerged: the progressive "Vote NO" campaign (seeking to strike down the amendment) and the conservative "Vote Yes" campaign (advocating for the passage of the amendment). Before 2011, every state-proposed amendment defining marriage as between one man and one woman had passed. Given this history, the passage of Minnesota's amendment was an assumed outcome, but on November 6, 2012 Minnesota residents voted to reject the amendment.

Public opinion pertaining to Amendment One oscillated precariously in the months leading up to the November 2012 election. Three separate opinion polls in late May and early June of 2011 reported contradicting figures.[203] As the election grew nearer, public opinion remained largely divided, with polls in October 2012 reporting gaps no wider than seven points

[203] D Braunger, "Minnesota Poll: Majority Oppose Gay Marriage Ban," *Star Tribune*, May 13, 2011, Retrieved from http://www.startribune.com/politics/121725399.html; KSTP-TV Minneapolis, "Results of SurveyUSA News Poll #18243," *Survey USA*, May 24, 2011, http://www.surveyusa.com/client/PollReport.aspx?g=be72dc6c-d8fe-4da2-ab5d-07ce56bc7bee; T. Jensen, "Minnesotans like Dayton, Split on Gay Marriage," *Public Policy Polling*, June 1, 2011, http://www.publicpolicypolling.com/pdf/2011/PPP_ Release_MN_06011118.pdf.

between those opposing and supporting the amendment.[204] Given the tight race and the staunch ideological underpinnings of the amendment, both campaigns (Vote NO and Vote Yes) battled fiercely over the "persuadable middle," those voters still on the fence about Amendment One. This was no easy task since the persuadable middle only constituted roughly seven to eight percent of voters in Minnesota. Despite the narrow demographic, each campaign rose to the deliberative challenge of attempting to persuade these undecided voters who ultimately made the difference in deciding the outcome of the election.

The deliberative public discourse surrounding Minnesota's marriage amendment and the surprising defeat of Amendment One, demands our attention as a site of making law. In this chapter, I argue that *loci* of proximity enabled Vote NO to make present the threat posed by Amendment One to families in Minnesota. Affectively resonant arguments that promoted a vision of the family as a unit defined by commitment and love rather than the sex/gender/orientation of the married partners won the day. These arguments built associations between family values and LGBTQIA+ households. Vote NO amplified the concrete experiences of familial relationships, shared by same- and opposite-sex couples, and thereby renegotiated abstract values like love, commitment, and compassion as they relate to concrete values like family and the Golden Rule. In this shuffling of value orientations, affect 1) constituted persuadable voters as a community loyal to universal, abstract values and 2) decoupled family values from "natural marriage." In essence, Vote NO created rhetorical space for gay and lesbian heads of households within the family.

The outcome in Minnesota marked a turning point in the struggle for marriage equality

[204] S Frank et al., "Fall Statewide Survey October 2012" (Minnesota: St. Cloud University, 2012), http://www.minnpost.com/sites/default/files/attachments/saint-cloud-amendment-survey-methodology.pdf.

and illustrates that affect, particularly as it was used in the Vote NO campaign, may be a largely untapped resource for progressive activism in similar discourses. The following critically evaluates how affect enabled the renegotiation of value hierarchies as they functioned in primary texts from the Vote NO campaign. Specifically, I focus on video campaign messages aired on television and subsequently posted online. These TV spots were the most pervasive and consistently broadcast messages released by both campaigns, with multi-million dollars spent between them.[205] As such, these ads comprised the most cogent rhetorical platform from which the campaign advocated. This analysis reveals that *loci* of proximity facilitate affective arguments by which advocates can renegotiate the relationship between abstract and concrete values in public argument in order to shape public opinion and policy.

In the following pages, I first discuss the argumentative pillars of the Vote Yes campaign, which were largely predicated on the defense of "natural marriage" and religious freedom, before turning to a close reading of Vote NO campaign TV spots. The dialectic between Vote No's campaign spots and undecided voters invited active participation from the public in re-visioning the family as a concrete value reflective of a community hampered by the law of the land and in need of revitalization.

Vote Yes and the Movement to "Protect Marriage"

As early as the 1990s, several countries in Europe legalized civil unions and made the expansion of marriage and other legal unions for same-sex couples became politically relevant. In 1993 the Supreme Court of Hawaii became the first state in the union to take on the issue in *Baehr v. Lewin* (*Baehr*), a decision that maintained that prohibiting marriage licenses to same-

[205] B. Helgeson, "Minnesota's Marriage Amendment Fight Funded by Catholics," *Star Tribune*, October 18, 2012, http://www.startribune.com/politics /statelocal/174875371.html.

sex couples was sex-discrimination specifically under Hawaii's state constitution.[206] Conservative factions in Hawaii responded by introducing Constitutional Amendment Two in 1998, which upon its passage granted the state legislature power to prohibit the recognition of same-sex marriage in the state. Though Hawaii's Amendment Two was different from subsequent marriage amendments in that it did not explicitly ban same-sex marriage, Hawaii's amendment did allow the state to enact such a ban, which Hawaii ultimately did. Amendment Two in Hawaii was the first amendment that was proposed and adopted in the U.S. that led to the explicit nullification of same-sex partnerships under the law. Over the years, other states across the nation proposed constitutional amendments to codify the definition of marriage as a union between one man and one woman.

In support of Minnesota's marriage amendment, *Minnesota for Marriage* headed the Vote Yes campaign to defend the amendment and the assumptions and values pertaining to marriage and family that the amendment represented.[207] In this section, I briefly contextualize the values deployed by *Minnesota for Marriage* and the ways in which the coalition used value-based argumentative warrants to assert the primary importance of "God's will" and "natural marriage," as well as a broader appeal to the preservation of freedom (freedom of religion, in this case).

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[206] Honolulu Star-Bulletin, "Special Report: 'I Do,'" January 22, 1997.

[207] *Minnesota for Marriage* is a broad coalition of leaders, both inter-faith and people outside the religious community, who supported Amendment One and asked the Legislature to place it on the ballot for the November 2012 election. A broad range of organizations supported *Minnesota for Marriage*, including the Minnesota Family Council, Minnesota Catholic Conference, and the National Organization for Marriage. As the spearheading organization for the Vote Yes campaign, *Minnesota for Marriage* developed a two-pronged advocacy approach that sought to assert a heteronormative definition of marriage and a circumvention of the Court's authority to allow the legality of same-sex marriage. This information can be found on the Minnesota for Marriage Facebook page: https://www.facebook.com/pg/mnformarriage/about/?ref=page_internal

"God's will" and Natural Marriage

The values deployed by *Minnesota for Marriage* were that of Christian tradition, institutional history, and a particular version of family. Importantly, the Vote Yes campaign linked tradition, institution, and family with heteronormative sex and gender norms. From this perspective marriage was a tradition and an institution reliant on man and woman joining to create a family. Using the longevity of heterosexual marriage as a strategy to naturalize marriage as an inherently sexed institution, some Vote Yes video campaign ads relied heavily on appeals that positioned same-sex marriage as threatening to a "natural" way of life. Matt Birk (a Minnesota native and former NFL player of the year) offered his testimony in a Vote Yes television ad. In the ad, Birk asserted the "natural" definition of marriage as non-threatening and that defining marriage in this way does not infringe upon the rights of people with same-sex attraction.

> Outside, and unfortunately even inside our own parishes, we have people telling U.S. to stop talking about marriage, an institution that the church has been talking about for thousands of years. They say that if we stand up and talk about the natural definition of marriage, that we are somehow being mean or bullies.[208]

Speaking as a Christian, Birk conveyed a deep association between marriage, as a union between one man and one woman, and the mission to promote God's will. In the video, Birk relied on the longevity of Christian tradition and the assumed naturalness of heterosexual marriage, which implicated Vote NO as radical, subversive and threatening to a Christian way of life. Other videos echoed Birk's appeal by asserting, "throughout history and all societies, marriage has

[208] "Matt Birk Speaks on the Minnesota Marriage Protection Amendment" (Minnesota, September 29, 2012), http://www.youtube.com /watch?v=G5sOchA49cc.

been between a man and a woman."[209] For the sake of preserving tradition, Vote Yes called for voters to support the amendment:

> The law should step up and support this institution and preserve it to be what it should be, what it was meant to be which is a union, a life-long commitment between one man and one woman.[210]

The ads mentioned above positioned tradition as a superior value to inclusivity. Vote Yes reappropriated the abstract notion of "natural" marriage in a way that negated many Christian principles predicated on an "open doors, open hearts" paradigm. However, in doing so, Christianity and heterosexual marriage were framed as inextricably linked. This enabled Vote Yes to assert the passage of the amendment as a defense not only of marriage, but also of Christian tradition.

To create a sense of heightened authority many campaign messages cited the Bible and positioned marriage as part of a God-given covenant. Another ad described the position, "We believe that the Bible is our authority and that God has ordained marriage to be between one man and one woman and that's actually best for society."[211] Evoking a biblical ethos reified Christian dominance in American society. On this basis, Vote Yes affirmed marriage as a "pillar of our society," asserting that it "has been for thousands of years and needs to be for years to come."[212] Importantly, *Minnesota for Marriage* implied that "voting yes" would represent one's commitment not only to the institution of marriage, but to God's will and the broader interests of

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[209] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 3" (Minnesota, April 23, 2012), http://www.youtube.com/watch?v=hcZY3tZFRH4.
[210] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 1" (Minnesota, November 4, 2011), http://www.youtube.com/watch?v=yqPiQMfH-i0.
[211] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 5" (Minnesota, May 23, 2012), http://www.youtube.com/watch?v=CnBbfzJfFJY.
[212] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 4" (Minnesota, April 30, 2012), http://www.youtube.com/watch?v=Q0CFP87Y7qA.

society: “Since the beginning of time, God has established that marriage is between a man and a woman and I believe it is important for us to do the will of God.”[213] Vote Yes messages relied heavily on the call to promote God’s will and frame one's support of the amendment as a commitment to such work.

> As human beings, I think most of us just search for the truth, you know, what is the truth? As Catholics, we try to find, you know, what is God's will and I believe that this is his will, to stand up and fight for it and protect one of the gifts that he blessed us with.[214]

Certainly, no argument is without ideological underpinnings and it is not uncommon in public argument to appeal to religious tradition. However, in privileging loyalty to Christian tradition and carrying out the will of God over a more inclusive vision of marriage and the family, *Minnesota for Marriage* negated a lived, embodied reality that many Minnesotans experienced firsthand or had encountered in their lives; namely, the existence of LGBTQIA+ families.

Christians under Siege: The Call to Protect Religious Freedom

The Vote Yes campaign was also foundationally about protecting freedom of religion from what was viewed as an assault against Christianity. From the perspective of Vote Yes, the Vote NO campaign sought to redefine marriage, to write into law “that marriage is fundamentally about people's emotional unions rather than the procreation and raising of children.”[215] Vote NO posed a danger to the ideology that naturalized marriage as a sexed institution by promoting marriage as a loving commitment between two individuals who may subsequently build a family. This danger, as was argued, was presented as insidious as it was unchristian and threatened to undermine the freedom for Christians to join in a marital institution

[213] “Minnesotans Vote Yes for the Marriage Protection Amendment Video 5,” 5.
[214] “Matt Birk Speaks on the Minnesota Marriage Protection Amendment.”
[215] “Minnesotans Vote Yes for the Marriage Protection Amendment Video 6” (Minnesota, August 1, 2012), http://www.youtube.com/watch?v=WQXY8Jr2xAY.

that reflected their religious beliefs. The underlying values that Vote NO and Vote Yes argued for were shared between the campaigns, as Christian marriage is also linked with love and commitment; the schism that divided NO and Yes from one another issued from a foundational disagreement about which of those value clusters *defined* marriage. In other words, the campaigns disagreed about where love and commitment would sit in hierarchical relation to other values associated with marital partnership. Given the push to link heterosexual marriage with God's will and the fundamental importance of relative sex/gender between the marital partners, any perceived redefinition of marriage was understood as a threat to the practice of religious freedom as Vote Yes had defined it.

Vote Yes also warned that failure to adopt the amendment would make way for systemic violations of religious freedom beyond the state. Namely, denying passage of the amendment would allow for future legislation to legalize same-sex marriage, which could force churches to honor such unions. It was feared that churches would no longer have the freedom to exercise discretion when sanctifying marriages. Passing the amendment on the other hand, would protect churches' freedom to worship as they so choose:

> Right now there is a court case in Hennepin County to change the definition of marriage through the courts. It's the same type of case that happened in Iowa before marriage was redefined there. Politicians have said that they will try to redefine marriage at their earliest opportunity, even next year, if the marriage amendment doesn't pass.[216]

Turning to Iowa as an example, the ad warned against giving an inch to progressive political action. The warning was given even more weight with the reminder that Hennepin County court

[216] "Matt Birk Speaks on the Minnesota Marriage Protection Amendment."

in Minnesota was already hearing a case about the expansion of same-sex marriage. Including same-sex unions within the institution of marriage was framed as an intrusion from the government into one's religious expression and concomitantly a threat to Christians.

Vote Yes benefitted from appeals to tradition as status quo defenders.[217] Turning almost exclusively to negative arguments that focused on the negative consequences of any proposed alternative to the status quo, Vote Yes attempted to inoculate voters against any counter argument to what they viewed as natural marriage and religious freedom.[218] Doing so provided what Kahneman and Tversky originally coined as the "status quo advantage," with which status quo defenders "need not explicitly engage in outlining the virtues of the status quo policy. Rather, it is sufficient (and not too terribly difficult) to suggest that certain costs and negative consequences *might* result from a policy option being proposed."[219] In one "man on the street" campaign spot one Minnesotan said, "I'm glad that we have this marriage amendment on the ballot because I don't want a politician or a judge determining the definition of marriage. I think every Minnesotan deserves a vote on the issue."[220] Another Minnesotan agreed: "I believe it strengthens democracy and allows the people of Minnesota the opportunity to protect marriage before it is redefined by judges and politicians."[221] Fixating on the potential that politicians and judges might corrupt the existent tradition of "natural marriage," the campaign framed Amendment One as a bulwark against the danger of governmental intrusion that *could* come

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[217] For more elaboration on the notion of "status quo defenders," see: Frank R. Baumgartener et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (Chicago, IL: University of Chicago Press, 2009), 141.
[218] Baumgartener et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why*; For more information on the status quo advantage of painting alternatives as risky choices, see: D. Kahneman and A. Tversky, "Choices, Values, and Frames," *American Psychologist* 39, no. 4 (1984): 341–50.
[219] Baumgartener et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why,* 141.
[220] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 1," 1.
[221] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 5."

about from a change in policy. Similar rallying cries such as: "Marriage is such a foundational institution and we need to protect the family,"[222] "It's been proven that children grow up best in a house that has a father and a mother that are married to each other,"[223] and "Marriage is the basis of the family and the family is the fundamental building block of society,"[224] also framed the campaign for marriage equality as a direct attack on Minnesota's children and the family. From this platform, Vote Yes forged a connection between protecting the "natural" model of a nuclear family to protecting the integrity of society as a whole, without giving much regard to *proving* the inherent advantages of current policy (campaign ads relied on tacit agreement from viewers rather than external evidence to support claims).

Despite the relative advantages of occupying the role of status quo defender, Vote Yes enabled the rhetorical opportunity for Vote NO to assert the material existence of families headed by same-sex couples as justification for a change in policy. In making the presence of same-sex partnerships and families more proximal, Vote NO could argue that such families marked an extension of marriage. Specifically, Vote NO developed multiple points of identification between same- and opposite-sex couples based in fundamentally similar familial experiences, if not sexual attraction to their respective partner. By moving between abstract and concrete values, Vote NO renegotiated the relative hierarchical position of sexual attraction and familial bonds as they relate to both marriage and family. Running counter to *Minnesota for Marriage*, the Vote NO campaign headed by *Minnesotans United for All Families* defied the assumption that marriage was an institution fundamentally defined by the sex/gender/orientation

[222] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 3."
[223] "Minnesotans Vote Yes for the Marriage Protection Amendment Video 2" (Minnesota, November 8, 2011), http://www.youtube.com/watch?v=vlY3v00wcgE.
[224] Ibid.

of the committed partners.[225] Ultimately, positioning marriage and family as concrete values common to both same- and opposite-sex couples enabled Vote NO to appeal to voters on a personal, affective level and assert the abstract values of love and commitment as the foundational values that define and uphold the family.

Diversifying the American Family: An Invitation to Vote NO

As has been previously discussed, abstract values are general and transcend specific circumstances, which make them particularly useful for those "wishing to change the established order."[226] Because abstract values like love and commitment are not inherently connected to any one instance or experience, it is possible to build connections to concrete values, such as one's family. Such associations can substantiate the argument to reframe the meaning of either value. Once the connection is made, a particular value may be reframed to suit more universal contexts, and universal values can be made more specific.[227] The Vote Yes campaign relied solely on concrete values like *Christian* tradition and *religious* freedom to substantiate its argument about family. Vote NO on the other hand facilitated the renegotiation of value hierarchies in this discourse by moving between abstract and concrete values. This reordering of value orientations and hierarchies enabled Vote NO to appropriate family as a central value, and also to reframe family as a concrete value superior to Christian belief.

Vote NO brought to the fore love and commitment as points of identification shared by same- and opposite-sex couples. Campaign spots used personal disclosure from same- and

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[225] After Amendment One was put on the ballot for the 2012 election, *Outfront Minnesota* and *Project 515*, two groups working for LGBT rights in the state, along with political parties, labor unions, veterans, civic groups and businesses, formed *Minnesotans United for All Families*, which was the main campaign organization that would work to defeat the amendment. *Minnesotans United* was the spearheading organization for the Vote NO campaign.
[226] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 79.
[227] Ibid., 76.

opposite-sex couples as tools of proximity to build points of identification based in lived experiences. In other words, the rhetorical embodiment of same-sex couples within the narrative of family life functioned as a strategy to build proximity with voters. Minnesotans who followed their "gut check" and felt that the passage of the amendment would constitute a denial of dignity to gay and lesbian couples also developed the bridge between same- and opposite-sex couples. Vote NO emphasized appeals to the mundane, performed ritual, and inherited kindness as *loci* of proximity. This strategy analogized the day-to-day experiences of families headed by same-sex couples to those of opposite-sex couples, not on the basis of sexual orientation, but parallel familial relationships. By amplifying the threat against Minnesota families through *loci* of proximity, advocates demonstrated that the negative outcomes resulting from Amendment One would "hit close to home" by impacting those closest to them. *Loci* of proximity amplified the affective resonance of individual personal experiences and testimonies as identifiable and important markers of sameness.

Appeals to the Mundane

Vote NO reached out to persuadable voters with appeals to mundane day-to-day activities that characterize family life. In one campaign video, Minnesotans Paul and James explained why it was important to them that Minnesota recognize same-sex marriages and "demonstrate equality at the highest level from our state government, down to families."[228]

> We're the parents of twin boys who are going to be turning four next month and we're very proud of them. We have them going to church with us, we have them in preschool. They know what love is, they know what commitment is, and they know what

[228] "Real Minnesotans United for Marriage: Paul & James" (Minnesota, May 3, 2012), http://www.youtube.com/watch?v=u4RELs79nT8.

equality is and fairness and we want to demonstrate that for them.[229]

In this video, Paul and James' shared experiences as parents positioned their family as reflective of a broadly identifiable image of a family, and one that is religiously pious. The men discussed anecdotes such as going to church, dropping the children off at preschool, etc., as reflections of their spiritually enriched, familial life. Such activities were asserted as commonplace, something that many Minnesotan families at some point also experience.

In another campaign spot, Kelly and Laura discussed their own family. The campaign video included video footage taken when the couple testified at a state legislative session in 2009. The video concluded with Kelly's description of Laura's testimony.

> We wanted to make sure the committee knew that there were families who look like ours, children like ours all across Minnesota and they deserve the same rights and protections as any other family. We get up in the morning and struggle to get our kids out the door and struggle to get to work on time, just like every other family. We go through every day, live our lives just like every other family and shouldn't we be treated like every other family.[230]

As was the case with Paul and James, Kelly and Laura invoked day-to-day experiences to establish an affective connection with others who share their experience. Like many Minnesotans, Laura and Kelly get up every morning and struggle to get their kids out the door and to work on time, "just like every other family." The campaign videos asserted the mundane activities that make up daily life as integral experiences that characterize marriage and family. Through these appeals, the campaign invited viewers to recognize Kelly and Laura's experience

[229] Ibid.
[230] "Real Minnesotans United for Marriage: Laura & Kelly Olmsted" (Minnesota, April 16, 2012), http://www.youtube.com/watch?v=rAmqru06Kok.

as "ringing true," and affirmed marital, familial life as an experience not limited to opposite-sex couples. Through rhetorical embodiment, these experiences were shown to exist within families headed by same- and opposite-sex couples alike.

Performed Ritual

The two couples mentioned above also developed proximal ties with their viewers through appeals to the performance of marriage and family, the ritualized public performance of life-long commitment. Building from their appeal to the mundane, Paul and James articulated a rhetorical link between their children's moral upbringing and the values that they live out in their committed partnership to one another. The men argued that the continued refusal of the State to publicly recognize their family as a legitimate family could poison their son's view of justice by demonstrating systemic discrimination. By accentuating their personal, lived experience (i.e., maintaining a loving commitment to one partner, describing the joys of parenting, and the importance of family), the men's testimony first validated the dignity of their family before asserting the implications of being denied public recognition.

> It's very much, I think, a *public recognition* of the relationship, which is very important to us. Both of our parents are celebrating their forty-fourth wedding anniversary next June. They've showed us what committed, loving couples have and what that means and we want to show [our children] that we want to do the same thing as well.[231]

For Paul and James, marriage is a *public* reflection of kinship, the family its product. Paul and James provided a justification for rejecting Amendment One that directly challenged what Vote Yes had attempted to establish: that legalizing same-sex marriage would change the institution of marriage. Paul and James' testimony used the affective resonance of day-to-day experiences in

[231] "Real Minnesotans United for Marriage: Paul & James." Italics mine.

private life as support for the argument that a family that exists in private life should be recognized in public life. The public performance of commitment, signaled through the state's recognition of a marriage, is necessary to bestow dignity upon the family that is formed through that union. Same-sex unions existed and were recognized in various ways before the state extended marriage equality. However, for Paul and James the state's recognition of their partnership as a marriage would establish their family as a family.

Throughout the campaign, the ritual nature of marriage helped to forge the link between private and public life. Marriage ceremonies are a public rite of passage that commemorates promises of love and commitment that had been made privately. Though a couple's motivation to get married might be deeply personal or spiritual, the lived experience of getting married is anything but private. The process of getting married necessitates participation from the State and from witnesses; it is a public performance of commitment. Vote NO highlighted the importance of the public performance of marriage through the testimony of Laura and Kelly, who had already lived together in a committed relationship for several years and raised children before Amendment One was put on the ballot.

> I think allowing marriage equality is important to us for a number of reasons.
>
> The biggest personal reasons are the commitment we have to each other.
>
> Kelly and I have pledged our lives together, we made a life-long commitment to each other we stood before our friends and family and promised. Promised to build a future together.[232]

In their testimony, Laura and Kelly explained the ways in which their public pledge in front of friends and family to promise to build a future together should constitute not just a life-long

[232] "Real Minnesotans United for Marriage: Laura & Kelly Olmsted."

commitment, but also a *marital* union. As they described, they had already undergone the public declaration of life-long commitment; and yet their promise to build a life together, which mirrored the origin of so many marriages, had gone unrecognized by the state. In the clip filmed during a 2009 legislative session, Laura advocated in front of the state assembly on behalf of her relationship, and relationships like hers across Minnesota, in the hopes of achieving equal treatment from the state.

> On August 15, 2009, Kelly and I stood before our friends and family and we exchanged vows. We promised to love each other, to trust each other, to walk through this life together. As I assume yours did, our wedding included laughter, tears, good food, music, and a lot of love. What our wedding did not have, what our marriage still does not have, is any recognition by the state we call home.[233]

By describing their ceremony as a wedding, Laura minimized the perceived gap between same-sex unions and state-sanctioned marriages. Laura referenced the "laughter, tears, good food, music and lots of love" that made their wedding comparable to any other wedding. Defined not by the sex/gender/orientation of the committed partners, but by the ritualized actions that were carried out in public, Laura and Kelly asserted their committed partnership as a marriage.

Inherited Kindness

The campaign used concrete values like family and the Golden Rule to renegotiate the meaning and relative importance of abstract values like love, commitment, kinship, and compassion. Vote NO was inclusive in its depiction of what family, love and commitment "look" and "feel" like and argued for the public recognition of same-sex couples and their families by asserting the inherently identifiable aspects of kinship. In so doing, Vote NO worked to

[233] Ibid.

disentangle the construct of the family from heterosexual marriage, which was the only marital union recognized by law at that time. By way of troubling the assumption that heterosexual marriage was synonymous with family, Vote NO renegotiated family as a value that was threatened by Amendment One.

Vote NO included testimony from straight allies who, upon recognizing the dangers that Amendment One posed for their friends and neighbors, bolstered Vote NO's effort to make queer lifeways more proximal for voters. Along with same-sex couples like Paul and James and Kelly and Laura, John and Elizabeth provided testimonies that further supported the importance of publicly recognizing heterosexual and same-sex unions as legitimate marital unions and that of publicly enacting the values that undergird their own family. John and Elizabeth explained, "Our parents taught us the Golden Rule: not judging others and treating others the way we'd like to be treated and those are the values we're showing our children by voting no on the marriage amendment."[234] For John and Elizabeth, publicly enacting the Golden Rule (a biblical construct) was an important feature that defined their family. As a concrete reflection of an abstracted moral responsibility to model care and compassion to their children, the Golden Rule enabled John and Elizabeth to justify their choice to "vote no" through an identifiable Christian paradigm. Operating as a concrete value warrant within John's and Elizabeth's family, the Golden Rule provided an affective point of connection to viewers for whom Christian values would resonate. This argument deployed the Golden Rule as a concrete Christian value *and* as a fundamental feature of the family. Through their testimony, John and Elizabeth were a rhetorically embodied representation of the Golden Rule in action. As they put it, they "showed" their values to their children by voting no. The clip continues,

[234] "Our Values" (Minnesota, October 23, 2012), http://www.youtube.com/watch?v=jKeTgE72WHA.

> We thought long and hard about it and we know that someday, allowing everyone the freedom to marry won't change our kid's values because they get those values from us. We've been married, oh, it'll be almost twenty seven years. If I can get married, it just seems wrong to say that someone else can't get married.[235]

John and Elizabeth avoided taking on the moral "rightness" or "wrongness" of same-sex partnership, but focused instead on the way they instill and revitalize Christian values within their own family. In this case, voting no was a direct public expression of their Christian identity because the Golden Rule was a fundamental characteristic of their family identity. By "not judging others and treating others the way [they'd] like to be treated," John and Elizabeth invoked the Golden Rule as an affective representation of abstract values associated with marriage and family (i.e., love, commitment, and compassion), values shared between same- and opposite-sex couples alike.

The campaign ads tapped into Vote Yes's argument that the interests of children should be considered foremost when defining the stakes of Amendment One. For John and Elizabeth, the choice to vote no was a way to extend compassion and reserve judgment, values that could be best served in practice. John's and Elizabeth's choice to live out the Golden Rule in private and in public built an association between secular and non-secular value sets. Moving between abstract values (inclusivity and freedom) and concrete values (Golden Rule and children), the campaign created a road map for undecided voters to reconcile their religious identities with progressive policy. The interests of children and the values they might inherit were the primary vehicles for this argument.

The campaign ads modeled kindness and inclusivity. Vote NO called undecided voters to

[235] Ibid.

action, to vote no as an example for future generations. Former Minnesota Governor, Jesse Ventura, and his wife Terry illustrated the affective resonance of lived experience as exemplars of loving-kindness.

> We've been married now, believe it or not, thirty-seven years. The happiness we've had I would wish for everybody to have. Marriage is about when people fall in love and decide to make a commitment in front of their friends and their family and it means something. How in the world can two people professing how much they love each other and care for each other and that they want to be with each other forever, how can that be bad? No matter who you are.[236]

The Venturas asserted a definition of marriage that enabled an affective connection with viewers. Proffering a positive image of marriage, the Venturas discussed falling in love and deciding to make a commitment in front of friends and family as the primary markers that make a marriage a marriage. Taken together, the examples above served two interrelated goals: 1) to forge an association between same-sex partnerships and marriage, and 2) to frame the family as a site wherein values held privately *should* be extended outward into the public realm. John and Elizabeth and Jesse and Terry asserted marriage as a partnership defined by shared values, rather than relative sex/gender identity. Tapping into viewers' own experiences as spouses, parents, or children themselves, the testimonials in the video clips urged viewers to consider what their own families meant to them, how they defined their connection to those they love most. Moreover, the call to action issued in the campaign spots included a call to kindness and encouraged viewers to see the choice to vote no as a way of modeling a kindness that could be inherited by their children.

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[236] "Real Minnesotans Voting No: Terry & Jesse Ventura" (Minnesota, September 14, 2012), http://www.youtube.com/watch?v=M6SRCRxYa_k.

Making the private public, the campaign portrayed the family as a unit defined by love and life-long commitment, a private reflection of a public system of kinship that must be defended from Amendment One. The campaign was inclusive in its depiction of what family, love and commitment "look" and "feel" like and argued for the public recognition of same-sex unions and their families through *loci* of proximity. In essence, the use of personalized, experiential evidence countered the dominant framing of the discourse, which contributed to the shift in public opinion necessary to defeat the amendment.

Renegotiating community boundaries through proximal dialectic

Shared ideological commitments are important rhetorical features that work to constitute communities. However, communities are in need of constant revitalization and ritualized reconciling of differences. As countering viewpoints converge among members, the boundaries of the community are renegotiated. In these times when community ties are being renegotiated, the redefinition of experiences becomes possible. The proposition of Amendment One marked such a moment in LGBTQIA+ rights discourses. As had happened in thirty states before, the amendment forced a broader discussion of marriage and family in Minnesota's communities, and with the decision to pass or deny passage of the amendment firmly in the hands of voters, advocacy from either camp necessitated deliberative action from ordinary citizens. As the Vote NO and Vote Yes campaigns deployed their respective arguments with regard to the amendment, Minnesotans were called upon to cast a vote that would endorse one of two visions of marriage and family. However, importantly, the two visions put forth were not mutually exclusive – while Vote Yes spoke to the primarily religious tropes that defined marriage and family, Vote NO rhetorically embodied the lived experiences shared by those who value familial relationships.

As has been discussed in prior chapters, affect is a circulated entity that contributes to the

constitution of a collective through experience that is resonant in the body. Affect thereby materializes the foundations for the community that is called forth and sustained through shared experiences. Sara Ahmed notes emotions play a crucial role in creating individual and collective bodies and the very effect of togetherness and apartness between bodies, worlds, and the signs that represent them; emotions are the "corporeal limn that [guide] sensory perception."[237] Broad symbols represented in value warrants can evoke latent emotions that are felt by the persons who deploy that value in argument *and* by those for whom the value is a symbol of lived experience. Rather than appeal to viewers' potential fear that religious freedom might be infringed, which would have been an understandable concern for either ideological camp, Vote NO welcomed discussion about what marriage and family means on a personal level. In one Vote NO video a married, heterosexual couple conceded that they had not always been in support of same-sex marriage. However, interactions with a same-sex couple changed their views:

> We just had our thirteenth anniversary. Thirteen years and three kids. It's a commitment to forever. Marriage is really important to me, I didn't really think a lot about same-sex marriage. We had a gay couple live in our neighborhood. They had adopted a little son and they were the most wonderful neighbors. […] We did have some good discussions. In our daughter's world, her normal is so much different than ours. It didn't phase her at all. It's ok to take a second look. And when you do, vote no."[238]

During her testimony above, Kim first noted how important marriage was to her and how for her, the primary feature that defined her marriage was the "commitment to forever." After "some

[237] Ahmed, "Affective Economies."
[238] "Kim & John" (Minnesota, September 18, 2012), http://www.youtube.com/watch?v=HYR_E-fYfRo.

good discussions" with a gay couple and their son, and after viewing the issue through their daughter's eyes, Kim and her husband John embraced the comparability between their family and that of their neighbors. Through the exchange, Kim and John widened their perspective of what a family could look like and which families "counted" in their community.

Emotionally based, experiential evidence rhetorically represented in the example of Kim and John promoted dialogue with the expressed purpose of allowing a multiplicity of perspectives coexisting together. Kim and John, along with other couples and individuals who were featured in Vote NO campaign ads, engaged a dialectic with viewers. Dialectic as a rhetorical strategy is useful when attempting to forge connections between *multiple* symbolic reflections of lived experience. It is a terminological means of building bridges between individuals, of establishing consubstantiality between contrasting ideologies in order to renegotiate the boundaries of a community. As Kenneth Burke explains, dialectic is largely driven by ironic interaction, which "arises when one tries, by the interaction of terms upon one another, to produce a development which uses all the terms."[239] There is enough ambiguity to embrace multiple interpretations of the same phenomenon. Within the context of Vote NO, the video testimonies all described the lived experience of "family" and "marriage," while also intimating that public deliberation of what those experiences signified was necessary to arrive at a more socially conscious, ultimately more Christian, understanding.

The dialectic was a means to invite persuadable voters to work through their misgivings about the amendment, to consider the merits and consequences of a "yes" or "no" vote. The videos showed that speaking to other Minnesotans about love and commitment as universal, abstract values was an enjoyable experience that ultimately led to a deeper appreciation for

[239] Burke, *A Grammar of Motives*, 512.

marriage and family. It allowed viewers to consider the amendment without approaching their gay and lesbian neighbors, coworkers and friends as adversaries. Dialectic enabled a widening of the community that did not inherently threaten the shared values of that community. As Burke notes, in a dialectic all contributions to the discourse are treated as meritorious in their own right, "none of the participating 'sub-perspectives' can be treated as either precisely right or precisely wrong. They are all voices, or personalities, or positions, integrally affecting one another," needing each other, indebted to each other, and consubstantial with each other.[240] As more individuals are welcomed to a conversation, perspectives that had previously been incongruous collide as individuals negotiate for the legitimacy of their experiences. Through dialectic, the boundaries that define and separate parties from each other are tested and re-tested, negotiated and reframed as the discourse develops.

Vote NO engaged the public with the eventual goal of moving the needle, so to speak, on public opinion pertaining to same-sex marriage. Other examples of emotionally driven arguments in Vote NO also demonstrated a careful consideration of the issue and the benefits of keeping an open mind. In a Vote NO campaign spot, one elderly Minnesotan man, donning a cowboy hat, explained:

> It used to be there wasn't even this discussion. Marriage was a man and a woman. But times change and I've thought about it more. My marriage is the most important thing in my life. Who am I to deny that to anybody, gay or straight. I'm not going to limit a basic freedom just because I'm uncomfortable. And I'm not going to put it in our state constitution. Our constitution should protect our freedoms, not take them

[240] Ibid.

away.[241]

In this video, the man noted the discomfort he felt when considering same-sex partnerships. Yet his discomfort did not supersede the value he placed on his own marriage and the experience of marriage more broadly. After "[thinking] about it more," the man reconsidered how marriage could be envisioned, which helped him bring into congruity competing experiences (i.e. that of his own marriage and the full range of partnerships he had encountered). "Gay or straight," everyone who shared in a relationship similar to the one he experienced with his wife was deserving of public recognition from the state, regardless of the *type* of union. Moreover, the man in the clip tapped into Vote Yes rhetoric by saying "I'm not going to limit a *basic freedom* just because I'm uncomfortable." Echoing appeals to religious freedom from the Vote Yes camp, the man was able to illustrate for viewers how to renegotiate the relative hierarchical position of "family" and "freedom" as concrete and abstract cultural values, respectively. By engaging dialectically, and turning to his experience as a married man, the man in the clip argued for a renegotiation of community ties. This strategy was a common feature throughout the campaign. Vote NO infused their messages with multiple perspectives, which moved between abstract and concrete values as each value was negotiated dialectically. This strategy may have been appealing for people belonging to the persuadable middle who were resistant to ideological polarization.

Within an ironic dialectic, negotiation continues without predetermined resolution, as the process of negotiation is more significant than the resolution. Vote NO invited viewers to recognize multiple points of identification, all related to the issue of marriage and family, and each designed to make more proximal the threats posed by Amendment One. The testimonies

[241] "Pretty Simple" (Minnesota, September 20, 2012), http://www.youtube.com/watch?v=8fIMeIrwPQ8.

cited above emphasized the paramount relevance of commitment, vibrant dialectic, and basic freedom, which challenged the "naturalness" of "natural marriage." Vote Yes argued that God had ordained marriage as a union through which to procreate. However, Vote NO diversified the purpose of marriage beyond procreation by highlighting the many experiences that characterize a married lifestyle, which served to subsume the Vote Yes message under a more inclusive umbrella. For example, one campaign ad cited responsibility as one of the pillars of marriage.

> Government isn't telling people who they can fall in love with, so governments shouldn't be telling people who they can marry. We're supposed to be the home of the brave, land of the free. *If two people, gay, straight, commit to each other and want to take responsibility for each other through marriage, there is no reason for the government to get in the way of that*. The constitution is supposed to protect our freedom, not take it away. I'm votin' no.[242]

Tapping again into Vote Yes's appeal to viewers on the basis of religious freedom, Vote NO asserted that the public recognition of same-sex partnerships would not intrude into religious freedom; rather the institution of marriage was characterized by two people taking responsibility for one another. The act of taking responsibility for one another is ungendered, and could be carried out by any two partners, regardless of their sex/gender/orientation. Importantly, in leaning on tropes like freedom from government intrusion, which was a key rhetorical strategy for Vote Yes, Vote NO didn't simply *counter* hegemonic assumptions embedded within Amendment One, but *engaged* them in order to reorder their respective importance. Vote NO depicted the question as undecided, the picture of the family in flux. Renegotiating the purpose of marriage enabled Vote NO to envision the family as an inclusive social construct, one that

[242] "Land of the Free" (Minnesota, October 11, 2012), http://www.youtube.com/watch?v=_Gz7SvEJnhU. Italics mine.

needed and deserved room to grow.

The infusion of Vote Yes argumentative tropes served other ends as well. Leading up to the vote in Minnesota there was a pervasive fear among conservative voters that denying passage of the amendment would then pave the way for the state to intrude into their churches. This led to an underlying feeling of discomfort predicated on fear of the unknown. To dispel that discomfort, Vote NO engaged it, head-on. For example, Paul and James responded in their video testimony to Vote Yes's claim that legalizing same-sex marriage would result in churches being forced to sanctify all marriages. Paul and James explained, "What's wonderful about the state of Minnesota is that churches will continue to be able to have the right to marry who they want and who they don't want to. The churches get to decide who they can and cannot marry. Nobody will ever be forced to marry somebody else."[243] Directly naming the fear felt by many who supported the amendment was a political gamble, as it lent credibility to the claim. However, naming the fear also empowered Vote NO to assuage that fear.

Vote NO discussed religious freedom in more diverse terms than Vote Yes, which may have made their case more persuasive to voters who were not affiliated with an evangelical Christian religion. Vote NO widened the conversation beyond that of protecting Christianity by pointing out the disparity of treatment that had existed for churches seeking to sanctify same-sex marriages. In one video clip, Katie and Gwen discussed their church's policy regarding marriage and pointed out that while their marriage may be recognized within the walls of their church they did not enjoy recognition by the state, a privilege enjoyed unquestioned by heterosexual married couples.

Marriage is a civil institution and churches can choose to or not choose to marry

[243] "Real Minnesotans United for Marriage: Paul & James."

> whomever they want. But when it comes to the law of the land, that belongs to the state. Our church, of which we're a member [recognizes marriage as] any consenting, two adults who are in a loving, committed relationship, who choose to commit to one another and share, hopefully, their entire lives together.[244]

In the example above Katie and Gwen maintained emotional sensitivity and challenged the hegemonic assumptions that justified marriage as a union between one man and one woman, while also working dialectically to widen the boundaries of the family to encircle all unions that are lived out by two consenting adults who "are in a loving, committed relationship, who choose to commit to one another" in order to build a life together.[245]

The choice to formulate the campaign as a dialectic may not have been voluntary, as TV spots for the Vote Yes campaign ran for several months before *Minnesotans United* began their TV campaign. A complete negation of Vote Yes would not have been practical. Nevertheless, dialectic enabled *Minnesotans United* to renegotiate key terms within the heated campaign season and purposefully invite the participation of voters in reinvigorating their community ties. Amendment One provided the crisis moment necessary to revitalize public deliberation on the definition of marriage and family in Minnesota. Engaging marriage and family as contested terms, Vote NO implicated what had previously been accepted as private spaces (i.e., marriage and family) as public, socially constructed spaces in need of re-evaluation. Above all, *Minnesotans United* seemed to understand the power of rhetorical embodiment in the process of building and revitalizing community. Amendments like Minnesota's Amendment One may have provided the impetus for reconsidering what marriage and family means in America; Vote NO

[244] "Real Minnesotans United for Marriage: Katie & Gwen" (Minnesota, May 2, 2012), http://www.youtube.com/watch?v=AUigW0dRX_c.
[245] Ibid.

provided the strategy.

"Real Minnesotans" Vote No

A critical investigation into the Vote NO campaign reveals that "emotionalism and rationality are not at opposite ends of a spectrum," rather emotional rhetoric may serve as a means of reframing dominant discourse.[246] By analyzing the personal testimonies of individual Minnesotans through the Vote NO campaign, this chapter has revealed the utility of rhetorical embodiment in renegotiating the meaning of and relationship between abstract and concrete values within argumentative *loci* of proximity. By appealing to the mundane, performed ritual, and inherited kindness, *Minnesotans United* invited viewers to see their own marriages and families reflected in the shared similar experiences of gay and lesbian couples as committed partners and parents. Vote NO renegotiated marriage and family as concrete values that underpin kinship. By making the private public, Vote NO argued for the imperative of gay and lesbian couples to demand recognition of their union from the state. Ultimately, the personal testimonies of same-sex and heterosexual couples helped Vote NO to assert love and commitment as more authoritative definitional characteristics of marriage than the respective sex/gender/orientation of the married partners. Renegotiating for a more inclusive model of the family, Vote NO also renegotiated the relative position of conservative and progressive values with respect to marriage equality.

Perhaps the most powerful strategy at Vote NO's disposal was that of constituting community. This analysis has shown that dialectic is an effective strategy for creating shared stakes among disparate collectives in order to co-create a community. Even when facing political polarization, affective economies, via rhetorical embodiment, reinvigorate individual investment

[246] Patricia Roberts-Miller, *Deliberate Conflict: Argument, Political Theory, and Composition Classes* (Carbondale, IL: Southern Illinois University Press, 2004), 230.

in public issues and "align individuals with communities - or bodily space with social space - through the very intensity of their attachments."[247] By way of dialectic, Vote NO encouraged a co-creation of meaning between disparate parties, in this case marriage equality advocates and undecided voters. Vote NO offered a realistic, diverse and affective vision of committed love, partnership, and family and used experiential knowledge to argue that families come in all shapes and sizes. From there Vote NO relied on audiences to provide the inevitable inference that same-sex couples and their families, who within an alternative frame of reference, are no different from any other family in deserving equal recognition under the law. Vote NO reflected the lives of "real Minnesotans" and invited voters to participate in the deliberative practice of deciding what marriage and family could be. Voters got to "feel good" about inclusion, and ameliorate the face threat that might come from breaking with ideological or religious tradition. Vote NO's portrayal of everyday Minnesotans and their families allowed the audience to bypass Vote Yes's claim that heterosexual and same-sex unions were incontrovertibly different. Vote NO *invited* undecided voters to co-create their community as one that reflected shared experiences and values.

Vote Yes's demise might ultimately be attributed to their insistence on battling on rigid concrete values, rooted in ideological purity. Vote Yes' argument that same-sex marriage posed a threat to both "natural marriage" and religious freedom was made less compelling when Vote NO made more proximal the humanity of those *individuals* and *families* who would be harmed by the passage of the amendment. Moreover, same-sex couples seeking public recognition of their families faced an easily definable threat in that passage of the amendment would make any marriage equality legislation impossible. Amendment One constituted a crisis moment for

[247] Ahmed, "Affective Economies," 118.

Minnesotans, and Vote NO built a strong case that the amendment itself constituted a threat to Minnesotan families. Vote NO didn't seek to create rigid boundaries around marriage and family. As a dialectic, gaining total agreement from Minnesotans on a "new" definition of marriage and family wasn't as important than the process of negotiating inclusion, of seeking a more authentic representation of what marriage and family could look and feel like.

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Stability, Dignity, and a "happy, healthy home":

Adoption Rights for Same-Sex Couples and the Moral Imperative to Provide Care

In the state of Mississippi, as in all of the United States, there is strong public interest to place children into stable, loving homes through the foster care system or through adoption. Though the federal government legislates nationwide requirements for legal guardianship and adoption, and states must comply with federal regulation, the states are given latitude to develop policies and regulations to facilitate the fostering and adoption of children. Several such statutes have been implemented in Mississippi to find foster or permanent homes for displaced children, including the Adoption and Safe Families Act of 1997[248] and Mississippi Code Ann. 43-15-13(8).[249] Both these statutes emphasize the desirability of permanence and stability as outcomes for children, along with the maturity and holistic wellness of their guardians. Under Mississippi statute, single persons and married couples are eligible to foster and adopt children provided they are at least twenty-one years of age, have "income and insurance sufficient to meet the additional needs of an adopted child," and "meet accepted emotional, intellectual and psychological standards to be good parents."[250] All of these qualifications and criteria are designed to ensure a foster or adoption placement is in the best interest of the child, which is not to say that couples and families are not enriched by the inclusion of a foster or adopted child. Nonetheless, the law prioritizes the interests of the child over the interests of the parents and guardians. Statutes that deny adoption rights to same-sex couples have necessarily established that such homes are

[248] The Adoption and Safe Families Act of 1997 was a policy that encouraged permanent adoptive homes for children in need of placement.

[249] Mississippi Code Ann. 43-15-13(8) advised that if a child currently in the foster system could not be reunified with one or both of their birth parents, then the eventual placement must constitute the best possible *permanent* living arrangement for the child.

[250] The Interstate Compact on the Placement of Children, "Public Adoptive Placements-Requirements," *The ICPC State Pages*, 2012, http://icpcstatepages.org/Mississippi/.

unsuitable placements for children.

As has been discussed at length in prior chapters, the hierarchical arrangement of values and value-driven arguments relative to one another impact the trajectory of discourse. In Mississippi, the prioritization of the interest of the child over that of the adoptive or foster parent enabled those who would exploit anti-LGBTQIA+ public sentiment and policy to cast same-sex couples as unsuitable options for guardianship, regardless of biological parentage. Other legal precedents have worked alongside the inherent barriers resulting from "best interests" arguments, which, in this context are specifically grounded in anti-LGBTQIA+ advocacy. In 1999, the Mississippi Supreme Court issued a decision in the case of *Weigand v. Houghton*, which denied the petition for custody of a child to a gay guardian. The child in question was biologically the son of divorced couple, David Weigand and Machelle Weigand Houghton. During the proceedings, the court noted that David was a loving and affectionate father, provided a stable home and ensured that Paul (child) had all of the necessities and luxuries of life. Paul's mother, on the other hand, worked two jobs, which meant that were she granted custody, Paul would be parented largely by Paul's stepfather, a convicted felon, who had been physically abusive to Machelle, abused alcohol and would have provided a potentially psychologically and physically dangerous environment for Paul.[251] Despite these potential dangers, the court awarded full custody to Machelle. David Weigand was denied custody of his biological son, Paul, on the grounds that his sexuality and romantic lifestyle made him unfit to parent.[252]

Following suit and extending the court's decision to petitioners not biologically related to their children, legislators in Mississippi drafted an amendment in the following year that codified

[251] David John Weigand v. Machelle "Gil" Weigand Houghton, No. 97-CA-01246-SCT (Supreme Court of Mississippi February 4, 1999).
[252] Justice Banks, David John Weigand v. Machelle "Gil" Weigand Houghton Dissenting opinion, No. 730 So.2d 581 (Mississippi Supreme Court February 4, 1999).

the extent of the state's jurisdiction with regard to adoption. A statement within the new language of the statute effectively prohibited same-sex couples from adopting, regardless of marital status or biological parentage of one of the petitioners. The statute unequivocally stated: "Adoption by couples of the same gender is prohibited."[253] As the legislature worked to secure passage of the adoption ban, vested parties voiced support on the grounds that same-sex partnerships were morally wrong, and thus could not establish a suitable home for children. State Senator, Ron Farris, stated, "a homosexual relationship implies the exercise of illegal activities […] and no child should be permitted to enter that type of setting."[254] Echoing Farris' argument State Representatives Rita Martinson and Gary Chism stated, "there is no way you can convince me that 'Joe has two mommies' is a value that we need to extend to the next generation" and the state of Mississippi "shouldn't place [children] in a lifestyle that's unnatural," respectively.[255] Taken together, testimony from the state assembly that supported the ban reflected the assumption that gay and lesbian couples were incapable of providing a suitable home for children in need of placement because they lacked the moral fitness to be parents.

In the effort to overturn foster care and adoption statutes in Mississippi that excluded same-sex couples from eligibility, the Campaign for Southern Equality (CSE), along with the Family Equality Counsel (FEC) and several same-sex couples, filed a lawsuit against the state of Mississippi. CSE and their allies capitalized on the State's emphasis on the interests of the child as a primary pillar of their argument, shifting the field of argument in favor of a progressive vision of the home. The case documents include detailed discussion of the "*Albright* factors,"

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[253] "Mississippi Code," 93-17-3 § (2000), sec. 5, http://codes.findlaw.com/ms/title-93-domestic-relations/ms-code-sect-93-17-3.html.
[254] Gina Holland, "State Bans Adoption by Gay Couples, ACLU: Decision Likely to Bring Lawsuits," *Sun Herald*, April 20, 2000, sec. A4.
[255] Emily Wagster, "Bill to Ban Adoptions by Same-Sex Couples Advances," *Clarion-Ledger*, February 23, 2000, sec. 5B.

often used by Mississippi courts when determining the best interests of the child in a petition to adopt.[256] Included in those factors are the age, health and sex of the child, continuity of care, parenting skill and a willingness to provide primary childcare, the moral physical, mental fitness and age of the parents, employment of the parents, stability of the home, and preferences of the child. Relying on the rhetorical options made available by the *Albright* factors, plaintiffs in *Campaign* brought credence to the primary, if not sole focus on the child's wellbeing in determining the suitability of placements before extending through their argument the realm of suitability to include same-sex couples and their homes.[257]

CSE challenged the assumption that a stable home was in any way defined by the sexuality of the parents. Arguing against the second-class status to which the adoption ban had relegated gay and lesbian couples, the plaintiffs reframed the legal problem itself by magnifying the significant harms brought about by the ban as they effect children already in custody of same-sex parents and those still in need of placement. CSE countered the assumption that same-sex parents were morally unfit to parent children by shifting the field of argument away from the moral rightness or wrongness of homosexuality and toward the right of children placed or currently living in same-sex households to "understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[258] As was argued, the ban created two entwined problems simultaneously: it wrongfully deprived gay and lesbian couples of their constitutional rights and caused "their children to suffer irreparable harm.

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[256] *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983), is a case filed in Mississippi that lists thirteen factors that the Court must consider when making an initial custody decisions. The facts of the case are considered relative to each factor. The Court makes a determination as to which factor favors which parent and decides how to weigh each factor.

[257] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief, No. 3:15cv578DPJ-FKB (n.d.).

[258] Ibid., 21.

It also harm[ed] the significant number of children in Mississippi waiting to be adopted."[259]

In their case against Mississippi CSE renegotiated the value cluster associated with "the home" by emphasizing the affective experiences of stability, love, nurturance, as well as physical, mental, and emotional health. This reordering of priorities and value hierarchies enabled the plaintiffs to make concrete the threat of displacement for children in need of foster and adoptive parents. More specifically, the plaintiffs' argument highlighted the severity of harm brought about by the ban in order to advocate that same-sex couples were a superior option for children in need of placement. In so doing, the plaintiffs accomplished several things. First, plaintiffs in *Campaign* made present the ways in which same-sex couples created homes more suitable for children than displacement and decreased the presence of arguments that challenged the moral fitness of same-sex couples as parents. Perhaps more importantly, they also assuaged the material and psychological impacts on children who had been deprived of legal parentage by the state by asserting the moral imperative to provide care where care is needed. Guided by an ethic of care, same-sex couples meet the moral imperative to provide stability and dignity to children most in need.

The following first provides a contextual backdrop for the suit, with specific attention to the plaintiffs and defendants. I then dissect the three *loci* of severity deployed by CSE: crises of stability, financial cost and loss of dignity for children awaiting legal guardianship. Transmitted with affective resonance, these three *loci* enabled CSE to make present and compelling the problems associated with the ban. I then explore the ways in which *loci* of severity enabled a shift in the field of argument and a reordering of abstract and concrete values associated with "the home" and the moral imperative to give care, which ultimately created the rhetorical space

[259] Ibid., 20.

for progressive models of the family. By amplifying lived experience as superior to abstracted claims, CSE de-emphasized questions of morality in a discussion of what makes a home suitable for children. Echoing arguments from *Lawrence*, the case ultimately establishes that heteronormative visions of the home are outmoded and too exclusionary to reflect the myriad joys, responsibilities, and challenges of parenting.

Background on the Plaintiffs & Defendants

The Campaign for Southern Equality (CSE) was established in 2011 to "advocate for the full equality of lesbian, gay, bisexual, and transgender ("LGBT") people in American life and to increase public support for their rights."[260] Based out of Asheville, North Carolina, the coalition provides support and resources throughout the south. Their services are varied, ranging from free legal clinics, litigation, and local organizational support and training for grassroots LGBT leaders. CSE was recognized as a proper institutional plaintiff soon before the adoption case in Mississippi, focusing much of their efforts on achieving marriage equality. After the *Obergefell* decision however, CSE turned their attention toward adoption litigation for same-sex couples. Joining CSE in the suit was the Family Equality Council (FEC), the only national organization "exclusively dedicated to securing justice and equality for LGBTQ parents and their children by advancing legal and social justice for all families."[261] Founded in 1979, the FEC extends its reach beyond the informal boundaries of the south, across the nation. However, the FEC remains invested in service to LGBTQ parents in Mississippi, sponsoring legal service clinics, seminars and other community-building events in order to increase awareness of family-building legal options.[262]

[260] Ibid., 5.
[261] Ibid., 6.
[262] Ibid.

Along with CSE and the FEC, several same-sex couples added their names to the suit. Each of the couples that participated in the suit spans the gamut of family building. For Donna Phillips and Jan Smith, legal adoption will make Jan a full and legal parent to the daughter that Donna gave birth to but both women parent. Kathryn Garner and Susan Hrostowski face similar circumstances, wherein Kathryn gave birth to their son and Susan is seeking legal adoption rights. Jessica Harbuck and Brittany Rowell were engaged to be married at the time of the lawsuit and had hoped to jointly adopt children through Mississippi's foster care system, something it was noted they were both emotionally and financially able to manage. Similarly, Tinora (Tina) Sweeten-Lunsford and Kari Lunsford hoped to foster and adopt children with special needs, which was something the couple was uniquely equipped to do given Tina's professional experience working with children with disabilities. As was cited in the case brief, children with special needs are in desperate need of foster placement and eventual adoption and many couples are ill equipped to care for these children, which means many children cannot be placed. It was argued during the proceedings that for their employment security and marital status, each of the four couples would have otherwise been able to obtain legal adoption of their current and future children had they not been same-sex couples in Mississippi. Notably, each of the plaintiffs in the case are women. Functioning not only as caregivers but also as *mothers*, the women reify the underpinnings of an ethic of care through their gender. More importantly in this case, these same-sex couples not only answered the call to provide care to children in need, but they banned together as women in a way that challenged heteronormative notions of what it means to provide care as parents within a home.

On the other side of the aisle, representatives from three institutions were under fire in the CSE's lawsuit. For his capacity as the Executive Director of the Mississippi Department of

Human Services, Richard "Rickey" Berry, was implicated in the suit. In addition, Phil Bryant was implicated for his capacity as the Governor of the state of Mississippi, as was Jim Hood for his capacity as the Attorney General of the state of Mississippi. Each of the men in their official roles represented the majority sentiments put forth by the state assembly, which insisted that children would be better off as wards of the state than in the temporary or permanent custody of same-sex couples. The question of moral fitness was paramount to any professional or personal experiences same-sex couples might have that position them to provide stable, permanent homes. The defendants posed abstract value arguments about what moral fitness entailed, and what a moral home would look like, as superior to physical or financial arguments that might have justified same-sex couples as fit parents in light of the *Albright* factors. In so doing, the defendants not only asserted the moral unfitness of same-sex couples as reason to deny them eligibility to foster or adopt children, but also exalted the superiority of moral arguments altogether within the discourse.

The plaintiffs, however, challenged such arguments with a two-pronged attack. Initially, they shifted the field of argument such that arguments regarding sexual orientation and identity as moral issues were hierarchically subordinated to other argumentative storehouses. Second, they asserted the fitness of same-sex parents through an ethic of care, which engaged the moral objection. CSE made present the severity of the problem of displacement in order to argue for the superiority of placement in homes headed by same-sex couples. Abstract values from both sides coalesced around the concrete value of "the home;" both parties asserted the importance of a stable, loving home for the development of healthy children. Yet each side proffered different models for what that home might look or feel like. Arguments made on behalf of the plaintiffs emphasized love, nurturance and dignity as synonymous with the home. These affective appeals

worked to uncouple sexual orientation from the moral component of a safe, stable, permanent and loving home. Importantly, anecdotal evidence served progressive arguments that highlighted the uniquely severe problem of child displacement and the ways in which same-sex couples are uniquely suited to address that problem. The following section illustrates how the plaintiffs reordered the hierarchical relationship between moral arguments against same-sex couples as parents and arguments based on stability, financial fitness, and dignity.

A Crisis of Stability, Financial Cost and Loss of Dignity for Children

Each party on both sides in *Campaign* contended that displaced children constituted a particularly vulnerable community. As individuals in need of stability and guidance, children in the foster and adoption system must be placed in suitable homes in order to thrive. CSE amplified the problem of child displacement, with specific regard to the ways in which the adoption ban exacerbated the severity of the problem. *Loci* of severity make present a problem by showing that "those affected by the problem have suffered great hardship or have had their lives disrupted in an extreme way."[263] Inherently, then, the lived experience of great hardship or extreme disruption is central to *loci* of severity. Individuality of experience calls for a flexible sense-making paradigm wherein arguments can be viewed dynamically, so that there may be varied uses for a single notion. When a notion is viewed dynamically, "in terms of its uses of the notion in argumentation, [the] field of application of the notion varies according to these uses and that the plasticity of notions is related to them. The 'emotive meaning' is an integral part of the notion's meaning, not just an adventitious addition that does not belong to the symbolic character of language."[264] In other words, argumentative *loci* of severity are imbued with affective resonance, which facilitates an emotional response that can be persuasive. CSE turned

[263] Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*, 4:457.
[264] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 140.

to affectively charged arguments that emphasized the problem of adoption and foster bans on same-sex couples on three topical levels, stability, financial fitness and dignity.

A Crisis of Stability and Financial Cost

Initially, the plaintiffs argued that denying same-sex couples the right to foster or adopt children created a crisis of stability, one that was unique in its severity. As a function of presence, developing a crisis of stability in affective terms made the problem more concrete and the threat posed by the ban more evident. By denying same-sex couples the right to adopt, children in need of foster and adoptive placement are inevitably left out in the cold, so to speak. At the time the lawsuit was filed, the Mississippi Department of Human Services (MDHS) had approximately four hundred children who were in need of adoptive homes, one hundred of whom were placed in temporary foster care. As was cited in the court documents, many of the children in the system experience serious medical, emotional, or psychological setbacks while awaiting permanent placement stemming from "backgrounds of adversity, loss, and instability, such as parental abuse and neglect, removal from their homes, and subsequent (sometimes multiple) temporary placements."[265] CSE included in their documents personal information and anecdotes about children who were available for adoption at the time of the lawsuit. Included were descriptions of Aeron, "a sweet, out-going 8-year-old boy' who 'loves eating soul food' and Joyce, a 17-year-old 10th grader, who is a 'good student' and 'likes to climb trees.'"[266] These personal stories about the children left displaced under the adoption ban illustrated the problem of displacement. When left in abstract terms, child displacement could easily be seen as a severe

[265] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 23.
[266] Ibid., 22. The case documents site the Mississippi Department of Child Protective Services website, specifically the Mississippi Heart Gallery page where profiles can be found of children available for adoption. Some children who were mentioned in the case document, Aeron, for example, are still available for adoption.

problem. However, the specific stories of *these* particular children who had been displaced made the crisis of stability more concrete, which amplified the hardship and extreme disruption felt by those affected.

With stability as an abstract value that characterized the interests of both legal parties in this lawsuit, CSE attempted to shift the concrete value associated with stability. This enabled them to challenge the assertion that homes headed by same-sex couples were inherently less stable. The plaintiffs argued that the severity of the problem of child displacement was further amplified because gay and lesbian couples tend to be more motivated to adopt than heterosexual couples.

> Prohibiting gay and lesbian married couples from adopting – couples that tend to be more motivated to adopt – means that many of the children waiting to be adopted will have to wait longer, and some will age out of foster care without ever having a permanent, stable family of their own.[267]

Citing the motivation of same-sex couples to provide care, CSE argued that the problem at hand was child displacement, not the question of moral fitness, and same-sex couples were ready and willing to answer the call. Waiting longer to be placed in a foster or adoptive home was equated with an increased instability. As such, the problem of displacement under the adoption ban created hardship and extreme disruption for the children involved. Without the stability of a long-term or permanent home, the children would continue as wards of the state, some until they reach adulthood.

Having described actual children like Aeron and Joyce as potential casualties of the ban, the case documents made the issue of child displacement affectively resonant. CSE and their

[267] Ibid., 23.

allies developed argumentative connections between the material interests of actual children, the strong display of character in being motivated to provide care where it was needed, and the stability of a loving home, which the CSE argued same-sex couples were willing and able to provide. The plaintiffs used material referents to make present the severe outcomes of having a lack of stability, in order to diminish the persuasive impact of arguments against same-sex couples' moral fitness to raise children. The severity of the problems associated with displacement were positioned as a superior concern to the moral fitness of same-sex parents, and more aptly supported with concrete examples. Because reliability and longevity of care was linked with the abstract notion of stability, placement in homes headed by same-sex couples was promoted as a fitting solution to that problem.

Relatedly, the plaintiffs turned to *loci* of severity when arguing the enormous material and financial costs to denying same-sex couples the right to adopt. A study from the Williams Institute, cited in the case documents, established that a national ban on gay and lesbian foster care could cost anywhere from eighty-seven million dollars to one hundred-thirty million dollars in foster care system expenditures each year. Costs to individual states would soar up to twenty-seven million dollars.[268] As was cited, "preventing qualified gay parents from adopting leaves more children in foster care for longer periods of time and this, in turn, costs the state more money."[269] Running counter to paradigms of parenting that embrace a village mentality, the Adoption Ban in Mississippi was presented as an obstruction to residents' collective responsibility to care for and rear children. In this way, the notion of stability was extended

[268] Gary J. Gates et al., "Adoption and Foster Care by Gay and Lesbian Parents in the United States" (The Williams Institute & Urban Institute, March 2007), 3, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf.
[269] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 24.

outward to the interests of society at large. Preventing same-sex couples from adopting not only cost the children in need of loving and stable homes, but also the state's economic stability.

A Crisis of Loss of Dignity

Renegotiating the concrete value to the abstract value of stability enabled CSE to make present the severity of the threat posed by the ban, not only for the children left displaced, but also for the state. In addition, the plaintiffs turned to *loci* of severity in arguing that the adoption ban damages the dignity of children waiting to be legally adopted, some of whom have been parented by same-sex couples their whole life. Similar to the way stability functioned as an abstract representation of the material stakes of displacement, dignity served as an abstract representation of home, or perhaps more specifically, feeling at home. The plaintiffs argued that denying recognition as parents under federal law to married gay and lesbian couples would humiliate tens of thousands of children being raised by same-sex couples and would make it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[270] In other words, the argument was based in the truth that homes headed by same-sex couples exist, children already live in those homes, and the adoption ban degraded the stability of those homes by preventing the state from recognizing a legitimate family unit. Hearkening to the shared experience of daily life in a community, CSE positioned the discriminatory aspects of the adoption ban as something that would be felt and lived out by the children in those homes. The argument extended an invitation to consider what it would be like for these children as they ride bikes with neighborhood friends or attend church and Sunday school.

Somewhat different from the arguments regarding stability or financial cost, which

[270] Anthony Kennedy, United States v. Windsor, No. 12-307 (US Supreme Court June 26, 2013).

focused on displaced children waiting for foster or adoptive guardians as wards of the State, arguments about dignity emphasized the severity of the problems associated with the adoption ban for children already living in homes headed by same-sex couples. In such cases, when adoption rights are denied to gay parents, "the equal dignity of hundreds of families and thousands of children in Mississippi is disrespected and the significant and concrete rights, benefits, and duties that come with legal parentage are denied."[271] Turning again to the concrete, material experiences that characterize life within a loving home, CSE developed a connection between dignity as an abstract value that represents the material existence in a home. Denying the dignity of such an existence would potentially place a badge of inferiority on children, something the Court had determined inappropriate in cases like *Brown vs. Board of Education*.[272] Also leaning on *Obergefell* and *Windsor* as precedent, CSE argued that beyond the undeniable harm done to parents who are unable to seek legal adoption of their children, "such discrimination against children because their parents happen to be gay is blatantly unconstitutional."[273] Therefore, denying adoption rights to same-sex couples infringes on the *children's* constitutional right to equal dignity within their home.

Further amplifying the severity of the problem, the plaintiffs also highlighted the ways in which "the absence of a legal relationship between parent and child often becomes critical in situations that are already stressful or traumatic for families, including medical emergencies and

[271] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 4.
[272] *Oliver Brown, parent of one of the children, filed Brown v. Board of Education 347 U.S. 483 (1954) against the school board in Topeka, Kansas,* denied access to Topeka's white schools. Brown claimed that racial segregation in the schools violated the Equal Protection Clause because black and white schools were not equal to each other and never could be. The Court unanimously sided with Brown, contending that education was an essential aspect of private, civic and professional life.
[273] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 5.

the death of a parent."[274] Each of these arguments emphasized the double-pronged infringement of liberties, for the guardians and children involved, but also for society. By evoking affective qualities that illustrate these harms and magnify the potential negative outcome of denying legal adoption rights to same-sex parents, CSE reoriented how the home could be constituted as a place of refuge that was simultaneously strong and fragile. A loving home was strong enough to sustain families through hardship yet fragile enough that the State's interference by way of the adoption ban threatened its characteristic stability. In the same portion that discussed the potential trauma that parents and children can experience during medical emergencies and unexpected deaths in the family, the case documents cited Kathy's and Susan's shared fear that being denied legal adoption would potentially fracture their already grief-stricken family should Kathy (H.M.G.'s biological mother) pass away.[275] Donna and Jan cited similar concerns, given that Donna (H.M.S.P.'s biological mother) was often out on military deployments. CSE argued that Donna's routine deployment away from home compounded understandable concerns and anxiety that a tragic incident could jeopardize their family unit:

> Donna and Jan understandably share similar concerns and anxiety, which they feel particularly acutely when Donna is deployed away from home. During deployments, Jan and H.M.S.P. worry not only for Donna's safety, as does the family of every service member on duty away from home, but they also have the added distress that, if something were to happen to Donna, they could lose each other as well.[276]

Evident in this passage are allusions to fears and anxieties, commonly experienced by military

[274] Ibid., 21.
[275] Acronyms like H.M.G. and H.M.S.P. are initials used in lieu of the children's given names throughout the case documents to protect their privacy.
[276] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 21–22.

families and identifiable to civilians as well. The love shared by Donna, Jan, and their daughter made their family strong, and the family leaned on one another to endure the hardships that accompany Donna's routine deployments. However, these hardships and the worry that a loved one might not return from deployment was amplified by the fear that should something happen to Donna, Jan and H.M.S.P. would also lose one another as the state would be legally obligated to dissolve their family status.

Loci of severity enabled CSE to develop a double-pronged argument that asserted the simultaneous strength and stability of the home as well as its preciousness and fragility. Taken together, arguments that established a crisis of instability, financial cost and loss of dignity, each of which is a *locus* of severity, facilitated a hierarchical reordering of values within the discourse. Appropriating abstract values shared between the two legal parties, such as stability and dignity, CSE shifted the concrete values represented by those abstractions. Whereas the defendants of the case sought to situate moral arguments as superior to other *Albright* factors, the plaintiffs made present the severity of the problem of child displacement brought about by the adoption ban, and the loss of dignity for those children living with same-sex parents. Thereby CSE diminished previously asserted arguments against the moral fitness of same-sex parents as hierarchically inferior, in both relative importance and veracity with regard to the case.

Moving "Home" from the Abstract to the Concrete

By making present the severity of the adoption ban, CSE shifted the field of argument toward an argument of what constitutes a home. The argument put forth by the plaintiffs benefited from two major sources of evidence. First, the narrative representation of existing homes headed by same-sex couples, and the material existence of children flourishing in such homes, were asserted as primary markers of good and authentic parentage. A significant amount

of page space in the case documents was devoted to the exposition of the plaintiffs' backgrounds, employment information, children's hobbies and interests, among other details about everyday life in the household. In Donna and Jan's case, the brief cited that the couple had been together since 1995, were legally married in Maryland on August 1, 2013, and that they lived in Mississippi their entire lives. In addition, the case brief cited Donna's service with distinction in various positions in the military, "including as a company commander of a unit in the Mississippi Army National Guard responsible for the immediate response to Hurricane Katrina."[277] Both women's Master's Degrees are listed, and their daughter (born to Donna) is described as "happy, bright, and well-adjusted."[278] The women are described as being actively involved in their daughter's life, and the eight year old is described as loving both women as parents very much and wanting to be legally adopted by Jan. The case documents include similar detail about Kathy and Susan. Their son (born to Kathy) is described as "thriving in every measure. He earned straight A's in his freshman year of high school, was the starting quarterback for his high school football team, and spent part of [his] summer as a counselor at a camp for children with intellectual disabilities."[279] Such descriptions served as concrete evidence to support not only the existence of households headed by same-sex parents, but also a home.

Including mundane details such as getting straight A's, being quarterback of the football team, or being bright and well-adjusted echoes common experiences that are affectively resonant to the reader and illustrate the significance of the *Albright* factors. Rather than list a full employment history, the case documents narrativized Donna's military service and illuminated what it was like to be a military family. In so doing, CSE deployed the material existence of

[277] Ibid., 6–7.
[278] Ibid., 7.
[279] Ibid., 9.

same-sex households as homes to their argumentative advantage. That these families exist provided tangible, concrete evidence, which was then asserted as a material referent for the concrete value of a good home. The narrative representations of the plaintiffs' material existence, recorded in the case documents, created an affectively compelling narrative in which the onus to ensure care was shifted. As was illustrated, same-sex couples had lived up to their moral duty to provide care where care was needed – and were pleading to give more. It was up to the State to uphold its moral covenant to honor that ethic by fully recognizing the guardianship that was already taking place.

Along with the material existence of same-sex families (illustrated through narrative), the second source of evidence that the plaintiffs benefited from was the statistical substantiation of their assertion that same-sex couples were willing and able to provide care where care is needed. CSE used official numbers from the Census to illustrate the material existence of homes headed by same-sex couples and the number of children currently living in those homes. The 2010 Census captured a telling snapshot of the present-day American family that countered hegemonic models that depict a father, mother, two kids and a dog. In 2010, twenty-six percent of the approximately 3,500 gay couples living in Mississippi were raising children (under the age of 18) in their homes. As of 2014, however, that picture had shifted even further away from hegemonic notions of the family, with twenty-nine percent of gay couples in Mississippi, or approximately one thousand households, raising nearly 1,500 children in their homes. [280] The plaintiffs used these numbers to assert a progressive vision of the family, or at the very least to establish that an updated vision is necessary.

Narrative and statistical evidence, along with *loci* of severity, amalgamated to form a

[280] Ibid., 2–3.

cohesive argument strategy with which to reposition the adoption ban and the primary problem at hand, that actively worked against the State's interest to secure safety and stability to its most vulnerable residents. Moreover, the arguments highlighted an ethic of care as the primary marker of a healthy home that satisfies the *Albright* factors while disregarding antiquated questions of morality with regard to sexuality. As a state behind the times, "Mississippi is the last state that explicitly bans gay couples from adopting without regard for their qualifications as parents or the best interests of the child," regardless of the actual reality that many Americans experience as authentic family life.[281] References to "actual reality" and "authentic family life" brought abstracted representations of family and the home closer in line with the lived experiences that mark a family's daily life. In other words, shifting the field of argument in this case also facilitated a renegotiation of the abstract values associated with "the home."

Importantly, this process reoriented the frame of reference away from the abstract and toward the concrete via affective appeals toward embodied, lived experience. The case documents cited the diversity of families, noting:

> They differ in size, cultural heritage, religion, and economic means. Some are headed by parents who planned, were prepared for, and wanted children – others are not. Some children, regardless of their parents' sexual orientation, come from single-parent, divorced, or blended families. And some children now have married lesbian and gay parents who live in committed and loving relationships in Mississippi."[282]

Key in the passage above is the means through which the concept of family is defined by individual experience. While hegemonic models of the family are characterized through the sex/gender/orientation of the parents (i.e., one mother and one father), the case documents

[281] Ibid.
[282] Ibid., 4.

argued that a family can also be recognized by the presence of children. When two parents are involved, sex/gender/orientation is diminished as less important than the commitment and loving relationship they share. In other words, affective experience is the key defining feature. The presence of children, love, and commitment are brought to the fore of the hearer's consciousness. These appeals countered the persuasive impact of claims that challenge the moral fitness of same-sex parents because they center attention on the hearer's lived experience, occupying the "foreground of the hearer's consciousness."[283] This strategy is useful not only in

> argumentation aiming at immediate action, but also in that which aspires to give the mind a certain orientation, to make certain schemes of interpretation prevail, to insert the elements of agreement into a framework that will give them significance and confer upon them the rank they deserve.[284]

In other words, the argumentative processes that made CSE's arguments compelling asserted that it was not enough to debate the merits of same-sex couples as parents – one must instead consider the moral imperative that *all* parents or guardians share, including those in same-sex partnerships. The abstract notion of morality became associated with the call to provide care, to live out the responsibilities of *being* a family.

Several years after signing the Adoption Ban into law, former governor of Mississippi Ronnie Musgrove expressed regret at having made it illegal for gay and lesbian couples to adopt children. He explained, "There are far too many children in America in need of a loving home, who are shuttled between temporary homes and group shelters that fail to provide the stable,

[283] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 142.
[284] Ibid.

nurturing environment all children deserve."[285] Reliant on outmoded tropes of morality that diminished the moral imperative to provide care, the adoption ban could not respond adequately to the accelerating need for permanent, legal guardianship for displaced children and those living in same-sex households. Opponents of the ban brought to the fore a kaleidoscopic view of the family, families that occupied a home with greater plasticity and dynamism than the outdated Mississippi statute could contain.

The broader point of this strategy is to shift the definition of what makes a family a family and what qualities define a strong and nurturing home. In this case, the relative success of children in same-sex households was a common trope used to demonstrate the positive consequences, as illustrated in the lives of the children, of growing up in such a home. The case documents told the story of Jan and Donna, one of the couples to file against the state in *Campaign*.

> Jan and Donna have a happy, bright, and well-adjusted eight-year-old daughter whom they both love very much. Jan and Donna are exemplary parents who have mutually provided H.M.S.P. with a childhood full of love and support. Both are actively involved in their daughter's life and are dedicated participants in the Parent Teacher Organization at H.M.S.P.'s school.[286]

Having provided their daughter with a "childhood full of love and support," Jan and Donna's mutual parenting has produced a "happy, bright, and well-adjusted" child. Specifically, the passage cites Jan and Donna's active daily involvement in their daughter's life as evidence of exemplary parenting skills. Their daughter's positive qualities are a direct result of the home they

[285] Ronnie Musgrove, "Portman's Conversion Should Be a Lesson," *The Huffington Post Blog Section*, March 20, 2013, para. 4, http://www.huffingtonpost.com/ronnie-musgrove/portmans-conversion-shoul_b_2918493.html.
[286] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 7.

have provided. Similarly, Kathy and Susan not only provided their son with a stable home, but also enabled him to thrive, achieving academic and athletic success and giving back to his community. Though not reflective of heteronormative models of the family, Kathy and Susan reflect a progressive vision of what the family actually looks like for many Mississippians. In showing the lived experiences that comprise each of the families whose heads of household filed the suit, the plaintiffs decoupled parents' sex/gender/orientation from the definitional qualities of heads of households in order to emphasize that a home is not a home without the presence of children, made to thrive through the stability of constant love and nurturance. The primary definitional quality of the home is that it be a place where children are supported and reared lovingly. In this way, the plaintiffs reordered the value hierarchies associated with the case and shifted the field of argument toward the importance of stability and nurturance within the home and the moral imperative to give care.

What Damages One, Injures the Other: Equal Dignity and the Interests of the Child

Taking place in a courtroom, advocacy in this discourse necessarily had to respond to the issue of legal precedent. CSE took advantage of prior proceedings that challenged direct infringement on Constitutional liberties, like Equal Protection and Due Process. Importantly, the arguments in this case linked the infringement of parental liberties with that of the children involved. As part of a family, parent and child would share a stake of the threat. Stating outright the claim of infringement for the foster and adoptive parents, the case documents submitted by CSE contend

> the Mississippi Adoption Ban at issue denies to persons within Mississippi the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. By allowing straight coupes to adopt, while refusing to allow gay

couples to do the same, the State of Mississippi impermissibly distinguishes among similarly situated people by discriminating solely on the basis of sexual orientation."[287] Concomitantly, the case documents stated that the adoption ban "prohibits gay couples from adopting without any regard for their qualifications as parents or whether the adoption would be in the best interests of the child."[288] This succession of arguments paired concerns for the equal protection of the parents with the best interests of the child in question, which intimated that what is good for one party is good for the other. Similarly, that which is damaging to one party injures the other as well. Barring same-sex couples from adopting "demeans gay families and deprives them of equal dignity. [The law] also *demeans children* who are actually being raised by two gay married parents in Mississippi, but who only have one legal parent." [289] Depicting the adoption ban as reflective of an injurious "regime," the case documents positioned the ban "at odds with creating and maintaining a stable relationship within which children may flourish." [290]

The issue of personhood, which is cornerstone to arguments regarding Equal Protection under the Constitution, supports affective arguments against the adoption ban. Families, comprised of individual persons unified through their daily commitment to love and nurture each other within a stable home, were of central importance. As was argued in the case documents, the ban

> conveys the message that gay families are inherently less valuable than all other families and should not be afforded the same dignity under the law. It is a public, government-sponsored rejection of one of the most important relationships in the lives of gay Mississippians, and it unconstitutionally relegates them and their families to second-class

[287] Ibid., 30.
[288] Ibid., 19–20.
[289] Ibid., 20. Italics mine.
[290] Ibid., 21.

citizenship."[291]

Though many of the arguments, illustrated by the passage above, focused specifically on families wherein children were already being parented by same-sex couples, some arguments broadened the scope to include children waiting for placement in foster or adoptive care. A decision issued in *Campaign for Southern Equality v. Bryant III* by Justice Carlton W. Reeves, which was cited in the case documents, explained that the state of Mississippi, like many states,

> suffers when heterosexual parents have unprotected sex, bear children, and cannot take care of them. A number of those children end up in the foster care system, the juvenile justice system, and the children's mental health system. These children need homes and caretakers that love them. Same-sex couples can help."[292]

Put simply, foster children were positioned as a vulnerable population in need of a stable, loving home *above all else*. Same-sex couples do offer a sensible solution in that they can provide stability and care to children left displaced by supposedly irresponsible birth parents. Building upon this argument, and the premise that heterosexual birth parents of displaced children were irresponsible, CSE proffered that same-sex couples were, in many ways, uniquely suited to provide stability to the children who are awaiting placement because they were properly responding to the call to provide care. Having been born to parents unfit or unready to raise them, these children suffer mental and psychological harm as they await placement. Yet "research demonstrates that gay and lesbian couples have an understanding of how it feels to be different and may have overcome oppression and discrimination in their own lives."[293] Thus, the

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[291] Ibid., 22.
[292] Carlton W. Reeves, Campaign for Southern Equality v. Bryant III, No. 3:16-CV-442-CWR-LRA (United States District Court for the Southern District of Mississippi Northern Division November 25, 2014).
[293] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 24. For more information, reference Children's Bureau/ACYF/ACF/HHS, "Working With Lesbian,

personal struggles faced by children in the system mirror some of the same struggles that same-sex couples have had to overcome. In this way, it was argued that same-sex couples would be more naturally equipped to relate to these children. The case documents cited several sources that supported their claim that same-sex couples would be more likely (and better equipped) to parent children who are members of racial or ethnic minorities or who are otherwise seen as "other" in society. In preventing these couples from filling the role for which they are uniquely suited, CSE argued that "the State does not encourage the stability or well-being of the family or community in which they live, it only undermines it."[294]

All is Queer on the Home Front

Turning to the personal testimonies of Mississippians, the plaintiffs built a case for the ways in which same-sex couples could assuage many of the fears and threats that occur when children are displaced or left in the foster system indefinitely. By channeling the abstract value of the home through queered concrete values, CSE renegotiated morality as an abstract value associated not with sex/gender/orientation, but with an ethic of care. As was illustrated through the proceedings, same-sex couples' unique suitability to parent children with special needs and those from marginalized communities often resulted in a very normal upbringing for the child in question. In the end, it was illustrated that these couples could provide foster and adopted children with the quintessential American home built upon stability, nurturance and parents who meet the moral imperative to provide care. One such testimony came from Will Miller, a 28-year-old Mississippian. Parented by mothers who had been together for 23 years, Miller said that he never understood "what all the fuss was about. They loved me and that was all that mattered.

Gay, Bisexual, and Transgender (LGBT) Families in Foster Care and Adoption," Bulletin for Professionals (Child Welfare Information Gateway, January 2011).

[294] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 26.

It's all that should matter. Indeed, my childhood as the son of lesbian parents was extraordinary in that it was simply ordinary."[295] Certainly, stories like Miller's are not uncommon as "the positive experiences that children of gay parents have are consistent with decades of social science findings: children of same-sex parents and children of different-sex parents fare equally well academically, psychologically, and socially."[296]

The case against Mississippi's Adoption Ban echoes the plaintiffs' case in *Lawrence* in their assertion of Equal Protection and Due Process as relevant statutes through which to challenge the defendants in the case. The Equal Protection clause directs that "all persons similarly situated should be treated alike" and that "a law cannot be sustained where the proffered reasons for the law are simply irrational."[297] Similar to the argumentative choices made on behalf of Lawrence and Garner, the case documents filed by the CSE cited a slew of prior court cases that had directed a higher level of scrutiny to laws that discriminate particular groups of people. In particular, such scrutiny was applied in cases where the following factors are relevant: a group that has been historically discriminated against, a group that differs from others in a way that impacts their ability to contribute to society, a group that is defined by "obvious, immutable or distinguishing characteristics," a group that lacks political power because "prejudice against the group tends seriously to curtail the operation of those political processes ordinarily to be relied upon."[298] Same-sex couples fit the bill for several of these factors and it was upon which these premises that the CSE built their case.

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[295] Ibid.
Will Miller's testimony was taken from the Brief for Family Equality Council et al. as Amici Curiae in Support of Petitioners at 12, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (No. 14-556).
[296] Ibid.
[297] Ibid., 31.
[298] Ibid., 32–33.

Citing the Due Process clause, which contends that no State shall deprive citizens of life, liberty, or property without due process of the law, the CSE also linked personal freedoms guaranteed through the Constitution with the desire to establish a home. They claimed that protected liberties within the Due Process Clause include personal choices "central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[299] Speaking specifically to that clause, the CSE highlighted "the freedom to have and raise children is one of the most basic civil rights," which was supported the *Obergefell* decision.[300] Ultimately, Mississippi's adoption ban was an "outdated relic" reflective "of a time when courts and legislatures believed that it was somehow okay to discriminate against gay people simply because they are gay."[301] As was demonstrated through the affectively charged arguments in the case documents, the adoption ban, which prevented children from being adopted by "otherwise qualified married gay couples, [did] not improve or in any way affect the stability of families with opposite-sex parents."[302] Rather, such discrimination "circumvents the regulatory system that otherwise ensures that adoptions proceed in the best interests of the child."[303] Denying adoption rights to same-sex couples not only supports a stigma against gay couples seeking to raise children, but also extends that stigma to the children themselves. As the plaintiff's contended, families headed by same-sex couples already exist; households headed by same-sex couples already included children. The adoption ban did not create or erase families; it preempted the formation of a stable home and deprived families of the dignity and stature "afforded to straight, married couples through governmental recognition of one of their most

[299] et. al. Obergefell and Richard et. al. Hodges, Obergefell v. Hodges, No. 14-556 (US Supreme Court June 26, 2015).
[300] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 35.
[301] Ibid., 4.
[302] Ibid., 30.
[303] Ibid.

cherished relationships."[304]

> In his statement of regret about passing the Adoption Ban, Governor Musgrove stated: If you are fortunate in life, age and knowledge breed compassion. And as I have gotten older, I came to understand that *a person's sexual orientation has absolutely nothing to do with their ability to be a good parent.* In every decision I made as Governor, I always tried hard to view the *profound personal and individual impact of the laws* I signed and policies I enacted on every Mississippian. Had I vetoed the law denying LGBT adoption, the Legislature had more than enough votes to override my veto. Nonetheless, this decision that all of us made together has made it harder for an untold number of children to grow up in *happy, healthy homes* in Mississippi—and that breaks my heart."[305]

In the end, the CSE and others who advocated against the adoption ban contended that all things being equal, the key for children's success centers on the notion of the home. In shifting the field of argument away from the moral fitness of same-sex couples as parents and toward the moral imperative to provide care, the CSE engaged directly the values and characteristics that define a home. So much more than four walls and a roof, the home is where loved ones dwell and where sanctuary can be found. The case documents, and the resultant decision to strike down the ban, reflect a hierarchy of values wherein stability and nurturance supersede outmoded assumptions regarding morality and homosexuality. By amplifying personal testimonies and shared experiences, the plaintiffs made present the problems associated with a backlog of children waiting to be placed in safe, loving and permanent homes, thereby overwhelming counter-arguments through affectively charged *loci* of severity. As was stated in the case brief, "the question before the Court is not what kind of family is best. That is not a question for this or any

[304] Ibid., 35.
[305] Musgrove, "Portman's Conversion Should Be a Lesson," paras. 4 & 8. Italics mine.

court to decide."[306] The question is now, and perhaps was inevitably about the degree to which members of a partnership, family, community, or country, should care for one another.

[306] Campaign for Southern Equality et al., Complaint for Declaratory and Injunctive Relief at 4.

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Queer Legal Worldmaking:

An Answer to Stagnation and LGBTQIA+-Exclusive Policy

Queer legal worldmaking is a complex and interactive process through which judges, lawyers, voters, plaintiffs and defendants negotiate a tangled web of co-constituted rhetorics via formal and informal channels of power brokerage. The role of culture, language, and human relationships has been integral to the development of queer social movements, and subsequently, queer worldmaking in legal and public contexts. This dissertation has dissected the argumentative processes through which progressive advocates arguing for the expansion of queer rights have created rhetorical space for queer perspectives in legal and public deliberation.

Public and legal deliberation tends to be conservative and resist change, but my analysis has proven that social movements can engage these seemingly stagnate sites of influence with argument *loci* that constitute communities around fulcrums of shared experiences. Through argumentative *loci* of presence, advocates in the three aforementioned case studies deployed affect to accentuate and make relevant the threat posed to LGBTQIA+ individuals and broader communities by heteronormative policy. The magnitude, proximity and severity of anti-queer policy make such laws as intolerable as they are discriminatory for vested stakeholders. The key then is to renegotiate how vested parties are delineated and to widen the scope of stakeholders by reinvigorating communities around shared values.

Fundamental to advocates in *Lawrence*, Vote NO, and *Campaign* were definitional questions about the meanings of intimacy, privacy, partnership, marriage, and family. These questions have been pervasive in post-homophile era social movements, but only relatively recently have they been appropriated in legal reasoning and political decision-making. In part, the *Obergefell* decision was an answer to those questions. *Obergefell* asserted enduring love,

deep respect and fulfillment as common markers of Americans' pursuit for happiness, irrespective of one's sex/gender/orientation. Post-*Obergefell* legal logic contends a marital partnership is no more defined by the sex/gender/orientation of the partners than sexual intimacy is defined by genitalia, than a family is defined as the traditional nuclear model. *Obergefell* crystalized a fundamental obstacle for LGBTQIA+ rights advocates: status quo politics misrepresents intimate partnerships, marriage and family and the value clusters that had come to be associated with those performances of private life in public domain.

Lawrence and Garner v. Texas, the Vote NO campaign, and *Campaign for Southern Equality v. Mississippi* encapsulate primary contexts wherein deliberation about queer rights policy take place. As exemplars of LGBTQIA+ advocacy, within and without the state and federal courtroom, these case studies reveal how vernacular, social movement rhetorics can be appropriated in legal argument to challenge legal precedent regarding queer rights. The three case studies I have examined develop a prescriptive vision for queer legal worldmaking. Ranging from the U.S. Supreme Court (*Lawrence*), to the Mississippi statewide Supreme Court (*Campaign*), to the TVs and billboards of Minnesota (Vote NO), advocates involved with the case studies constituted policy-making communities in legal and extra-legal contexts. These case studies demonstrate the dialectic relationship between social movements and the law as advocates attempt to make queer partnerships and families more present in political discourse.

In this chapter, I summarize the key arguments I have advanced in this dissertation and contextualize the contributions I have made to several theoretical areas including, intersections of social movement and legal discourses, the role of affect in creating presence, and the function of abstract and concrete values in community formation. This dissertation has affirmed that affecting change in legal and public deliberative discourses is often met with firm resistance and

is fraught with identitarian political conflict. Nevertheless, legal traditions and the social constructions that bolster them can be impacted through argument. Argument strategies for bringing about change, like those discussed in the prior case studies, take advantage of moments wherein values are renegotiated and reasserted in particular ways for particular parties. Moments of dissonance enable a reshuffling of who can be counted as a vested member of the community at stake and what values define the community. With this in mind, I conclude the chapter by discussing practical pathways forward for scholars and advocates hoping to engender continued resistance to laws and movements that would obfuscate or delegitimize queer lifeways.

Affect as a Tool for Creating Presence

A way of addressing the difficulty of bringing about change in legal deliberative contexts, affect as a feature of *loci* of presence bring problems associated with anti-LGBTQIA+ policy to the fore and to renegotiate community ties. In *Lawrence* Lambda Legal turned to *loci* of magnitude to make discursively present the material harms of anti-sodomy legislation for vested parties beyond homosexual individuals. Texas' Homosexual Conduct Law outlawed homosexual sodomy only, which meant that the person was being policed, not the action itself. For that reason, Lambda highlighted the affective resonance of government's "prying eyes" and the notion that all U.S. citizens value privacy and self-determination. Prior to *Lawrence*, same-sex couples who had been arrested for homosexual conduct violations in states like Texas who upheld and enforced statutes condemning such behavior, gays and lesbians could be designated as criminals, relegated to a status of delinquency in the community. The *Lawrence* decision, however, codified that the threat against private intimacy was a matter of public concern for same- and opposite-sex couples alike. From an affective standpoint, Lambda's argument deemphasized the emotional justification for designating homosexuality (and by extension,

homosexual sodomy) as immoral and diminished the negative affective resonance that had for so long been associated with homosexual sodomy. Lambda brought to the fore the unpleasantness of an altogether different scenario: that of "prying government eyes" watching the most intimate moments that take place in the bedroom.

The Vote NO campaign turned to *loci* of proximity to argue that amendments defining marriage as a union between one man and one woman would have unintended negative consequences for those closest to voters. Similar to *Lawrence*, advocates involved with the Vote NO campaign built community bonds between same- and opposite-sex couples. These appeals worked to create a community of vested individuals who valued love and commitment as the primary pillars of marriage and family. Specifically, the campaign redrew community lines around the shared experiences that marked day-to-day life as a family. Campaign spots cited the daily battle to get kids off to school and get to work on time, the importance of bringing up children to understand the dignity of their family, and the public performance of kinship. The campaign spoke directly to undecided voters, who may not have otherwise realized they had skin in the game, so to speak. By dialectically negotiating what marriage and family could look like, Vote NO highlighted for voters the threat posed to already existing families who would have been deemed "second-class" were the amendment to pass. In this case study, perhaps more so than hearings in the courtroom, the influence of affect on public opinion and the dialectic process of public argument was integral to success.

Advocates for *Campaign* argued from *loci* of severity to emphasize the problems with Mississippi's adoption law that kept same-sex couples from legally adopting. The plaintiffs in the case turned to the affective elements of child displacement to reveal a problem more dire than the idea of placing children in homes where they would be fostered or raised by same-sex

couples. By amplifying the experiences of families headed by same-sex couples, or same-sex couples seeking to adopt, CSE highlighted two entwined problems simultaneously. The first was that the ban wrongfully deprived gay and lesbian couples of their constitutional rights. The second was that the ban also posed problems for children with same-sex parents, the dignity of whose family was stripped, and a significant number of children in Mississippi in need of placement. CSE emphasized the affective resonance of "the home" to create rhetorical space for progressive models of the American family to dwell.

In each of the case studies, politically conservative arguments aimed toward preserving the status quo assumed that the majority of Americans considered homosexual partnerships immoral and deviant. Yet the rhetorical embodiment of lived experiences created the possibility for progressive arguments as intelligible and suasory on multiple legal and cultural levels. Counting on the affective function of values in argument, advocates in each case renegotiated community ties through *loci* of presence.

Reshaping Abstract and Concrete Values through Presence and Affect

Affect and presence make it possible to renegotiate the field of argument in legal reasoning and reorder the hierarchical relationship between values that come to bear on legal debates over the expansion of queer rights. Namely, advocates in each case study grounded their arguments in concrete values like sexual partnership, marriage, family and the home and established associations between abstract values like privacy, love, commitment, stability and safety. In so doing, advocates created the opportunity to lessen the argumentative impact of moral arguments regarding sex/sexual orientation. The rhetorical process of associating and dissociating concrete and abstract values from one another is useful when resolving value-driven arguments. Abstract values are general, transcend specific circumstances, and are not inherently

connected to any one instance or experience. However when abstract values are paired with a concrete value that is attached to "a living being, a specific group, or a particular object," the meaning of either value can be reframed. [307] Through its connection to an abstract value, a concrete value may be reframed to suit more universal contexts, and universal values can be made more specific.[308] Manipulating the relationship between abstract and concrete values is particularly useful in legal and political contexts. Individuals may claim allegiance to any number of concrete values but it is difficult to reconcile abstract values without the argumentative process of establishing similarities through particulars. [309] As such, arguing from the abstract to the concrete, and vice versa, was useful for advocates in these case studies who sought to minimize the cognitive dissonance that for some, issued from embracing morality and love and commitment within the context of queer partnerships and families.

The process of moving from between abstract and concrete values manifested slightly differently in each case study. When arguing on behalf of Lawrence and Garner, Lambda Legal decoupled values associated with moral rightness from questions of homosexual sodomy by building fresh associations between morality and *privacy*. Shifting the imperative for moral rightness, Lambda argued that privacy was an apt particular within which morality was reflected. By establishing privacy as a concrete value representative of abstract notions of moral rightness, Lambda could then assert the moral implications of defending same-sex partnerships, which were as deserving of privacy as intimate partnerships between opposite-sex couples, from the prying eyes of government. Through *loci* of magnitude, Lambda renegotiated the hierarchical relationship between morality and privacy as values reflective of everyday American

[307] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 77.
[308] Ibid., 76.
[309] Ibid., 79.

experiences. Community lines were redrawn; parties impacted by anti-sodomy laws were constituted as Americans concerned with equal dignity and individual liberty, not their sex/gender/orientation. In moving from the abstract to the concrete, Lambda asserted that every American, gay or straight, should expect that they would be free to live their lives without the government's intrusion into their homes, into their bedrooms.

Vote NO, on the other hand, moved from the concrete value of marriage and family toward abstract values of love and commitment in order to establish that same- and opposite-sex unions are more similar than they are different. Through *loci* of proximity, *Minnesotans United* countered arguments that defined marriage by the *type* of union (i.e., the relative sex/gender/desire of the partners). Rather, marriage was defined by the depth and strength of a loving, intimate relationship. Similar to the strategy used by Lambda, Vote NO shifted the moral implication for voters. While Vote Yes asserted the moral imperative to defend religious freedom, Vote NO asserted that voters had the moral obligation to defend their friends and neighbors from the threat posed by Amendment One. Leaning heavily on the affective aspects of the Golden Rule, *Minnesotans United* encouraged voters to reconsider the ways in which families were counted. As key players in the dialectic, Minnesotans renegotiated the value associations that define marriage and family such that those closest to them could seek public recognition as members of a unified community. In so doing, the debate over Amendment One could be shifted away from a discussion of religious freedom and moral superiority toward a defense of marriage and family as a lived experience, shared by those who value love, commitment and the Golden Rule.

Finally, CSE established a crisis of instability, financial cost, and loss of dignity, all of which are grounded in *loci* of severity, to facilitate a hierarchical reordering of values within the

discourse. Whereas the defendants of the case sought to situate the moral fitness of the parents or guardians as superior to other *Albright* factors, the progressive party diminished arguments related to the moral fitness of gay parents as hierarchically inferior, both in relative importance and veracity with regard to the plaintiff's case. References to "actual reality" and "authentic family life" brought abstract values associated with family closer in line with the lived experiences that represent "the home." In other words, reorienting the frame of reference away from the abstract and toward the concrete via affective appeals exalted the material needs of children above the ideological commitments of lawmakers. CSE amplified the problem of child displacement by contending that displaced children were particularly vulnerable and in need of stability, dignity and suitable homes. Doing so made it possible to shift the field of argument away from the moral fitness of same-sex couples as parents and toward a discussion of what constitutes a safe and loving home. The adoption ban was positioned as outmoded and overly rigid, incapable of adequately responding to the accelerating need for permanent, legal guardianship for displaced children and those living in same-sex households. Similar to the logic used in *Lawrence* and Vote NO, CSE emphasized the affective resonance of concrete values in order to forge fresh associations to abstract progressive values. In shifting the field of argument away from purely abstract value warrants pertaining to Christian ideology and morality, progressive advocates enabled a more inclusive argument imbued with greater plasticity and dynamism than outdated legal precedents could contain.

Renegotiating Value Hierarchies in Legal reasoning

This renegotiation of abstract and concrete values in relation to one another makes two main outcomes possible in political contexts. First, by shifting the field of argument, advocates can make queer perspectives legally relevant and the values associated with such perspectives as

superior to others. Values and value arguments can become relevant in queer legal worldmaking when they achieve "stickiness" across both legal and social movement discourses. Renegotiating the relationship between abstract and concrete values in legal debate empowers progressive advocates to read queer perspectives in the values that people hold most dear. In other words, values and value warrants can empower a person to argue not only for a particular action, as a reflection of a certain point of view, but also to assert the superiority of arguing from that point of view. The valuation of queer perspectives in legal reasoning assigns importance to those perspectives and invites the audience to assume a similar point of view. In the case studies, values and appeals based on values were powerful argumentative supplements that created a queer-inclusive worldview, justified by its relevance and affective resonance.

Second, shifting the field of argument through affective channels can make concrete values superior to abstract values. In selecting certain elements over others as evidence in an argument, the relative importance and pertinence of those elements is elevated as well.[310] Concrete values are particularly useful when the hierarchical relationship among values are actively negotiated. Concrete values operate as touchstones that make abstract values re-interpretable. When values are in dispute, "a person may disqualify it, subordinate it to others, or interpret it but may not reject all values as a whole."[311] Same-sex partnerships and families, when represented discursively can gain legitimacy as concrete, representations of value arguments that had already been made legally relevant. Arguments that spoke to the importance of preserving the nation's moral history, honoring a faith-filled lifeway, and bringing up children in stable, loving homes created rhetorical space in which Lambda Legal, *Minnesotans United,* and CSE could ultimately realign abstract and concrete values with queered material referents.

[310] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 116.
[311] Ibid., 75.

Though conservative and progressive parties contend morality as important, in dispute were the concrete values that reflect it. In *Lawrence,* Lambda built associations between morality and a defense of privacy through the imagery of a bedroom, the physical representation of sexual intimacy. Vote NO linked morality with the Golden Rule in order to motivate voters to defend their friends and neighbors from the negative consequences of Amendment One. When arguing *Campaign,* CSE linked morality with the dignity of the home and an ethic of care. In each case, the simultaneous coupling and uncoupling of abstract and concrete values made it possible to assert affective arguments as convincing and superior to other modes of argument. The process of creating and sustaining value hierarchies with respect to ideological formations necessitates that a person acknowledge and dispense with those in opposition. As Perelman and Olbrechts-Tyteca argue, "In this respect, values are comparable to facts: for, when one of the interlocutors puts forward a value, one must argue to get rid of it, under pain of refusing the discussion; and in general, the argument will imply that other values are accepted."[312] As the relationships between abstract and concrete values are renegotiated, the acceptable parameters of argument may also shift. As such, value hierarchies enable the negotiation of values across social contexts and are integral to the process of creating and interpreting legal precedent. Values and value hierarchies are useful constructs in argument, particularly when challenging the status quo. The success of such arguments depends largely on the perceived relevance for vested audiences. As such, deliberative moments wherein values are renegotiated, or reasserted as hierarchically superior or inferior relative to one another, constitute a kairotic moment in which communities may be reconstituted, bound by shared affiliation to those values.

Theoretical Implications

[312] Ibid.

This dissertation contributes to several theoretical conversations. First, the three case studies provide a more complete picture about how legal change happens. More specifically, this dissertation discusses the ways in which social movement and legal rhetorics both contribute to the formation of policy and queer legal worldmaking. Language is integral to the creation of meaning in legal discourse and how values come to represent dearly held community ties. The law is reflective of cultural and social activities, all of which are dependent on language.[313] As a social and cultural function, the law is

> something we do with our minds, with language, and with each other. This is a way of looking at the law not as a set of rules or institutions or structures (as it is usually envisaged), nor as a part of our bureaucracy or government (to be thought of in terms of political science or sociology or economics), but as a kind of rhetorical […] activity.[314]

If laws constrain behavior, then argument creates and constrains the possibilities for the formation of law. The law is far from static. It can be translated and reappropriated for and by particular audiences in order to achieve socio-legal rights. Importantly then, judges, lawyers, voters, plaintiffs, defendants, and laypersons all may be constituted as a community of stakeholders in policy. The law is at its core a constitutive force and through argument, can impact how communities are created and transformed. Not merely a "system of rules (or rules and principles), nor reducible to policy choices or class interests," the law is a cultural context within which one party seeks to persuade another toward a particular position.[315] The law's greatest and most basic power is "in the coercive aspect of its rhetoric – in the way it structures sensibility and vision."[316] The law is created through the collaboration between existent policy

[313] White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. p. ix.
[314] Ibid. p. x.
[315] White, *The Legal Imagination, Abridged Edition*. p. xiii.
[316] Ibid. p. xiii.

and vernacular, grassroots and even extra-legal discourses that are rooted in the assertion of lived experience as legitimate resources in argument. Yet communities must be constituted and actively revitalized through argument. Understanding the ways in which social movements intersect with legal discourse is key to understanding how the law is created. As these case studies have shown, law is not only a product of the technical sphere, but of the public sphere.[317]

Second, as a function of technical and public sphere discourses, the negotiation between abstract and concrete values is a primary vehicle for queer legal worldmaking. Perelman and Olbrechts-Tyteca note the movement between abstract and concrete values can serve a key function in resolving value-driven arguments. As a value that is associated to specific ideas, persons, or objects, concrete values are an entry point for affective arguments.[318] Abstract values, when associated with the concrete, transcend specific circumstances and can facilitate the process of reframing the meaning of either value. Once the connection is made, a particular value may be reframed to suit more universal contexts, and universal values can be made more specific.[319] In the three cases studies, advocates deployed abstract values as tools for revolution and concrete values as tools for community building. In turning to abstract values such as privacy, love and commitment, and the ethic of care, concrete values like family and the home could be made more inclusive. Similarly, by deploying the affective resonance of concrete values, and by building associations to the abstract, advocates could impact the relative importance of abstract values. The renegotiation of the hierarchical position of abstract and concrete values facilitated progressive argument in each respective political context. While

[317] See Karen Griggs, "A Legal Discourse Community: Text Centered and Interdisciplinary in Social and Political Context," *Journal of Business and Technical Communication* 10, no. 2 (1996): 251.
[318] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 77.
[319] Ibid., 76.

politically conservative arguments relied heavily on the moral deviance of same-sex couples and parents, progressive arguments shifted the meaning of morality altogether, while simultaneously heightening the relative importance of other abstract values. What these cases ultimately illustrate is that both a hierarchical reordering of values and an assertion of concrete values as reflective of their more universally accepted, abstract counterparts is useful in progressive political argument. When contradictions arise between abstract values like morality, love or care, it is difficult to reconcile the contradictions without establishing similarities through particulars. As such, arguing from the abstract to the particular, and vice versa, is a practical method for reconciling contradicting value arguments and redrawing community lines around shared values in legal and public deliberative contexts.

Third, this dissertation more fully explores the function of affect in *loci* of presence. Each of the three *loci* of presence that were illustrated in this dissertation provide insight into how representations of queer partnerships and families gain visibility and legitimacy in the legal sphere. Argumentative appeals rooted in the magnitude, proximity and severity of problems associated with regulating sexual intimacy, marriage and family building could make the rhetorical embodiment of queer persons and lifeways "sticky" across both legal and social movement discourses. The discursive aspects of lived experience were vital resources for arguing from the *loci* of magnitude, proximity, and severity. Arguing through affect facilitates a "discursive effect" that makes a "phenomenon, idea, concept, process, or person [more] vivid, tangible, and /or proximate to an audience."[320] This "verbal magic" both focuses the audience's attention while altering its perceptions and perspectives, and motivates an audience toward an

[320] Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Study*, 4:456; See also John M. Murphy, "Presence, Analogy, and Earth in the Balance," *Argumentation & Advocacy* 31 (1994): 1–16.

action or judgment.[321] As an instrumental technique of argumentation, which often elicits emotional responses geared toward initiating a change in audience's attitudes or behavior, presence is persuasive and speaks to experiential existence.[322]

The process of making values more present is an inherently affective process. Presence "acts directly on our sensibility"[323] and has "an indisputable effect on those who recognize the symbolic connection, but none at all on others."[324] Illustrations that amplify or analogize experiences and values contribute to the affective impact of presence. Illustrations that made vivid and specific that which as abstract were useful for advocates in the Vote NO campaign and for the CSE. Amplifying the existence and legitimacy of queer partnerships and lifeways as fundamentally similar to those of heterosexual couples facilitated the transposition of queer perspectives in policy-making. No longer should queer partnerships and families be obfuscated within the law. No longer should queer partnerships and families be abstract reflections of some immoral lifeway. *Loci* of presence, and the affective impact of amplification, created rhetorical space for queer persons and the values they hold dear within the policies that govern their lives.

Moreover, affective arguments can make the process of political negotiation more pleasurable. Rather than adopt a confrontationalist perspective wherein winners triumph over losers on an ideological battleground, dialectic negotiation predicated on affective commonality broadens communities of protest to include non-marginalized individuals as vested parties. What these case studies illustrate is that arguing alongside comrades can be a more comfortable process than arguing against an enemy. As a direct living out of the Golden Rule, the emotional

[321] Karon, "Presence in The New Rhetoric," 97.
[322] See Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*; Mader, "On Presence in Rhetoric."
[323] Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 116.
[324] Ibid., 335.

resonance of amplification facilitates the presence of queer perspectives in common values, which are essential resources in legal argumentation *and* the constitution of communities of protest.[325]

Finally, these case studies show how amplifying queer experiences by moving from abstract to concrete value arguments takes advantage of the plasticity of concepts and better enables progressive advocates to respond to the exigencies they face and to make more strategic considerations of their audience. Each successive case study appealed to a broader audience than the last by relating the problems associated with each respective contested policy to a wider circumference of vested individuals. When advocating on behalf of Lawrence and Garner, Lambda Legal's primary task was to supplant outmoded legal precedent regarding sexual activity between two people. The outcome of the case not only challenged moral judgments that relegated homosexual relationships to a criminal status, but also overturned outmoded legal precedent that designated privacy and sexual intimacy beyond the scope of legal protection. By turning to *loci* of magnitude, Lambda set the stage for legal debates to follow in two key ways. Initially, Lambda developed the moral imperative for the state to protect the privacy of its citizens. Secondly, by amplifying the magnitude of the harms brought about by Texas' Homosexual Conduct Law Lambda illustrated how morality as an abstract value could have stronger ties to the virtue of private, intimate partnership than to sexual desire or orientation. Before the *Lawrence* decision, homosexual individuals were still represented as a social "infection," capable of spreading the disease of deviance within an otherwise virtuous populous. A post-*Lawrence* legalscape however, exonerated gay couples from their criminal status and co-created a cultural narrative that cast *Bowers*-era legal logic as the infectious disease in need of

[325] Ibid., 117.

eradication. Lambda's argument created rhetorical space wherein protecting citizens' privacy was the state's moral imperative, superior to outdated models of American morality. The case called into question the assumed moral deviance associated with homosexuality while also making legal debates about privacy and intimate relationships of greater concern to a greater number of people.

When arguing against Amendment One *Minnesotans United* built from the successes Lambda achieved in *Lawrence* by making more proximal the threats not only to intimate partnerships but also to families. The Vote NO campaign invited the voting public to weigh in on what makes a family a family with the expressed goal of widening the scope of who would be counted. The dialectic negotiation and affective arguments facilitated the constitution of persuadable voters as a community bound by abstract values like commitment and love and decoupled traditional family values from traditionally upheld definitions of marriage. By framing the family as a concrete value irrespective of the sex/gender/orientation of the married partners, Vote NO created rhetorical space for gay and lesbian heads of households that already materially existed. Importantly, Vote NO shifted the issue of marriage equality toward a debate about *family* equality. Amendment One in Minnesota predated *Obergefell*, which meant that the definitional stasis of marriage remained unsettled in legal discourse. Vote NO broadened the stakes of marriage equality to encompass the importance of the family. What Vote NO ultimately accomplished was to translate legal debate into a context wherein public opinion could stand in for legal precedent and wherein voters would have a direct hand in creating policy. In this case, more than the others, vernacular discourses intersected with legal rhetorics in order to further widen the public's purview in creating law. In so doing, the community of vested individuals not

only widened to include individuals from non-marginalized communities, but also enabled those members to see their gay and lesbian friends and neighbors' interests as proximal to their own.

Finally, *Campaign for Southern Equality v. Mississippi* extended the successes of *Lawrence*, Vote NO and *Obergefell* by asserting the moral imperative of providing care as a social responsibility, one that takes precedence over antiquated moral objections to same-sex couples as parents. CSE made present the severity of the problem of child displacement in order to argue for the superiority of placement in homes headed by same-sex couples. While morality was a relevant abstract value for the plaintiffs and defendants, the plaintiffs shifted the meaning of morality through its association to the concrete value of "the home." Whereas *Lawrence* subordinated morality as an abstract value less important than privacy, CSE returned to a conversation of morality, albeit from a different field of argument. The affective resonance of anecdotal evidence served progressive arguments that highlighted the uniquely severe problem of child displacement. In a post-*Obergefell* legalscape, married couples (gay or straight) are charged with an ethic of care, a moral imperative to take responsibility for children through foster care, adoption, or by supporting others' choice to provide such care. *Campaign* worked to widen the community of vested individuals beyond intimate partners and families to encompass societal interest. Mississippi's Adoption Ban characterized households by the sex/gender/orientation of the figureheads. What the case ultimately illustrates however is that sex/gender/orientation is not inherently nor incontrovertibly coupled with marriage and family. Linkages between moral virtue and same-sex attraction are contestable and likely will continue to be outmoded through legal argument. Additionally, abstract values like love, stability, and care have strong affective connections to the home and the values that define it. Defined by the

"right to be left alone," love and commitment, and an ethic of care, the home is an apt vector through which to sustain queer legal worldmaking.

Queer Legal Worldmaking and Rhetorical Change

Legal and social change is slow and complex. The result of incremental collaboration among vested parties to determine shared futures, such change requires continual, often uncomfortable negotiation to determine who can be counted as a vested party and what constitutes a shared future. Social movement rhetorics are important features of community building and social progress, and it is imperative that these rhetorics are understood. It is also vitally important to understand how social movements and legal rhetorics intersect and reach out to a persuadable audience in order to create lasting and meaningful change. This dissertation has established that affect as a tool of presence can reach persuadable audiences to both widen community boundaries and make LGBTQIA+ families and lifeways more present in legal discourse. Specifically, queer perspectives that are already evident in social movement contexts are amplified within legal contexts through *loci* of presence. As a process of "competing examples," legal reasoning produces decisions that arise out of a process in which "parties as well as the court participate in the law making."[326] Litigants, judges, plaintiffs, defendants and the public all have a stake in the laws that are created as well as laws that exist. On some level, each vested individual has played some role in making law.

A primary rhetorical problem that this dissertation has illuminated and, in part, addressed is that of creating an argument that is "sticky" for persuadable audiences. This is a problem that continues to hamper deliberation about the expansion of rights for queer persons. The *Obergefell* decision assuaged the problem somewhat, specifically in deliberation about same-sex marriage.

[326] Levi, *An Introduction to Legal Reasoning*, 504.

Obergefell made any remaining statewide prohibitions on same-sex marriage unenforceable. However, marriage is not the only socio-economic issue around which legal and public debate remains heated for LGBTQIA+ advocates. Since 1977, eleven states have passed some form of prohibition on adoption rights for same-sex couples.[327] Ranging from a resistance to the institution of gender-neutral terms for parentage, disallowing gay partners to adopt the biological children of their partners, to all-encompassing prohibition that prevent same-sex couples from fostering or adopting children altogether, these laws relegate same-sex couples to a second class status and bring about significant harm to the children caught in the crosshairs of the continued political firestorm.

Beyond the scope of marriage and adoption rights, queer and trans persons have also been targeted by exclusionary policies with regard to access to bathrooms and service in the armed forces. On August 25, 2017, President Trump signed a directive to reinstate a ban on transgender individuals from serving in the military. Caveats to the ban have continued to emerge from the Administration, namely through President Trump's deference to the pentagon in implementing the ban as well as the reservations that have been articulated by Secretary of Defense, James Mattis. Nevertheless, the ban echoes deliberative premises that facilitated the passage and eventual overturning of "Don't Ask, Don't Tell." Despite the gains that have been made through legal triumphs like *Obergefell*, discrimination against LGBTQIA+ individuals in workplaces, the military, and even rented properties is a persistent obstacle to those fighting for full rights and recognition of personhood within these communities. The attempt by communities hostile to LGBTQIA+ rights advancement to preserve the status quo and resist the installation of progressive policy makes the battle for persuadable audiences of even greater importance.

[327] Those states include Alabama, Arkansas, Florida, Idaho, Indiana, Kansas, Michigan, Mississippi, Nebraska, New York, and Wisconsin.

In large part, affect is a component in legal and public argument that reiterates the material consequences of policy for those the policy impacts. Of key utility in affective strategies is the function of empathy as an abstract value capable of associating with myriad concrete values. Advocates have deployed the constitutive power of empathy, through affect, to gain access to communities and public platforms wherein they can bring about change, not only within the case studies included in this dissertation and the realm of queer rights, but also civil rights as a whole. Empathy as an abstract value drove the activist agenda headed by Dr. Martin Luther King Jr. who argued that empathy and justice were inextricably linked. As King wrote in the *Letter from Birmingham Jail*,

> injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly. Never again can we afford to live with the narrow, provincial 'outside agitator' idea. Anyone who lives inside the United States can never be considered an outsider"[328]

Through King's paradigm, the application of justice through the law is contestable. We whom the law governs have vested interest in ensuring that the law is just. Through argument, communities bound by collective stake in moral justice, who fought on behalf of the "plight of the negro" in the 60s, advocate now for the interests of queer brethren in the present day. An affectively resonant argument, King's appeal to empathy reveals two interrelated truths that maintain their relevance across legal and extra-legal contexts: 1) Americanness cannot be characterized by one singular archetype, and 2) all American citizens are implicated in the perpetuation of injustice through the law for their continued allegiance to the United States. As

[328] Martin Luther King Jr., "Letter from Birmingham Jail," August 1963, para. 4.

has been illustrated in prior pages, there are deep injustices embedded into the notion of "law and order" in this country. Laws that violate the Fourteenth Amendment of the Constitution by privileging a certain way of living at the expense of other alternatives perpetuate an injustice rooted in the extra-legal rhetorics that along with legal rhetorics, formulate public opinion. Drawing concrete connections between the notion of empathy and the material interests of marginalized communities is an affective process that can bring to the light injustices otherwise left obfuscated. For lasting and meaningful change to take place such injustices must not only revealed but *experienced* by those who are part of the impacted community. Rhetorical embodiment is a powerful tool for accomplishing this task. Following the rule of law is not enough in the pursuit of higher justice, and the rule of law cannot alone illuminate the shared stakes of public life. Rather, the interaction between social movement and legal rhetorics provide the tools needed to ensure that the law is just.

Affect is a means through which advocates can renegotiate the values and value hierarchies that become relevant in legal debate. The reordering and re-coupling of abstract values and the concrete values and the shifting of the field of argument away from points of division toward points of unification, enable advocates to come to fight *for* the interests of their fellow citizens, rather than *against* the interests of the status quo. Individual legal cases serve as prominent and fertile grounds on which to apply such political strategy. Individual lawsuits put into stark relief the material, lived experience of injustice – and enable legal practitioners to tackle isolated premises as opposed to entire social platforms. Lambda Legal argued through *Lawrence* that no one would be less free to live their life authentically if intimate partnerships between gay men were decriminalized. Rather, all Americans would be *more* free to live their lives openly. *Minnesotans United* argued through the Vote NO campaign that marriage would

not be trivialized or in any way marred should same-sex marriages be recognized by the State. Rather, families already in existence would be *more* free to share in community life. CSE argued through *Campaign* that children would be no more harmed in the legal custody of gay, lesbian, and queer guardians. Rather, children in need of stability could gain access to safe and loving homes. Advocates in each case study in this dissertation deployed the strategic benefits of presence and affect to illustrate that fabric of our nation is made stronger by the addition of more threads, more voices that represent the shared qualities that unite all of us under a common banner. In creating seats for queer perspectives and lifeways at the proverbial table, affect lessens the inevitable tension experienced by those loyal to the status quo. Welcoming queer perspectives into legal paradigms does not take space away from one to give to the next. There are more than enough possibilities, more than enough seats when we build a bigger table.

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CURRICULUM VITAE

Hilary A. Rasmussen

Place of birth: Stevens Point, WI

Education

B.S., University of Wisconsin-Eau Claire, May 2008
Major: Public Communication

M.A., Northern Illinois University, May 2010
Emphasis: Communication, Rhetoric

Ph.D., University of Wisconsin-Milwaukee
Emphasis: Communication, Rhetoric

Dissertation Title: Amplifying LGBTQIA+ Presence Through Queer Legal Worldmaking: The Role of Affect in Renegotiating Value Hierarchies in Political Argument

ACADEMIC EMPLOYMENT

Adjunct Professor
August 2017-present
Department of Communication, University of Wisconsin-Milwaukee

Courses Taught

COMMUN 103: Public Speaking (1 section) *anticipated Spring 2018*
COMMUN 365: Human Conflict ONLINE (1 section) *anticipated Spring 2018*

Department of Communication, Concordia University Wisconsin

Courses Taught

COMM 205: Advanced Public Speaking (1 section) *anticipated Spring 2018*
COMM 201: Interpersonal Communication (1 section) *anticipated Spring 2018*
COMM 201: Interpersonal Communication (1 section) Fall 2017

Graduate Teaching Assistant
August 2013-May 2017
Department of Communication, University of Wisconsin-Milwaukee

Courses Taught

COMMUN 335: Critical Analysis of Communication ONLINE (2 sections) Spring 2016
COMMUN 335: Critical Analysis of Communication ONLINE (1 section) Fall 2016
COMMUN 335: Critical Analysis of Communication (1 section) Fall 2016
COMMUN 300: Interviewers & Interviewing (1 section) Spring 2016

COMMUN 300: Interviewers & Interviewing (1 section) Fall 2015
COMMUN 103: Public Speaking (1 section) Summer 2016
COMMUN 103: Public Speaking (1 section) Spring 2016
COMMUN 103: Public Speaking (1 section) Fall 2015
COMMUN 103: Public Speaking (2 sections) Spring 2015
COMMUN 103: Public Speaking (2 sections) Fall 2014
COMMUN 103: Public Speaking (1 section) Summer 2014
COMMUN 103: Public Speaking (3 discussion sections) Spring 2014
COMMUN 103: Public Speaking (3 discussion sections) Fall 2013

Assistant Professor of Speech
August 2010-May 2013
Department of Fine Arts and Communication, Southwest Minnesota State University

Courses Taught

COM 110: Essentials of Speaking and Listening (2 sections) Spring 2013
COM 110: Essentials of Speaking and Listening (2 sections) Fall 2012
COM 110: Essentials of Speaking and Listening (2 section) Spring 2012
COM 110: Essentials of Speaking and Listening (2 sections) Fall 2011
COM 110: Essentials of Speaking and Listening (1 sections) Summer 2011
COM 110: Essentials of Speaking and Listening (2 sections) Spring 2011
COM 110: Essentials of Speaking and Listening (2 sections) Fall 2010

Additional Responsibilities

Site Supervisor for the *College Now* concurrent enrollment program

- Supervised the instruction of Essentials of Speaking and Listening in regional high schools via the SMSU Distance Education department
- Mentored high school teachers as they created and implemented new course materials and adjusted to collegiate course delivery
- Participated in programmatic assessment of data

Assistant Director of Forensics

- Coaching and student mentorship
  - Held weekly coaching appointments with undergraduate competitors
  - Visited with prospective students interested in the major and/or Forensics
- Tournament travel and administrative responsibilities
  - Chaperoned students to and from Forensics tournaments
  - Served as a judge for regional and national Forensics tournaments
  - Aided in the organization and execution of the SMSU High School Invitational and Sectional tournaments, hosted on-campus
  - Coordinated all travel arrangements for tournaments (including, but not limited to: hotel and vehicle reservations, all necessary paperwork required by the university, maintenance of up-to-date emergency contact information for all traveling students, etc.)
  - Maintained budget records and proposals for the academic year

Instructor of Record
August 2008-May 2010
Department of Communication, Northern Illinois University

Courses Taught

COMS 100: Fundamentals of Oral Communication (2 sections) Spring 2010
COMS 100: Fundamentals of Oral Communication (2 sections) Fall 2009
COMS 100: Fundamentals of Oral Communication (2 sections) Spring 2009
COMS 100: Fundamentals of Oral Communication (2 sections) Fall 2008

Additional Responsibilities

Graduate Forensics Assistant

- Served as an assistant coach for an intercollegiate Speech and Debate team in charge of team travel, promotion and recruitment
- Served as an assistant director for NIU Summer Speech Institute (details below)
- Participated on the local volunteer recruitment committee for the 2009 National Communication Association Conference

Assistant Director – NIU Summer Speech Institute
Summer 2008-present
Northern Illinois University

- Organized and presented seminars in the areas of oral interpretation of literature
- Coached high school students in the selection and preparation of literature

PUBLIC RELATIONS AND PROFESSIONAL WRITING EXPERIENCE

Communications Assistant
September 2014-present
College of Health Sciences, University of Wisconsin-Milwaukee

- As a member of the Department of External Relations, created written content for the College of Health Sciences bi-weekly newsletter, which was disseminated to audiences within the college, university and community
- Created written content for the College's website including faculty biographies, directory information, academic program and department pages, alumni pages, and community service pages, during a college-wide redesign of all web content
- Conducted other duties as needed, including event planning, photography and interviews, within our small team of four

ACADEMIC RESEARCH

Publications

Rasmussen, H. A. (2017). *Amplifying LGBTQIA+ Presence Through Queer Legal*

Worldmaking: The Role of Affect in Renegotiating Value Hierarchies in Political Argument. (Unpublished doctoral dissertation). University of Wisconsin-Milwaukee, Milwaukee WI.

Rasmussen, H.A. (2017). Queer Theory. In M. Allen (Ed.) *The Sage Encyclopedia of Communication Research Methods* (pp. 1394-1396). Sage Publishers: Thousand Oaks, CA.

Walker, B., **Rasmussen, H. A.** (2015). "'... and finally some implications': (Mis)use of evidence in informative speaking." *National Forensics Journal, 33* (1), 5-13.

Competitively Selected Presentations

Rasmussen, H. A. "(Re)constituting an affective history on *Vanguard Revisited* digital archives." Paper presented at the 102nd annual convention of the National Communication Association in Philadelphia, PA, November 2016.

Rasmussen, H. A. "Strategic ambiguity in conservative political leadership: Deconstructing Nixon's attempts to unify the nation in 1968." Paper presented at the 102nd annual convention of the National Communication Association in Philadelphia, PA, November 2016.

Rasmussen, H. A. "(Trans)forming the dominant discourse: Arguing for Burke's irony in controversies surrounding transgender children." Paper presented at the 101st annual convention of the National Communication Association, Las Vegas, NV, November 2015.

Rasmussen, H. A. "Rhetorical queering as a mode of resistance in the digital world." Paper presented on the Top Paper panel for the GLBTQ Division at the 101st annual convention of the National Communication Association in Las Vegas, NV, November 2015.

Rasmussen, H. A. "Love, commitment, and family values: Civil activism in the 2013 campaign against Amendment One in Minnesota." Paper presented at the Central States Communication Association Conference, Madison, WI, April 2015.

Rasmussen, H. A. "Appropriations of motherhood: constructing the mythic American teacher." Paper presented on the Top Paper panel for the Women's Caucus at the Central States Communication Association Conference, Madison, WI, April 2015.

Rasmussen, H. A. "(Trans)forming the dominant discourse: Arguing for Burke's irony in controversies surrounding transgender children." Paper workshop at the 2015 Midwest Winter Workshop, Evanston, IL, January 2015.

Rasmussen, H. A. "'Great hair and pink shoes': Detrimental constructions of femininity in American politics." Paper presented at the National Communication Association Conference in Chicago, IL, November 2014.

Rasmussen, H. A. "30 years later: Examining evidence use in current public address events." Presented at the National Communication Association Conference in Washington D.C., November 2013.

Rasmussen, H. A. "Why we do what we do in Interp." Panelist at the Communication and

Theater Association Conference in Bloomington, MN, September 2011.

Invited Presentations

Rasmussen, H. A. "'In the 'kNOw': A panel discussion on same-sex marriage and the 2012 Minnesota constitutional marriage amendment." Served as emcee and moderator for a panel discussion regarding the potential passage of *Amendment One* in Minnesota, Southwest Minnesota State University, Fall 2012.

Rasmussen, H. A. "'Equality at the Altar': A panel discussion of same-sex marriage and the 2012 Minnesota constitutional marriage amendment." Served as emcee for a panel discussion regarding *Amendment One* in Minnesota, Southwest Minnesota State University, Spring 2012.

Rasmussen, H. A. "'The F-Word': A panel discussion of contemporary feminism." Served as a panelist in a public forum pertaining to contemporary feminist issues, Southwest Minnesota State University, Spring 2011.

Rasmussen, H. A. "'Ask! Tell!': A panel discussion of GLBT issues." Served as moderator and emcee for public forum on the implications of overturning DADT in the US military, Southwest Minnesota State University, Fall 2010.

PROFESSIONAL MEMBERSHIPS

Central States Communication Association (CSCA)
National Communication Association (NCA)
Rhetoric Society of America (RSA)

LEADERSHIP AND SERVICE

Reviewer for Rhetorical and Communication Theory NCA Division (Spring 2016)

Rhetoric Society of America, Student Chapter, Vice-President, University of Wisconsin-Milwaukee (Spring 2015-2016)

Reviewer for GLBTQ NCA Division (Spring 2015)

Reviewer for Political Communication NCA Division (Spring 2015)

Rhetoric Society of America, Student Chapter, Treasurer, University of Wisconsin-Milwaukee (Spring 2014-2015)

UWM Public Speaking Showcase for undergraduate Public Speaking students, co-coordinator (Spring and Fall, 2014), volunteer judge (Spring 2015 and 2016).

Southwest Minnesota State University Faculty Association (SmSUFA) Executive Committee member, Southwest Minnesota State University (Fall 2012-Spring 2013)

Minnesota Collegiate Forensic Association (MCFA) Executive Committee member,

Southwest Minnesota State University (Spring 2012-2013)

Gay Lesbian Bisexual Transgender Ally (GLBTA) SmSUFA faculty committee, Chair (member since Fall 2010), Southwest Minnesota State University (Fall 2012-Spring 2013)

Woman's Studies faculty committee, Chair (member since Fall 2010), Southwest Minnesota State University (Fall 2011-Spring 2013)

College Now Advisory faculty committee member, Southwest Minnesota State University (Fall 2011-Spring 2013)

First-Year Experience faculty committee member, Southwest Minnesota State University (Fall 2010-Spring 2013)

Contemporary Feminist Issues faculty committee member, Southwest Minnesota State University (Fall 2010-Spring 2013)

EDUCATIONAL AND PROFESSIONAL HONORS AND AWARDS

Melvin H. Miller Doctoral Teaching Award, University of Wisconsin-Milwaukee (Spring 2017)

Melvin H. Miller Doctoral Service Award, University of Wisconsin-Milwaukee (Spring 2016)

Dave Scheidecker Coaching Award, Northern Illinois University (Summer 2012)

Outstanding Graduate Student, Certificate of Merit, Northern Illinois University (Spring 2010)

Outstanding Woman Student, Northern Illinois University (Spring 2010)