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## Editor's Introduction

Welcome to the Eighteenth Volume of *Journal of Law and Social Deviance (LSD Journal)*, an independent, peer-reviewed journal. *LSD Journal* encourages submissions from a wide range of professionals, researchers, and scholars in a variety of fields. Within our broader interest in social deviance and the law, we are particularly interested in how law creates, inhibits, or challenges deviant behavior, especially as it evolves from, responds to, or inspires the animal kingdom, art, design, structure, pop culture, hate, religion, sex, illness, drugs, terrorism, and youth. Volume Eighteen is about alternative points-of-view and promoting innocence. Each article examines how to restore innocence, promote ambient wellness, and exercise good judgment. Past volumes have considered some related issues and solutions; and similarly, these articles call upon the past for inspiration and extend past success by innovating new ideas that respond to various problems. *LSD Journal* remains committed to publishing articles, essays, and book reviews that strongly represent the journal's niche and offer readers important, substantive, and useful literature.

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**BOYS TALKING ABOUT *THE BOYS IN  
THE BAND*:  
READING WINDSOR AND  
OBERGEFELL DECISIONS INTO  
COMMERCIAL QUEER THEATRE**

Brian M. Balduzzi, Esq., Tax LL.M., MBA, CFP®<sup>1</sup>

I. INTRODUCTION

For many people within the Lesbian, Gay, Bisexual, Transgender, and Queer (the “LGBTQ+”)<sup>2</sup> community, the movement for LGBTQ+ equality stands at a crossroad. After winning marriage equality with United States Supreme Court decisions

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<sup>2</sup> This community includes Lesbian, Gay, Bisexual, Transgender, Transsexual, 2/Two-Spirit, Queer, Questioning, Intersex, Asexual, Ally, and other communities under the umbrella “queer” or LGBTQ+. Herein, the term LGBTQ+ will be used to reflect this inclusive community.



in *Windsor v. United States* and *Obergefell v. Hodges*, activists and community members question the future and direction of the movement.<sup>3</sup> The tension within the movement can be bifurcated into two foci: legal equality and lived equality.<sup>4</sup> Legal equality is the pursuit of legislative and litigation strategies for including and protecting sexual orientation and gender identity for equal access within employment, housing, public accommodations, credit, education, healthcare, and more.<sup>5</sup> Lived equality, on the other hand, concerns the reduction of bias, barriers, insecurity, and injustice faced by the members of the LGBTQ+ community in their daily lives because of their identity and status within this community.<sup>6</sup> Brandie Balken, Program Officer of the Gill Foundation, proposes that the advocates for changes within lived

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<sup>3</sup> See Brandie Balken, *Landscape of the Movement*, 38 HUMBOLDT J. OF SOC. REL. 8, 8 (2016). See also *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>4</sup> See Brandie Balken, *Landscape of the Movement*, 38 HUMBOLDT J. OF SOC. REL. 8, 8 (2016).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

equality use “social organizing, public education, coalition building, cross-issue organizing, and public demonstrations.”<sup>7</sup> Notably absent from this list is the vital role of theatre as a literary imagination for consensus-building and the storytelling for the LGBTQ+ community, specifically in relation to politics, society, and the law.

Drama has the potential to affect legal studies and the relationship between persons in the law in many ways, but most relevantly as a literary vehicle and tool for triggering discussion for the depiction of law and its effects on the *dramatis personae*, and as a reflection of the potential externalities felt or supposed by the collective audience.<sup>8</sup> LGBTQ+ and theatre scholar Jill Dolan writes about the potential for theatre to “create spectatorial communities who are able and willing to intervene in the larger public area.”<sup>9</sup> Other scholars suggest that by outpacing public opinion on issues of social reform, legal

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Leopold Lippert, “How Do You Think We Get to Pottery Barn?” *Mainstream Gay Drama, Homonormativity, and the Culture of Neoliberalism*, 75 S. ATLANTIC REV. 41, 51 (2010).

rulings may have “mobilize[d] opponents, undercut moderates and retard[ed] the cause they purport to advance.”<sup>10</sup> Despite these observations, “theatre and sexuality have always been productive spheres of overlapping influence, especially in contemporary Western performance.”<sup>11</sup> As social and legal activists have pursued and, even arguably, embraced assimilationist strategies through litigation and political lobbying for marriage rights, with the advent of marriage equality decisions the future of the “gay agenda” lies in a precarious and open position with the potential for returning to the more liberal agenda of the earlier movement.<sup>12</sup> This point of reflection incites one to consider “affective and emotional engagement with a queer past” and one that “consciously avoids narratives of progress and affirmation.”<sup>13</sup>

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<sup>10</sup> Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC’Y REV. 151, 152 (2009) (citing Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 482 (2005)).

<sup>11</sup> Jill Dolan, *THEATRE & SEXUALITY* 3 (2010).

<sup>12</sup> *Id.* at 14.

<sup>13</sup> Lippert, *supra* note 8, at 55 (citing Heather Love, *FEELING BACKWARD: LOSS AND THE POLITICS OF QUEER HISTORY* 4 (2007)).

Despite the wins inherent in the gay marriage legal decisions, one cannot read these cases without noting the exclusionary pursuit of such rights tied to heteronormative assumptions for reproduction and the familial, whereby one has simultaneously disregarded and isolated the lives of people of color and the sexual “other” outside of the monogamous and gender binary.<sup>14</sup> This “gay pragmatism” dominated United States political and legal agendas for over 20 years and arrived at a new homonormativity where one lacks the power and incentive to contest the dominant heteronormativity and institutions but instead uphold and sustain them through privatized domesticity and consumption.<sup>15</sup> The same-sex couple’s silent retreat from the public sphere to the privacy of their domesticated homes represents a “highly ideological and deeply politicized move.”<sup>16</sup> This restraint and congratulatory rhetoric of individual liberties

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<sup>14</sup> *Id.* at 47.

<sup>15</sup> *Id.* at 45 (citing Lisa Duggan, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 50 (2003)).

<sup>16</sup> Lippert, *supra* note 8, at 44.

obscures the underbelly of the remaining inequities and inequalities inherent in democratic processes, community engagements, and economic well-beings.<sup>17</sup> Criticism of legal and social progress, drawn from both a re-reading and paranoid sensibility of recent case law as well as a revival of gay drama, provide a heightened sense of the outcomes and effects of heteronormative progress, neoliberalism, and potential for a shift towards embracing the diversity of queer lives, dreams, and desires on stages, in courtrooms, and within communities.

With a modern reading of *The Boys in the Band*,<sup>18</sup> one might find more shame and clichéd tropes theatricalized for the pleasure and comfort of the white, heteronormative audiences. This theatricality, under the safety of a progressive upper-middle class audience, provides solace and reinforces the stereotypes personified from *Windsor* and *Obergefell*

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<sup>17</sup> *Id.* at 44-45.

<sup>18</sup> Mart Crowley, *THE BOYS IN THE BAND* (2008).

decisions.<sup>19</sup> Judicial opinions, widely read for their directions on the law and its relationship to culture, provide the new status quo for the marginalized community; however, it is the relationship with and to the dominant culture that must be rectified through popular culture. Mart Crowley's *The Boys in the Band* under the direction of two-time Tony Award-winner Joe Mantello and in the safety of a less controversial Broadway stage offers the self-loathing and stereotyped domination of the subordinate culture to assuage any beliefs of subversive homosexual culture.<sup>20</sup> Yet, while it ran 1,001 performances during its original Off-Broadway theatre, only 14 months after its premiere, and following the Stonewall riots, activists considered the play "on the wrong side of history."<sup>21</sup> One of its

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<sup>19</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>20</sup> Peter Libbey, "The Boys in the Band" is Bound for Broadway at 50, *NEW YORK TIMES*, Nov. 1, 2017, available at <https://www.nytimes.com/2017/11/01/theater/the-boys-in-the-band-is-bound-for-broadway-at-50.html>.

<sup>21</sup> Reid Orvedahl, Interview with Mart Crowley and Erin Moriarty of 48 HOURS, *Playwright Mart Crowley on the Revolutionary The Boys in the Band*, *CBS NEWS*, May 6, 2018, available at <https://www.cbsnews.com/news/playwright-mart-crowley-on-the-revolutionary-the-boys-in-the-band/>.

current stars, Jim Parsons, notes that the “very, very groundbreaking” play offered “a first kind of insight into what gay life may look like for a lot of people.”<sup>22</sup> Queer theatre critics and scholars question the historical acceptance or support for such a play because it opened Off-Broadway, rather than on it, suggesting that the commercial potential was doubtful, and that the production of such a play was still “dangerously daring for Broadway audiences.”<sup>23</sup>

Despite the dichotomy between groundbreaking historical gay drama and antiquated and stereotypical gay melodrama, *The Boys in the Band* may offer a hidden, more subtle opportunity to engage in a form of queer activism, legal analysis, and dramatic imaginary. In itself, under its current expression, “queer” refers to the unsettling of established cultural forms and modes of reception, particularly as

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<sup>22</sup> Andrew Rannells & Jim Parsons on ‘Very Gay’ & ‘Very Groundbreaking’ *Boys in the Band*, BROADWAY BUZZ, May 8, 2018, available at <https://www.broadway.com/buzz/192114/andrew-rannells-jim-parsons-on-very-gay-very-groundbreaking-boys-in-the-band/>.

<sup>23</sup> Nicholas de Jongh, NOT IN THE FRONT OF THE AUDIENCE: HOMOSEXUALITY ON STAGE 133 (1992).

defining to sexual norms and themes.<sup>24</sup> Within the 1968 play, with modern sensibilities and a queer re-reading, one may find language and situations that suggest more progressive and timely debates about the effects of the *Windsor* and *Obergefell* decisions, and the future of marriage equality, and, more importantly, the queer family and community.<sup>25</sup> By observing the importance of the choice of language exercised by the Supreme Court Justices in their marriage equality opinions as supertext that audience members bring with them into the 2018 revival of *The Boys in the Band*, one can layer this evolving cultural understanding and framework with the canonical gay play to discover potential within a revivalist impulse of queer theatre, a novel approach to using dramatic literature with legal texts to uncover potential cultural and humanist truths. These new truths may help guide one into a more compassionate, artful, and engaging understanding

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<sup>24</sup> Farfan, *supra* note 132, at 3. See also Madelyn Detloff, *Woolf and Lesbian Culture: Queering Woolf Queering*, in VIRGINIA WOOLF IN CONTEXT 345 (Bryony Randall & Jane Goldman, eds.) (2012).

<sup>25</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).



of the diverse needs and potential outcomes within queer communities and society at large.

In this Article, Section II considers briefly the 1968 original production of *The Boys in the Band*, and its recent revival on Broadway.<sup>26</sup> Next, Section III explores the context and some of the language used in the Supreme Court cases of *United States v. Windsor* and *Obergefell v. Hodges*.<sup>27</sup> Section IV then compares this reading with the language used in *The Boys in the Band*, as spoken by the gay characters and presumably heard by Broadway audiences in 2018. Finally, in Sections V and VI, the Article concludes by examining how, given the comparison of language between the literary and legal, the revival of *The Boys in the Band* and other theatrical productions, can serve a vital purpose in the continued push towards LGBTQ+ equality and

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<sup>26</sup> Peter Libbey, “The Boys in the Band” is Bound for Broadway at 50, *NEW YORK TIMES*, Nov. 1, 2017, available at <https://www.nytimes.com/2017/11/01/theater/the-boys-in-the-band-is-bound-for-broadway-at-50.html>.

<sup>27</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

community, and the future of law and dramatic literature.

## II. STRIKING UP *THE BOYS IN THE BAND*

Theatre has been a specific and unusual form of political activism and community for nonconforming sexual identities in the United States.<sup>28</sup> Playwright Lanford Wilson opined in 1988 that “the theater is the only public forum a gay writer has.”<sup>29</sup> Despite the New York legislature outlawing any play that dealt with “the subject of sex degeneracy or sex perversion” from 1927 to 1967, playwrights, directors, and actors collaborated to design and fashion a “homosexual iconography,” including a series of codes and language that signify what the plays’ text could only imply.<sup>30</sup> Language, along with appearance and behavior, became important signifiers that later playwrights used to corroborate

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<sup>28</sup> Alan Sinfield, *OUT ON STAGE: LESBIAN AND GAY THEATRE IN THE TWENTIETH CENTURY 1* (1999).

<sup>29</sup> Interview by Robert Massa with Lanford Wilson, *VILLAGE VOICE* (June 28, 1988).

<sup>30</sup> de Jongh, *supra* note 19, at 3, 12.

or subvert audience expectations.<sup>31</sup> By the 1960s, the theatre became an echo chamber for the “noises of dissonance” as factions among the old and new cultures clashed in a war for a stronghold on the American public.<sup>32</sup> Amidst this climate, gay communities began arguing that their internalized conception of self as constituting a “problem” was instead a question of “prejudice and discrimination.”<sup>33</sup> When the more popular plays about homosexuals preferred to conform to sexual myths and sensationalism, in 1968, Mart Crowley wrote *The Boys in the Band*.<sup>34</sup>

Heralded as a transition drama, *The Boys in the Band* straddled two distinct worlds for its audiences in the late 1960s: (1) the play dwelled in the old indulgence of homosexual guilt and shame; and (2) the play aspired to a new age of community, sexual self-confidence, and alternative to the heteronormative modes of living and expectations

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<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 86.

<sup>33</sup> *Id.* at 88 (citing John D’Emilio, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 237 (1983)).

<sup>34</sup> de Jongh, *supra* note 19, at 58.

that are approvingly and affirmatively imagined.<sup>35</sup> The literary and theatrical imaginary allow the actors, playwright, and audience to experience both a play about homosexuality and, as *New York Times* critic Clive Barnes recognized, “a homosexual play” that uses this way of life as a valid basis for the human experience.<sup>36</sup> Robin de Jesús, the actor who plays Emory in the 2018 production, remarks that Director Joe Mantello made this production different by reinforcing the belief that these gay men all love each other, creating a sense of community that “makes [their] version special.”<sup>37</sup>

Many queer critics and scholars have disparaged that the theatre’s treatment, and exploration of the homosexual experience has bordered on the conservative and even mythic lines of belief, reflecting a prevailing middle-class appeal and

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<sup>35</sup> *Id.* at 91.

<sup>36</sup> *Id.* at 133 (citing Clive Barnes, *Theater: ‘Boys in the Band’ Opens Off Broadway; Mart Crowley Drama is at Theater Fair*, N.Y. TIMES, Apr. 15, 1968, at 48).

<sup>37</sup> Joseph V. Amodio, *The Boys in the Band Returns to Broadway to Mark Its 50<sup>th</sup> Anniversary*, NEWSDAY, May 16, 2018, available at <https://www.newsday.com/entertainment/theater/boys-in-the-band-1.18553246>.

ideology.<sup>38</sup> Notably absent from theatre, especially the commercial, the legal, social, and cultural problems for the queer community have been left to the courts, streets, or other literary forms. With the advent of favorable Supreme Court decisions in *Windsor* and *Obergefell*,<sup>39</sup> same-sex couples began to see their inclusion in the national legal code and as legitimizing their way of life and ideologies under a dominant set of shared beliefs.<sup>40</sup> This shift in both political and social acceptance and visibility forms the backdrop for how contemporary audiences read and see a play like Crowley's *The Boys in the Band*. The language and behavior seen, heard, and read reflect not only the literary and theatrical imagination for Crowley and his audiences in 1968, but allow new audiences to consider the impact of marriage equality and the public acceptance and appearance of the band of the 21<sup>st</sup>-century homosexual man. The band beats the same drum, though condensed from a

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<sup>38</sup> de Jongh, *supra* note 19, at 188.

<sup>39</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>40</sup> Jacob Juntunen, *Mainstream AIDS Theatre, the Media, and Gay Civil Rights: Making the Radical Palatable* 1 (2016).

two-act to a one-act play, but sounds vitally different and plays to a different set of emerging sensibilities and needs.

In 1950, homosexuals were considered to have constituted a security risk; they were regarded as “unseen corruptors of the body politic.”<sup>41</sup> A December 1950 Senate subcommittee reported that a homosexual “was defined by his ‘lack of emotional stability’, the weakness of his ‘moral fibre’ and his capacity for seducing heterosexuals.”<sup>42</sup> Implicit in these arguments and myth-making is the suggestion that the sexual instability of heterosexuals made them easily seducible, an idea that *The Boys in the Band* treats both comically and tragically.<sup>43</sup> In addition, family life is also deemed to be in opposition to the queer existence, with the family’s permanency and security within society and the friendless limbo without community, rules, or

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<sup>41</sup> de Jongh, *supra* note 19, at 50 (citing *Employment of Homosexuals and Other Sex Perverts in Government*, 81st Cong. 241 (1950)).

<sup>42</sup> *Id.*

<sup>43</sup> de Jongh, *supra* note 19, at 50.

chance of relationship or lasting happiness observed for the gay man.<sup>44</sup>

Despite these observations for society, the American stage, however, has been seen as a welcoming environment for the exploration and expressions of differences, where the marginalized or oppressed “others” may give voice to their struggles and participate in the literary and dramatic imaginary of their hidden, or idealized, lives.<sup>45</sup> Theatre represented a venue where “pleas for tolerance and demands for equality could be heard, and what academics refer to as ‘teaching moments’ could educate both sympathetic and hostile audiences.”<sup>46</sup> Despite this opportunity, *The Boys in the Band*, though generally accepted as a breakthrough gay play, depicted both more realistic images of the modern homosexual and presented outmoded stereotypes of gays.<sup>47</sup> The play provided

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<sup>44</sup> *Id.* at 14.

<sup>45</sup> James Fisher, *Introduction* to WE WILL BE CITIZENS: NEW ESSAYS ON GAY AND LESBIAN THEATRE 1, 2 (James Fisher eds., McFarland) (2008).

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 1.

lasting value in its generalized and historical warning against a closed life, or guarded attempts to hide behind a public façade of a heterosexual life.<sup>48</sup>

The play also provided comparatively progressive images of the gay lifestyle and the dilemmas faced by some of the more marginalized members within this community, particularly the aging, the effeminate, the religious minority (namely, Jews), and the people of color, among others.<sup>49</sup> Playwright William M. Hoffman, known for his seminal gay play *As Is*, noted that *The Boys in the Band*, “more than any other single play, publicized homosexuals as a minority group.”<sup>50</sup> Seen as an act of defiance and in some ways empowering, a production of *The Boys in the Band* provides visibility and stereotypical but sympathetic portrayal and perspectives of gay men.<sup>51</sup> However, other scholars argue that it reinforced the representation of

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<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.*

<sup>50</sup> John M. Clum, *STILL ACTING GAY 203* (2000) (citing William M. Hoffman, Introduction to *GAY PLAYS: THE FIRST COLLECTION* (William M. Hoffman ed., Avon Books) (1987)).

<sup>51</sup> Dolan, *supra* note 10, at 20.



gay men as “pathological, diseased, suicidal, and perverse” and isolated its characters in the privilege of their whiteness and class, ignorant of civil activism and the perpetuation of the dream of being heterosexual.<sup>52</sup>

### III. THE COURT HAS SPOKEN

#### A. *United States v. Windsor*<sup>53</sup>

In 2013, in *United States v. Windsor*, the Supreme Court of the United States (“SCOTUS”) held Section Three of the Defense of Marriage Act (“DOMA”) to be unconstitutional because it deprived same-sex couples of the “equal liberty of persons that is protected by the Fifth Amendment.”<sup>54</sup> The case involved a surviving female spouse challenging DOMA for excluding a same-sex partner from the definition of “spouse” for the purposes of her decedent (female) spouse’s estate tax return.<sup>55</sup>

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<sup>52</sup> *Id.* at 21.

<sup>53</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>54</sup> *See id.* at 2680.

<sup>55</sup> *Id.* at 2682.

Justice Antonin Kennedy delivered the majority opinion, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan; Chief Justice John Roberts filed a dissenting opinion; Justice Antonin Scalia filed a separate dissenting opinion, joined by Justice Clarence Thomas and by Chief Justice Roberts in Part I; and Justice Samuel Alito filed his own dissenting opinion, joined by Justice Thomas in Parts II and III.<sup>56</sup> The diversity of responses from the Court become increasingly important as scholars examine the impact of this case on future marriage equality, due process and equal protection cases, and the perception of same-sex couples within the law and society.

### 1. Justice Kennedy's Majority Opinion

In *Windsor*, while recognizing that the definition of marriage is under the States' exclusive purview, the majority examined the DOMA's effects on the "long-established precept that the incidents, benefits,

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<sup>56</sup> *Id.* at 2681.

and obligations of marriage are uniform for all married couples within each State.”<sup>57</sup> The majority stated that DOMA imposed restrictions and disabilities, resulting in injury and indignity to same-sex couples and their families.<sup>58</sup> They also acknowledged that the States’ interest in defining and regulating marital relations is part of the recognition under *Lawrence v. Texas* that “private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’”<sup>59</sup> The majority granted that by recognizing same-sex marriages performed in other jurisdictions and then authorizing the same, “New York sought to give further protection and dignity to that bond.”<sup>60</sup>

Significantly, New York’s act gave “lawful conduct a lawful status,” deeming such relationships worthy of dignity and respect in the community equal

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<sup>57</sup> *Id.* at 2692.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2692 (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

<sup>60</sup> *Windsor*, 133 S. Ct. at 2692.

with other marriages.<sup>61</sup> The majority addressed the balancing by states for the “historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”<sup>62</sup> Its examination of the House report found that DOMA perpetuated moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional morality.<sup>63</sup> DOMA wrote inequality into United States federal law by identifying a subset of state-sanctioned marriages and making them unequal, creating two separate regimes for same-sex couples whereby they were legally married under state law, but deemed unmarried for federal purposes, creating a precarious and unstable position for them and their marriages and telling them and the rest of the world that they are “unworthy of federal recognition.”<sup>64</sup> The majority called this differentiation “demean[ing]” and “humiliat[ing],” making it difficult to understand

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2696.

<sup>63</sup> *Id.* at 2693.

<sup>64</sup> *Id.* at 2694.

“the integrity and closeness of [these] families.”<sup>65</sup> They also drew attention to the ways that DOMA had visibly and publicly burdened same-sex married couples’ lives.<sup>66</sup> It concluded that by removing this class from the responsibilities and benefits of the law, DOMA deprived such persons the liberty protected by the Fifth Amendment of the United States Constitution and, under the Due Process Clause, the equal protection of the laws.<sup>67</sup>

## 2. Dissents

Chief Justice Roberts’ dissent sought to qualify the majority’s opinion as based on federalism and restricted as such for DOMA’s overall constitutionality.<sup>68</sup> He was, in a sense, pumping-the-brakes for an inevitable follow-up case challenging the remainder of DOMA; while the majority opinion allowed for state choice under federalism, Chief Justice Roberts acknowledged that DOMA

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<sup>65</sup> *Id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See id.* at 2695-96.

<sup>68</sup> *See id.* at 2696 (Roberts, J., dissenting).

continued to allow states to bar same-sex couplings from the definition of marriage.<sup>69</sup> He also meaningfully chose not to engage in an examination of societal and legal treatment of same-sex married couples, unlike the majority and other dissents. Significantly, his agreement with Justice Scalia for the case's lack of jurisdiction indicated his unwillingness to wrestle with perceptions of (in)equality or due process.<sup>70</sup>

Justice Alito penned his own dissent, joined in part by Justice Thomas, which limited the scope of the challenge to DOMA to whether the Constitution guaranteed the right to enter into a same-sex marriage and whether the substantive component to the Due Process Clause for such right was “deeply rooted in this Nation’s history and transition.”<sup>71</sup> He stressed judicial restraint, but waxed poetically about the institution of the family, a notable departure from the otherwise present focus on the function and

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<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2714 (Alito, J., dissenting) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997)).

positioning of marriage.<sup>72</sup> He suggested that “family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects.”<sup>73</sup> He cited the diversity of perspective on how expanding the recognition of marriage to same-sex couples would impact the institution.<sup>74</sup>

Overall, he believed that the question of same-sex marriage “should be made by the people through their elected officials,” before addressing the equal protection decision as “misguided.”<sup>75</sup> He based this conclusion, as well as his conviction for the popular vote to decide the question, on the duality of the competing views of marriage.<sup>76</sup> The irony is that he retreated from an exploration of the family and its relationship in contemporary society to the question of the function of marriage throughout time and the divergence of such opinions into two camps of

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<sup>72</sup> See *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

<sup>73</sup> *Id.* at 2715.

<sup>74</sup> See *id.*

<sup>75</sup> *Id.* at 2716.

<sup>76</sup> See *id.* at 2720.

thought. He found that the Constitution is silent and that should be enough for the Court, but he supplied numerous footnotes to pepper his own seemingly neutral opinion on the matter. These footnotes become valuable prose for considering how modern society, and legal experts such as the Supreme Court Justices, view and decide the legal rights and responsibilities of same-sex couples, the positioning of marriage within society, and the function of the family.<sup>77</sup> Explicitly, he agreed with DOMA’s Congress that its definition under Section Three of DOMA validly sought to protect the view of “marriage as a valuable institution to be fostered” and that married couples compromise “a unique type of economic unit that merits special regulatory treatment.”<sup>78</sup> Implicitly, he suggested that by removing Section Three and recognizing same-sex marriage under federal law that the institution of marriage would not be fostered, same-sex couples are not the same type of unique economic unit

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<sup>77</sup> See *id.* at 2719, n. 7.

<sup>78</sup> *Id.* at 2720.



worthy of special treatment under federal law, or both. The result is a dissent that suggests impartiality and deferral to states' rights, but instead has whiffs of exclusion and presumptions for a particular vision of marriage that the writer reportedly avoided enshrining.<sup>79</sup>

### 3. Justice Scalia's Dissent

Justice Scalia engaged in his own examination and determination regarding the right for both the Court to consider the estate tax claim and constitutionality of Section Three of DOMA, as well as the rights, privileges, and power of the people, including same-sex couples.<sup>80</sup> He framed his dissent as a weighing and obstruction of the different powers held and exercised by American people and institutions.<sup>81</sup> Significantly, he argued that the majority offers a confusing rationale for basing its decision on equal protection because of its "passing

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<sup>79</sup> See generally *Windsor*, 133 S. Ct. at 2711-2720.

<sup>80</sup> See *Windsor*, 133 S. Ct. at 2697-98 (Scalia, J., dissenting).

<sup>81</sup> *Id.*

assertion that the Constitution protects the ‘moral and sexual choices’ of same-sex couples” and its avoidance of the words “substantive due process” and its accompanying historical analysis.<sup>82</sup> He called the majority’s maneuvering “nonspecific hand-waving,” which feels like a code or signifier for the effeminate physical response of a gay man gesturing or posturing with emotion.<sup>83</sup> With this dismissal of the majority’s opinion, Justice Scalia seemed to suggest that same-sex couples and their supporters are just extra sensitive and looking for ill intent where none might exist against these parties.<sup>84</sup> His language describing the hypothetical pro-DOMA legislature and injured same-sex couple is telling. He used emotionally-charged phrases like “unhinged members of a wild-eyed lynch mob” to characterize the majority’s description of the Act’s defenders.<sup>85</sup> When defending the difficult choice-of-law issues that might emerge, he posed an example of a “pair of

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<sup>82</sup> *Id.* at 2706.

<sup>83</sup> *Id.* at 2707.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2708.

women who marry,” not as a “same-sex married couple” or even “homosexual couple.”<sup>86</sup> While he referred to them later as a “couple,” he does not qualify them as “married” in his example, and only refers to opposite-sex persons as “spouses.”<sup>87</sup> This subtle shift in language and qualifiers indicated his own discomfort in including these parties and this community within the traditional notions of marriage, even while states like New York and close to one dozen others had already done so by statute or court decision.<sup>88</sup>

The crux of his dissent, aside from jurisprudential concerns, was dismissing the alleged malice assigned by the majority to the defenders of traditional marriage, emphasizing the ill-intent motives highlighted in the majority’s opinions as “accusations” and “high-handed invalidation.”<sup>89</sup> He exaggerated the majority’s conclusions that DOMA demeaned, imposed inequality and stigma, denied

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See id.* at 2689 (majority opinion).

<sup>89</sup> *Id.* at 2708-09 (Scalia, J., dissenting).

dignity, branded gay people as “unworthy,” and humiliated children and families to demonstrate that the majority acts beyond reason and “demeans *this institution*,” the Supreme Court, and judiciary branch.<sup>90</sup> Moreover, he pitted the parties in even more stark characterizations by stating that the majority adjudicated opponents to changes to marriage as “*hostes humani generis*, enemies of the human race.”<sup>91</sup> His animus towards the majority’s holdings can be read in his hyperboles and embellishments of the majority’s language, fueling his audience and supporters with feelings of opposition and declarations of war.<sup>92</sup> Scalia also recognized the power of language, and its purpose in future interactions with the law, and its effect on society’s on-going debate over marriage.<sup>93</sup> Ironically, he challenged the majority and its

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<sup>90</sup> *Id.* at 2708.

<sup>91</sup> *Id.* at 2709.

<sup>92</sup> See generally *Windsor*, 133 S. Ct. at 2697-2711 (Scalia, J., dissenting) (describing the majority as “formally declaring anyone opposed to same-sex marriage an *enemy* of human decency” and “the majority *arms* well any challenger” and categorizing the sides as seeing “victories” and “defeats”).

<sup>93</sup> See *id.* at 2710.

supporters in their “black-or-white” story of “hate your neighbor or come along with us,” and implicitly inserted charged language, such as “monsters” and “struggles,” to fuel the confrontations between these neighbors.<sup>94</sup> Despite his resolution to “let the People decide,” he read into the majority’s opinion to provide additional fuel for the marriage defenders’ negative reactions to the Court’s decision and future interactions and debates.<sup>95</sup> This response will likely have a lasting effect and be seen in the next SCOTUS marriage equality decision; the response also continues to influence the perception within the queer community and society at large.

### B. *Obergefell v. Hodges*

In 2015, the Supreme Court heard its second of the marriage equality cases, *Obergefell v. Hodges*, a collection of District Court challenges filed by 14 same-sex couples and two widowers claiming that state officials violated the Fourteenth Amendment by

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<sup>94</sup> *Id.* at 2711.

<sup>95</sup> *Id.*

denying them the right to marry or have their legal out-of-state marriages given full recognition within their home state.<sup>96</sup> The Court granted review and limited the case to two questions: (1) “Whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex,” and (2) “Whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.”<sup>97</sup> Justice Kennedy penned the majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, again; Chief Justice Roberts filed a dissenting opinion, joined by Justices Scalia and Thomas, who each wrote their own dissenting opinions, joined only by each other, and who also joined Justice Alito’s dissent.<sup>98</sup> The wealth and diversity of opinions provides ample fodder for discovering and discerning the varied language to describe the marriage equality decision and debate, making it even more valuable for society in

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<sup>96</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>97</sup> *Id.* at 2593.

<sup>98</sup> *Id.* at 2592.

understanding the popular perception of same-sex partners and the queer community.

### 1. Justice Kennedy’s Majority Opinion

Justice Kennedy’s majority opinion focused upon the importance of marriage in society and for each individual. He described it as “transform[ing] strangers into relatives, binding families and societies together” and as the “first bond of society.”<sup>99</sup> He highlighted that the petitioners sought not to demean or destroy marriage but uphold it as a pinnacle for society and their lives, noting their “respect—and need—for its privileges and responsibilities.”<sup>100</sup> Early in his opinion, he also gave clues about his own respect for the evolving nature and perception of same-sex couples when he refers to “their immutable nature” dictating that marriage to a same-sex partner as the only “real path to this profound commitment.”<sup>101</sup> This respect and

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<sup>99</sup> *Id.* at 2594.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

acknowledgement for the popular “Born This Way” motto and belief is further emphasized when he humanized the petitioners in his re-telling of James Obergefell and John Arthur’s relationship and subsequent marriage.<sup>102</sup> He used phrases like “fell in love;” “started a life together;” “establish[ed] a lasting, committed relation;” “commit[ment] to each other;” and “mutual promise.”<sup>103</sup>

Amidst the backdrop of these stories joined by this bond, Kennedy also detailed the evolution of the institution of marriage, which he describes as a history of “both continuity and change.”<sup>104</sup> Even while giving this history lesson, he peppered his opinions with empathetic language regarding the experiences of same-sex couples, reinforcing their “same-sex intimacy,”<sup>105</sup> the silencing of their love and commitment,<sup>106</sup> and the adversarial reaction and conflict within their daily lives.<sup>107</sup> He challenged the

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<sup>102</sup> *See id.* at 2594-95.

<sup>103</sup> *Id.* at 2594.

<sup>104</sup> *Id.* at 2595.

<sup>105</sup> *Id.* at 2596.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*



antiquated perception that homosexuality can be treated as an illness and classified as a mental disorder by drawing attention to the substantial cultural and political developments, particularly in noting that these individuals began to “lead more open and public lives and to establish families.”<sup>108</sup> With these social developments came equally important legal challenges and decisions that helped to extend the rhetoric and popular understanding of queer individuals.

Justice Kennedy pontificated on the extension of the Due Process Clause to same-sex couples in much more detail in his *Obergefell* decision than he did in *Windsor*.<sup>109</sup> In particular, he emphasized that the fundamental liberties include “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>110</sup> He analyzed a litany of relevant precedents to draw the conclusion that the “right to

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<sup>108</sup> *Id.*

<sup>109</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>110</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>111</sup> More importantly, he legitimized some noteworthy, and compassionate language from lower courts’ decisions, such as in *Goodridge v. Massachusetts*.<sup>112</sup> However, in his support for marriage, he isolated those who are barred from marriage, but he also implicitly defined those who choose not to be defined by marriage.<sup>113</sup> For example, he identified the shifting perception of same-sex couples as “outlaw to outcast” before expressing that freedom does not stop there.<sup>114</sup> This freedom, however, also demarcates and restricts popular understanding of marriage and its associated positioning within society, especially when he proceeded to defend the right of marriage based on the safeguarding of children and families, related to the rights of “childrearing, procreation, and education.”<sup>115</sup> He also reinforced his and the Nation’s traditions by

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<sup>111</sup> *Id.* at 2599.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> *See id.* at 2600.

<sup>115</sup> *See id.*

emphasizing marriage as a “keystone of our social order”<sup>116</sup> and “building block of our national community”<sup>117</sup> by listing some of the governmental rights, benefits, and responsibilities accompanying marital status.<sup>118</sup>

Justice Kennedy profoundly and broadly interpreted the Equal Protection Clause to allow the Court to recognize some of the new insights and societal understandings that can reveal “unjustified inequality” within fundamental institutions and honored traditions that have previously been “unnoticed and unchallenged.”<sup>119</sup> This reexamination is a form of dramatic revival to assess the familiar with fresh eyes under a new interpretation and understanding. Under this analysis, Kennedy and the majority observed keen

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<sup>116</sup> *Id.* at 2601.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* (listing “taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules,” among others).

<sup>119</sup> *See id.* at 2603.

parallels with *Loving v. Virginia*<sup>120</sup> and *Zablocki v. Redhail*,<sup>121</sup> particularly in recognizing the bounds of liberty and equality under the Constitution within the institution of marriage. Similarly, the Court also looked to *Lawrence v. Texas* for a revival of the legal treatment of gays and lesbians, acknowledging and seeking to remedy under the Due Process Clause the continuing inequality resulting from state sodomy laws.<sup>122</sup>

The Court also equated the denial of the right to marry to the invasion of privacy and barring them from a fundamental right to “control their destiny” and inherent in the liberty of their personhood under the Constitution.<sup>123</sup> They said that such a denial “works a grave and continuing harm;”<sup>124</sup> this harm will be seen, in both historical and lasting form in the characters within *The Boys in the Band*.<sup>125</sup> The petitioners’ stories, along with the loneliness and

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<sup>120</sup> 388 U.S. 1 (1967).

<sup>121</sup> 434 U.S. 374 (1978).

<sup>122</sup> 539 U.S. 558 (2003).

<sup>123</sup> *Obergefell*, 135 S. Ct. at 2604 (majority opinion).

<sup>124</sup> *Id.*

<sup>125</sup> See also Mart Crowley, *THE BOYS IN THE BAND* (2008).

isolation felt in *The Boys in the Band*, signaled and made clear the urgency of the issues presented before the *Obergefell* court.<sup>126</sup> Not only does the denial of the right to marry harm individuals, but the conflict of laws issue arising from the recognition bans inflicted “substantial and continuing harm” on these couples.<sup>127</sup>

Significantly, along with redressing these harms, the Court also recognized that it has a role in “teaching the Nation” in regards to the positioning of same-sex couples’ right to marry and exercise of said right under state law.<sup>128</sup> In its willingness to listen to the petitioners and their “friends of the court,” along with educating themselves about the multitude of state and federal laws impacted by marriage recognition at both levels, the Court played a fundamental role in legitimizing and de-stigmatizing the empathy necessary to redress some of the harm inflicted upon these couples through the inequities in

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<sup>126</sup> See *Obergefell*, 135 S. Ct. at 2604. See also Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>127</sup> See *Obergefell*, 135 S. Ct. at 2607.

<sup>128</sup> See *id.* at 2606.

the law. Such example also prepared the stage for similar stories and dialogue to continue understanding differences, but more importantly, how same-sex couples are similar to opposite-sex couples, yet treated differently under the law and in society. Justice Kennedy closed his opinion by respecting and understanding the petitioners, and those like them, in their litigation by stating:

Their plea is that they do respect [marriage], respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.<sup>129</sup>

This loneliness was personified in *The Boys in the Band* in 1968, and was seen through a similar lens in the 2018 revival, but given this majority opinion and its fresh understanding and interpretation of marriage equality, the experience of viewing the play anew also presents a stark plea for something more

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<sup>129</sup> *Id.* at 2608.

to be granted and understood in contemporary society.

## 2. Chief Justice Roberts' Dissent

Chief Justice Roberts penned his own dissent, which feels like a dark warning cloud for the principle of federalism and the separation of powers. In it, he admonished the majority for “stealing this issue from the people” and warned that “making a dramatic social change [will make same-sex marriage] that much more difficult to accept.”<sup>130</sup> By focusing upon the democratic republic and its elected representatives to make decisions for the people, Chief Justice Roberts separated and minimized any question or discussion of fundamental rights; such minimization in his dissent implies that he perceived a lesser gravity of harm and indignity than in prior Due Process Clause cases involving marriage rights.<sup>131</sup> He restricted the definition to its evolutionary origins in meeting “a vital need,”

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<sup>130</sup> *Obergefell*, 135 S. Ct. at 2611-12 (Roberts, C.J. dissenting).

<sup>131</sup> *See id.* at 2612.

namely procreative, from which he determines its fundamental premise based upon its association with survival.<sup>132</sup> Despite this heteronormative view of marriage, he also supported William Blackstone's conviction that marriage is "one of the 'great relations in private life.'"<sup>133</sup> He openly acknowledged that it is a "voluntary contract," but emphasized that its fundamental nature to existence and survival is necessarily linked to procreative elements.<sup>134</sup> He differentiated that the core meaning of marriage had not changed, despite "deep transformations in its structure," namely in regards to race and coverture.<sup>135</sup>

Chief Justice Roberts' concluding analysis reprimanded the "unprincipled tradition of judicial policymaking" that he observes within the majority's opinion.<sup>136</sup> He rejected *Lochner v. New York*<sup>137</sup> and

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<sup>132</sup> *See id.* at 2613.

<sup>133</sup> *Id.* (citing 1 W. Blackstone, COMMENTARIES \*410; J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 78-79, 39 (J. Gough ed.) (1947)).

<sup>134</sup> *Obergefell*, 135 S. Ct. at 2613-14 (Roberts, C.J., dissenting) (internal citations omitted).

<sup>135</sup> *Id.* at 2614-15 (internal citations omitted).

<sup>136</sup> *See id.* at 2616-17.

<sup>137</sup> *See Lochner v. New York*, 198 U.S. 45 (1905).



its progeny, favoring more judicial restraint, and supported the proposition that “courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws”<sup>138</sup> and “not hold laws unconstitutional simply because [they] find them ‘unwise, improvident, or out of harmony with a particular school of thought.’”<sup>139</sup> An emphasis on history is similar to re-staging an antiquated play as an authentic revival; it obscures the present while reinforcing the social norms in the original production as if the same circumstances and conditions existed today. This restraint, if applied equally to both literature and the law, would result in a more conservative view of social relations and literary imaginary. While the law inherently requires “more respect for the teachings of history, solid recognition of the basic values that underlie society, and wise appreciation of the great roles [of] the

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<sup>138</sup> *Id.* at 2617 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

<sup>139</sup> *Obergefell*, 135 S. Ct. at 2617-18 (Roberts, C.J., dissenting) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)).

doctrines of federalism and separation of powers,”<sup>140</sup> the law also has the opportunity to correct inequities through its interpretations of fundamental rights and their relations to individuals’ current lives.

Through *Griswold v. Connecticut*, Chief Justice Roberts drew an almost laissez-faire principle towards the right to privacy suggested by the majority as applied to the right to marry.<sup>141</sup> He suggested that *Griswold* and *Lawrence* can be summarized as the “right to be let alone.”<sup>142</sup> “Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit,”<sup>143</sup> however, in removing the federal recognition or stability of such, the government implicitly secluded same-sex couples to the fringes of society, the proverbial closets of their New York City apartments, as one finds in *The Boys in the*

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<sup>140</sup> *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J. concurring)).

<sup>141</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>142</sup> See *Obergefell*, 135 S. Ct. at 2619-20 (Roberts, C.J., dissenting) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, n. 10 (1972)).

<sup>143</sup> *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

*Band*.<sup>144</sup> This freedom does not imply rights or recognitions, and Chief Justice Roberts was cautious to bestow or acknowledge any fundamental right, particularly for fear of expanding the class of legal marriages to include plural marriages.<sup>145</sup> This idea, especially as it applies to *The Boys in the Band* and both their individual singularity and collective familiarity, warrants additional analysis outside of the scope of this Article.

To conclude, Chief Justice Roberts analyzed the risk of harm in the same-sex marriage decision, agreeing that times may change though he seems resistant to discard or ignore history and its constraints.<sup>146</sup> He reinforced that the Court's determination "comes at the expense of the people . . . in the midst of a serious and thoughtful public debate . . . [and] carefully considering . . . [and] reexamining their positions [on same-sex marriage]."<sup>147</sup> Though proponents of same-sex

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<sup>144</sup> See Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>145</sup> *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

<sup>146</sup> *Id.* at 2623.

<sup>147</sup> *Id.* at 2624.

marriage may have won equality, they have lost something perhaps far greater, in Chief Justice Roberts' opinion: "the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause."<sup>148</sup> This persuasion is rarely discussed in *The Boys in the Band*, and the homosexual characters seem even resistant or afraid to humanize their love and relationships and open existence in the presence of a heterosexual intruder into their closeted and safe space.<sup>149</sup> Such isolation is a product of the resistance to engaging with the democratic process and the fear of retaliation, as the law continues to intrude into their space, and the risk of physical altercations remains high.<sup>150</sup>

### 3. Justice Scalia's Dissent

Justice Scalia preferred to echo Chief Justice Roberts' dissent by emphasizing the loss of "self-

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<sup>148</sup> *Id.* at 2625.

<sup>149</sup> *See infra* Section IV. *See also* Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>150</sup> *See infra* Section IV.

rule” and the power of the people to govern themselves.<sup>151</sup> Scalia seemed to punish such behavior as observed within the apartment rented by Michael, a single, gay, pessimistic, and sarcastic man in the 1960s, marked with isolationism and secular community-building, by reinforcing the observable status quo as a ratification and universality and uncontroversial nature of limiting marriage to one man and one woman.<sup>152</sup> Scalia looked to history for an example, or even a controversy regarding such limitation, especially at the time of the ratification of the Constitution or Fourteenth Amendment and finds none.<sup>153</sup> His trust, or conviction, that the People would naturally exercise their “liberty” to create a principle or tradition of promoting, or at least acknowledging, the existence of same-sex couples implies that there were no boundaries or restrictions of their exercise of this right or power.<sup>154</sup> By observing even the internal discontent and seclusion

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<sup>151</sup> Obergefell, 135 S. Ct. at 2627 (Scalia, J., dissenting).

<sup>152</sup> *See id.* at 2628.

<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

in the men's lives within *The Boys in the Band*, one sees an exploration within the dramatized literary imaginary where the public recognition or exposure of their authentic lives leads to paranoia, guilt, shame, and physical and emotional pain.<sup>155</sup>

Scalia also ridiculed the notions that marriage helps couples find “other freedoms, such as expression, intimacy, and spirituality,”<sup>156</sup> or that the latter two qualify as freedoms. He contradicted the notion that marriage encourages freedom of expression by narrowly construing the exercise of such right as incompatible with the popular notion that marriage “constricts, rather than expands, what one can prudently say.”<sup>157</sup> His explanation borders on the cynical, rather than the profound, but he echoed some of the discontent in the restrictive nature of marriage and relationships, found in Hank and Larry's relationship in *The Boys in the Band*.<sup>158</sup>

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<sup>155</sup> See *infra* Section IV. See also Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>156</sup> See *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting) (citing the majority opinion).

<sup>157</sup> *Id.* at 2630.

<sup>158</sup> See *infra* Section IV.

The narrow construction of relationships and marriage, however, ignores that marital agreements are based upon the fundamentals of contract law, permitting parties to negotiate, debate, and determine the boundaries of their roles and responsibilities, as restricted only by public policy.<sup>159</sup> Unlike his opinion in *Windsor*, Scalia resisted comments about the nature of same-sex marriage and homosexuals within society, leaving one to speculate how, if at all, his opinions have changed in these regards.<sup>160</sup> His dissent rested instead on the reaches of the judiciary, and the scope of legal decision-making under the separation of powers, but also the force of a powerful historical majority to shape the continued status quo for which *The Boys in the Band* echoes the results and conditions of such policy.<sup>161</sup>

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<sup>159</sup> See generally Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VIRGINIA L. REV. 1225 (1998).

<sup>160</sup> See *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting).

<sup>161</sup> See *id.*

## IV. TALKING GAY

Critics and scholars have analyzed *The Boys in the Band* as a play that offers new stereotypes for homosexuality, personified as representations of a new generation of gay men in its characters.<sup>162</sup> Stereotypes are characterized as caricatures of archetypes, identifying their presence and positioning within members of a group as part of a larger society.<sup>163</sup> Like earlier plays, the play achieves this positioning and posturing by emphasizing and designating a series of signs and behaviors for each character.<sup>164</sup> Collectively, each character's actions and speech indicate his membership within the emerging understanding of the modern homosexual.

Uniquely, however, Crowley capitalizes upon the newly-lifted New York obscenity ban by introducing “[f\*g] humor,” an overt proclamation of the uncloseted homosexual on New York stage.<sup>165</sup> This rhetorical device served multiple purposes in its

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<sup>162</sup> de Jongh, *supra* note 19, at 134.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*



original production, as denoted by critic Martin Gottfried in one of the play's early reviews, notably the amusement of the general audience as well as a deeper denotation of the characters' self-contempt, frustration, desperation, and overall irony.<sup>166</sup> Only in recent years have scholars begun to judge the language and action within the play as being a more subtle revolt against the heteronormative judgment against homosexuals and their values.<sup>167</sup> Some of the characters are now considered some of the first Gay Liberation victors for their successful revolt against the then-governing orthodoxies and ideologies, whether familial, social, or sexual, and have emerged as fully-fleshed, happy or less so, individuals who will come to be known as "gay" shortly after its premiere in the modern queer and broader communities.<sup>168</sup>

The play follows an evening among alleged friends in a "smartly appointed duplex apartment in

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<sup>166</sup> *Id.* (citing Martin Gottfried, *Theatre: The Boys in the Band*, WOMEN'S WEAR DAILY, Apr. 15, 1968).

<sup>167</sup> de Jongh, *supra* note 19, at 138.

<sup>168</sup> *Id.* at 139.

the East 50s” of New York City in the 1960s.<sup>169</sup> The friends gather to celebrate the birthday of Harold, “the most conspicuously ‘queer’ man among them,” and who each seem to fit other cultural stereotypes and presumptions of the play’s premiere: “the self-hating homosexual who has internalized homophobia of his society and turned it on himself; the ‘straight-acting’ gay man who can pass as heterosexual; the promiscuity of gay male culture, based on what was seen as a constitutional inability to be monogamous, and the desire for sex over emotional intimacy.”<sup>170</sup> The self-hating homosexual is the most prominent stereotype within the play, with physical maladies laden by the anxiety and conflict of his existence within society being borne by Michael and Donald most prominently, and other characters to a lesser extent. As the play opens, Donald arrives to Michael’s New York City

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<sup>169</sup> Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>170</sup> Dolan, *supra* note 10, at 20.

apartment from a canceled therapist appointment, openly addressing his depression and pessimism.<sup>171</sup>

MICHAEL: Maybe after about ten more years of analysis you'll be able to move back to town permanently.

DONALD: If I live that long.

...

DONALD: . . . Ever have an anxiety attack at sixty miles an hour? Well, tonight I was beside myself to get to the doctor—and just as I finally make it, rush in, throw myself on the couch, and vomit out how depressed I am, he says, “Donald, I have to cancel tonight—I’m just too sick.”

MICHAEL: Why didn't you tell him you're sicker than he is.

DONALD: He already knows *that*.<sup>172</sup>

The characters are almost painfully aware of their status as then-popular gay stereotypes, knowing that they are gay, alone and unhappy, and that they may

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<sup>171</sup> MART CROWLEY, *THE BOYS IN THE BAND 5* (40th-Anniv. ed. 2008).

<sup>172</sup> *Id.*

be happier if they were straight.<sup>173</sup> Harold insults Michael by calling him “a sad and pathetic man [who is] a homosexual but [doesn’t] want to be.”<sup>174</sup> As Michael asks, early in the evening and sober: “There’s nothing quite as good as feeling sorry for yourself, is there?”<sup>175</sup> Even before the evening’s action, he, and the audience, are made to feel that gay men are looked down upon, but by few people more than themselves.

This shame follows the characters throughout the play, first appearing when Alan McCarthy, Michael’s former classmate from Georgetown University, calls and asks to visit Michael’s apartment that evening.<sup>176</sup> Michael calls his dinner guests a “*freak show*” and openly lectures Donald on people’s “different standards” regarding their attitudes towards people, and their lifestyles.<sup>177</sup>

DONALD: What the hell do you care  
what he thinks?

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<sup>173</sup> John M. Clum, *STILL ACTING GAY* 204 (2000).

<sup>174</sup> CROWLEY, *supra* note 115 at 108.

<sup>175</sup> *Id.* at 13.

<sup>176</sup> *See id.*

<sup>177</sup> *See id.* at 16.

MICHAEL: Well, I don't really, but .

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DONALD: Or are you suddenly  
ashamed of your friends?

MICHAEL: Donald, *you* are the only  
person I know of whom I am truly  
ashamed. Some people *do* have  
different standards from yours and  
mine, you know. And if we don't  
acknowledge them, we're just as  
narrow-minded and backward as we  
think they are.<sup>178</sup>

Like the same-sex couples and individuals  
affected by Supreme Court marriage equality cases,  
Michael is beholden to others' perceptions of him  
and his lifestyle choices that inhibit him from  
actively and authentically living his life on his own  
terms.<sup>179</sup> Michael succumbs to these expectations in  
his passive and subvert ways by hiding his identity in  
college and even afterwards not publicly defying  
societal norms, asking Donald: "Well, even you  
know to admit it's much simpler to deal with the

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<sup>178</sup> *Id.* at 16.

<sup>179</sup> *See id.* *See also generally* United States v. Windsor, 133 S. Ct. 2675 (2013); and Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

world according to its rules and then go right ahead and do what you damn well please.”<sup>180</sup> The juxtaposition between his authentic self through his drunken actions and societal expectations creates his “morning-after ick attack,” or the anxiety and “unfathomable guilt” when he must reflect on what he did the prior night.<sup>181</sup> Donald is quick to conform to these societal expectations, avoiding a lecture from Michael on “acceptable social behavior” by promising to “sit with [his] legs spread apart and keep [his] voice in a deep register.”<sup>182</sup> This “butching up” is referenced by Michael.<sup>183</sup>

Each of the boys hurls epithets at each other, distancing themselves from the slang and offense, as well as status and hierarchy within the gay community and society overall.<sup>184</sup> Michael and Donald begin the evening with humorous japes with

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<sup>180</sup> *Id.* at 23.

<sup>181</sup> *See id.* at 18.

<sup>182</sup> *Id.* at 19.

<sup>183</sup> *Id.* at 23.

<sup>184</sup> *See id.*

wit and ownership over their statuses, playfully teasing the other.<sup>185</sup>

DONALD: Yeah. Come to think of it, you're the type that gives faggots a bad name.

MICHAEL: And you, Donald, *you* are a credit to the homosexual. A reliable, hardworking, floor-scrubbing, bill-paying fag who don't owe nothin' to nobody.

DONALD: *I* am a model fairy.<sup>186</sup>

The two gay men jokingly debate what it means to be a “good” and a “bad” “fag,” and what is respectful about their status as such.<sup>187</sup> Their status defines them, but it is their relationship to the language that they and others use that traps them.<sup>188</sup> When Bernard arrives, despite him being “dressed in a shirt and tie and sport jacket,” Emory exclaims with a “big scream”: “Oh, it’s only another queen!”<sup>189</sup> Bernard does not take long to give his own retort to

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<sup>185</sup> *See id.* at 10-11.

<sup>186</sup> *Id.* at 10-11.

<sup>187</sup> *Id.* at 11.

<sup>188</sup> *See id.*

<sup>189</sup> *Id.* at 26.

Emory: “You’re *such* a fag. You take the cake.”<sup>190</sup> Emory, as one of the lowest on the social gay hierarchy, as referenced by Bernard later in the play,<sup>191</sup> uses the most pejorative language to describe and codify the others: calling Harold a “frozen fruit” because of his former ice skating profession<sup>192</sup> and a “sick lady,”<sup>193</sup> referring to Michael as a “sis” and “Mary;”<sup>194</sup> and codify Bernard as “only another queen.”<sup>195</sup>

This language and humor come to define Emory for Alan, the ambiguous heterosexual among the group and arguable stand-in for the audience.<sup>196</sup> Alan tells Michael that he “can’t stand that kind of talk” and that it “grates” on him.<sup>197</sup> Alan’s status as the only married heterosexual man in the group, and power as an attorney, provokes a different reaction when he uses derogatory language against Emory by

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<sup>190</sup> *Id.* at 27.

<sup>191</sup> *See id.*

<sup>192</sup> *See id.* at 32.

<sup>193</sup> *Id.* at 40.

<sup>194</sup> *Id.* at 25.

<sup>195</sup> *Id.* at 26.

<sup>196</sup> *See id.*

<sup>197</sup> *Id.* at 43.



calling him to Michael “such a goddamn little pansy.”<sup>198</sup> While Alan retreats from such strong insults, he tries to spur Michael into joining him in his taunts and judgment: “[Y]ou have to admit he is effeminate.”<sup>199</sup> While Alan attempts to reconcile the situation by reminding Michael that he believes “your private life is your own affair,” he goes further when he reinforces a view similar to that held by some of the Supreme Court in *Lawrence v. Texas*:<sup>200</sup>

ALAN: I don't care what people do—  
as long as they don't do it in public—  
or—or try to force their ways on the  
whole damned world.<sup>201</sup>

Worse than publicly gay actions, projecting the status of being gay and disrupting the traditional marriage erupts one of the first fights of the evening, as Alan and Emory taunt each other with subtle presumptions of sexuality and effeminacy.<sup>202</sup> The fight escalates with Alan's “hate speech”

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See Lawrence v. Texas*, 539 U.S. 558.

<sup>201</sup> *Id.* at 43-44.

<sup>202</sup> *See id.* at 49.

accompanied by his physical threats of murder, and then “pandemonium” with Alan beating Emory on the floor “before anyone [can] recover[] from surprise and react[.]”<sup>203</sup> Following this outburst, and after Harold enters and laughs at the scene, Alan is described as “absolutely speechless” by Donald.<sup>204</sup> Language drove antagonism and distancing among heterosexual and homosexual characters, and the lack of language also hindered their abilities to interact and communicate.<sup>205</sup> Only when Alan can look for pity for his supposedly physical maladies and sickness does he begin speaking and interacting with the rest of the guests.<sup>206</sup> Emory is quick to confuse any response from Alan as another attack, and that “he’s after [him] again.”<sup>207</sup>

Guilt is another key component of the homosexual characters’ reactions to each other and with themselves, as a result of their conflicted

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<sup>203</sup> *Id.* (as Alan “lashes out” calling Emory a “[f\*ggot], fairy, pansy . . . queer, [c\*cksucker] . . . goddamn little mincing swish . . . goddamn freak! FREAK! FREAK!”).

<sup>204</sup> *Id.* at 54.

<sup>205</sup> *See id.* at 54.

<sup>206</sup> *See id.* at 58.

<sup>207</sup> *Id.* at 58.

presence within society. Michael's guilt is most commented upon by the other guests, as Emory dubs him "Gilda Guilt" and "Harriet Hypocrite."<sup>208</sup> Michael acknowledges this conflict and his status as a "truly rotten Catholic," where he "can't live with [religion] and [he] can't live without it."<sup>209</sup> This mask of religious piety and fascination is uncovered by Emory when he reminds Michael that his guilt "depends on what you think sin is," provoking Michael's anger.<sup>210</sup> Language and the relation to traditional morality through religion seems to provoke some of the anger, anxiety, and "ick attacks" that Michael mentions earlier in the play and that pervade the queer community outside of the play.<sup>211</sup> Likewise, Harold suffers from paranoia, as Michael indicates and Emory coins as "Polly Paranoia," even such that Harold participates in self-mutilation.<sup>212</sup> Harold is the most self-aware of the group, openly

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<sup>208</sup> *See id.* at 64.

<sup>209</sup> *Id.* at 64.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *See id.* at 70.

laughing at the end of Act I at the mayhem,<sup>213</sup> and introducing himself as a “thirty-two-year-old, ugly, pockmarked Jew fairy.”<sup>214</sup> He has internalized and repeated the way that others have defined him, using language to create a personality of shame, paranoia, and isolation, ideal qualities for society to project onto their opponents to encourage submission and sedentariness.

Despite this guilt and shame, though, some of the characters still fantasize and dream about their potential public, fulfilled lives. Emory remarks that he would “make somebody a good wife” and imagines that he could “cook and do an apartment and entertain” before quickly resorting to comedy and embodying the femme fatale Carmen from the eponymous opera.<sup>215</sup> Harold noticeably ignores him; the others fail to react.<sup>216</sup> Bernard fantasizes about Peter Dahlbeck, a heterosexual for whom Bernard worked when they were both young boys, recalling a

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<sup>213</sup> *See id.* at 51.

<sup>214</sup> *Id.* at 53.

<sup>215</sup> *See id.* at 65-66.

<sup>216</sup> *See id.* at 66.

romantic nude swim that he assumes Peter forgot because of being so drunk.<sup>217</sup> Each of the guests likewise has an opportunity to fantasize and recount the story of his love when they engage in Michael's made-up game, "Affairs of the Heart," a combination of the Truth Game and Murder, a chilling foretelling of the disastrous results of the game.<sup>218</sup>

Theoretically, these stories, and acts of defiance against the status quo and heteronormative by calling the objects of their desires and speaking their truths, could be notable dramatizations and forms of legal and socio-political protest. In practice, Bernard encounters Peter's mother who arguably pays Bernard's mother still as a laundress and experiences debilitating guilt and shame for the rest of the play, silencing him;<sup>219</sup> Emory experiences the denial of the identity of his love, Doctor Delbert Botts, and silence when Delbert hangs up the phone;<sup>220</sup> and Harold, Michael, Cowboy, and Donald fail to take their

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<sup>217</sup> *See id.* at 82.

<sup>218</sup> *See id.* at 77.

<sup>219</sup> *See id.* at 82-84.

<sup>220</sup> *See id.* at 91-92.

turns.<sup>221</sup> While the absent players might forfeit their turn because Larry “wins” the game with the highest and full amount of points, the act of using language to articulate their fantasies and expressions of their wishes denies them their day in court. One can imagine that their decision not to take a turn is as destructive and inhibiting as their potential “loss,” though given the negative consequences and potential repercussions in the 1960s, both socially and legally, one may understand their reluctance to play the game on these terms.

The only visible same-sex couple in the play, Larry and Hank, offers a useful examination of homosexuals and relationships, particularly in regards to marriage and contracts, and how they choose to play Michael’s game. Throughout the evening, the two men bicker over their alleged “agreement,” debating its existence but rarely its terms.<sup>222</sup> Larry denies his acceptance of the contract, and Hank seems to justify the contract by reliance.<sup>223</sup>

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<sup>221</sup> *See id.*

<sup>222</sup> *See id.* at 45.

<sup>223</sup> *See id.* at 45.

Their status as a couple is hidden from Alan, the outsider, and for the audience members who cannot pick up on the unspoken language and signals of their covert relationship. Hank hides behind the label of “roommates” with Larry, when he talks to Alan about his current living situation following his divorce.<sup>224</sup> This “passing” allows Alan to express himself in what he assumes to be a heterosexual way, despite using homosexual language, describing Hank as “really a very attractive fellow”<sup>225</sup> and suggesting that Hank meet Alan’s wife in Washington.<sup>226</sup> This willful ignorance is disrupted by Michael “out-ing” the couple and remarking about the idiocy of the notion that “if a man is married, then he is automatically heterosexual,”<sup>227</sup> perpetuating the myth that men hide their sexuality behind and within their marriages.

After the climax, and as the party dissolves, Michael is left to reflect upon his and his friends’

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<sup>224</sup> *See id.* at 39.

<sup>225</sup> *Id.* at 43.

<sup>226</sup> *See id.* at 49.

<sup>227</sup> *See id.* at 80-81.

behavior and actions: “If we . . . if we could just . . . not hate ourselves so much. That’s it, you know. If we could just *learn* not to hate ourselves quite so very much.”<sup>228</sup> This lesson of more self-compassion and the effects for members of the gay community to learn not to hate themselves, and each other, resonates after the marriage equality cases. As previously discussed, Justices Kennedy, Scalia, and Alito, and Chief Justice Roberts attempt to teach both members of the gay community as well as others what it means to be gay in the United States.<sup>229</sup> Their language reflects the lessons that have been indoctrinated into socio-political interactions and lessons on morality and equity.

As previously referenced, Alito’s dissent in *Windsor* offers literary clues in its footnotes for popular opinions on same-sex marriage and its relation to the modern family.<sup>230</sup> He cited the positions that “allowing same-sex marriage will seriously undermine the institution of marriage,” by

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<sup>228</sup> *Id.* at 111.

<sup>229</sup> *See infra* Sections 2.

<sup>230</sup> *See Windsor*, 133 S. Ct. at 2719, n. 6-7 (Alito, J., dissenting).



separating the arguments into those who denounce the development as “undermin[ing] social boundaries relating to marriage and family relation” as well as the “confusion of social roles” and a message of “‘anything goes’ in the way of sexual behavior, procreation and parenthood.”<sup>231</sup> While challenging the societal necessity of a marriage institution, he coupled this argument with a complementary analysis that reinforces the belief that by introducing “radical new redefinitions,” namely same-sex marriage, one should expect consequences.<sup>232</sup> To believe otherwise is neither “a wise nor compassionate idea,”<sup>233</sup> though unclearly wise for or compassionate to whom, with others who celebrate the “implicit revolt” of the overall marriage

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<sup>231</sup> United States v. Windsor, 570 U.S. 744, p. 8 (Alito dissenting, 2013). *See also* United States v. Windsor, 570 U.S. 744, fnt. 6 (Alito dissenting, 2013) (citing Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL’Y 771, 799 (2001)).

<sup>232</sup> *Id.*

<sup>233</sup> United States v. Windsor, 570 U.S. 744, p. 8 (Alito dissenting, 2013). *See also* United States v. Windsor, 570 U.S. 744, fnt. 6 (Alito dissenting, 2013) (citing Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. ST. THOMAS L. J. 33, 58 (2005)).

institution.<sup>234</sup> More tellingly, Justice Alito also criticizes the judge in *Perry v. Schwarzenegger* for any normative decision-making through “‘findings of fact’ on such questions as why marriage came be,<sup>235</sup> . . . what marriage is,<sup>236</sup> . . . and the effect legalizing same-sex marriage would have on opposite-sex marriage.”<sup>237</sup>

This criticism of what marriage is or can be defined as is a telling and progressive understanding for how to view *The Boys in the Band*.<sup>238</sup> After considering the noticeable harms inflicted by and upon the boys within the play, one can revisit the play’s context to uncover a deeper truth to their isolated evening within Michael’s apartment. The act of separating and isolating themselves from the rest of New York City society, noticeably limiting the guest list to individuals who identify as queer or

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<sup>234</sup> United States v. Windsor, 570 U.S. 744, p. 8 (Alito dissenting, 2013). See also United States v. Windsor, 570 U.S. 744, fnt. 6 (Alito dissenting, 2013) (citing Willis, Can Marriage Be Saved? A Forum, *The Nation*, p. 16 (2004)).

<sup>235</sup> *Windsor*, 133 S. Ct. at 2719, n. 7 (Alito, J., dissenting).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Mart Crowley, *THE BOYS IN THE BAND* (2008).

questioning, is a provocative and important defiance. To create their own space and community suggests the possibility for queer individuals to define their own space, the privacy and “right to be let alone” that reflects Roberts’ dissent.<sup>239</sup> The social experiment brings some of the repercussions from their ongoing relations with the people who wish to disparage and harm them, leaving barbed wit that masks the paranoia, shame, and guilt within most of the characters. More significantly, however, the micro-community inspires the men to create their own rules and boundaries, noticeably in their social interactions and behaviors, games, social contracts, and, most importantly, language.

Michael’s game, though ultimately destructive, paves the way for future games and storytelling, but also shows the limits and boundaries of this social community and the pain that they are willing to inflict on each other internally. The social contract as debated and defined by Hank and Larry evolves and

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<sup>239</sup> See *Obergefell*, 135 S. Ct. at 2619-20 (Roberts, C.J., dissenting) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, n. 10 (1972)).

solidifies into a mutually-agreeable and affirming testament to their love and queer personalities.<sup>240</sup> It exists outside of the law but works for both men because they have each shaped its discourse and boundaries through their language and interests. Ultimately, it is the poetic and often anarchic wit that defines this play and its characters, but also charges them into making affirming and challenging judgments of themselves and each other. Such exercise is both defensive and liberating for themselves and the audience, especially when considering the contours of the queer community, marriage, and the queer self. Through such discovery, audiences can engage in their own revivalist imagining and engagement with the dramatic queer text to frame the language with that used and contextualized within their daily lives.

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<sup>240</sup> See Mart Crowley, *THE BOYS IN THE BAND* (2008).

V. REVIEWING *THE BOYS*

Scholars suggest that United States mainstream theatre plays an important role in assimilating emergent ideologies into a dominant ideology in popular culture.<sup>241</sup> This theatre has also succeeded in some ways for framing the discussion of gay rights and progressing the discussion of queer individuals within society.<sup>242</sup> Critics recognize now that the popular and commercial success of Mart Crowley's *The Boys in the Band* in 1968 allowed gay male characters to move onto the center stage, "as did an increasingly serious, diverse, and frank examination of the moral, spiritual, and political issues raised by the emergence of homosexuals from the nation's closet."<sup>243</sup> This successful emergence perpetuated the public's acceptance of gay-themed plays for decades to follow.<sup>244</sup> As more of these plays appeared and diverse representation correspondingly

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<sup>241</sup> Jacob Juntunen, *MAINSTREAM AIDS THEATRE, THE MEDIA, AND GAY CIVIL RIGHTS: MAKING THE RADICAL PALATABLE 2* (2016).

<sup>242</sup> James Fisher, *WE WILL BE CITIZENS: NEW ESSAYS ON GAY AND LESBIAN THEATRE 1* (James Fisher ed.) (2008).

<sup>243</sup> *Id.* at 2.

<sup>244</sup> *Id.* at 8.

evolved, the traditional notions about lesbian women and gay men held by these demographics and society overall was established, consolidated, and challenged.<sup>245</sup> Dramatized storytelling was once about gay men “finding a place on the dance floor,” where they could safely not act straight, and the audience could experience life being gay as seen from the inside.<sup>246</sup> Despite this evolution, the question remains, and continues to perplex audiences and artists alike: “What does it mean to be gay?”<sup>247</sup>

One point of entry towards answering this question seems to be fascination with exploring relational values: “What are the most appropriate gay relationships and what does love mean in a gay context?”<sup>248</sup> To answer these questions, one must confront “issues of alienation, internalized heterosexism, and the possibility of loving relationships” because they are interrelated and

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<sup>245</sup> Alan Sinfield, *OUT ON STAGE: LESBIAN AND GAY THEATRE IN THE TWENTIETH CENTURY* 4 (1999).

<sup>246</sup> John M. Clum, *STILL ACTING GAY* 160 (2000).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 161.

intertwined in both gay drama and society.<sup>249</sup> Significantly, what gay theatre has discussed, debated, and contextualized, the legal system is just beginning to tackle and ask similar questions in their full diversity. The visibility and normativity of the queer modern performance encouraged, and fashioned, the emergence of modern sexual identities.<sup>250</sup> The debut of the modern gay drama, and the homosexual's arrival onto the stage, was "as much an egress as an entry."<sup>251</sup> The stage, and performance, as "located, relational, textualized, vocalized, costumed, [and] choreographed" were forms of "queer subversions and the activation of queer significations, experiences, feelings, desires, and communities."<sup>252</sup> These gay dramas have a common identifying theme in that they describe and pose moral dilemmas where queer desire precipitates a crisis for the community;<sup>253</sup> and queer activism

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<sup>249</sup> *Id.*

<sup>250</sup> Penny Farfan, PERFORMING QUEER MODERNISM 1 (2017).

<sup>251</sup> *Id.* (citing Diana Fuss, *Inside/Out*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 4 (Diana Fuss ed.) (1991)).

<sup>252</sup> Farfan, *supra* note 132, at 2.

<sup>253</sup> de Jongh, *supra* note 19, at 3.

within the legal system has a similar resonating theme. Like the modern plaintiff for some legal scholars and experts, the queer character is a person “in revolt from family, from marriage, from the approved fixtures and fittings of life.”<sup>254</sup> Despite these idealized notions of queer theatre, other scholars argue that theatre does not just reflect reality and that these lesbian women and gay men alone do not, and would not, promote social change, but, instead, the theatre creates a reality “by enforcing conventional notions of ‘normal.’”<sup>255</sup> LGBTQ+ and theatre scholar Jill Dolan suggests that the presumption of the power of “arrival” can be a trap for the unwary and that, despite the numerous changes within American culture for the queer community, this change happened relatively slowly over 30 years and political history demonstrates that the dominant culture can easily backslide into (hetero)normativity in its passivity.<sup>256</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> Dolan, *supra* note 10, at 14-15.

<sup>256</sup> *Id.* at 83.



Some scholars dismiss the community within *The Boys in the Band*<sup>257</sup> by highlighting the lack of backstory connecting the members of the group, emphasizing their quarreling, shared sexuality and self-hatred, as well as perceived middle-class status.<sup>258</sup> This dismissal ignores the vital role that the men play in each other's lives, and the perceptions of the audience, by redefining gay men's relationships, both within Michael's apartment and on the stage.<sup>259</sup> Historical reviews and critiques of the play have isolated its problems, not the overt portrayal of sexual orientation (partly because the play resists physical displays of affection), but the "internalized homophobia" and resigned acceptance of the judgments within the heteronormative status quo outside of the apartment, whether within their nuclear family, modern medicine, the reach of the law, or religion and accompanying morality.<sup>260</sup>

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<sup>257</sup> Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>258</sup> John M. Clum, *STILL ACTING GAY* 204 (2000).

<sup>259</sup> *Id.* at 206.

<sup>260</sup> *See id.* at 206.

This acceptance is further exacerbated by the isolationism exercised by the characters, where their gay world is a “dangerously closed society” and the domestic space provides a refuge from the rest of the world, namely, heterosexuals and their norms; such refuge presumably inoculates the men from harm, but instead nurtures the demons of their own insecurities, created by their prior interactions outside of the apartment.<sup>261</sup> Such demons restrict their creative and literary imaginaries, stifling their fantasies and ambitions in adopting or creating roles and impacts on society, such as Emory’s wish to be a wife, Michael’s ambitions as a writer, or Donald’s meaningful participation in the workforce.<sup>262</sup> The community has the potential, however, to combat these criticisms to become a supportive, though occasionally biting, environment for the gay men’s individual, and collective, growth.

Without the presence of heterosexuals, or even without the imposed heteronormativity on the

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<sup>261</sup> See *infra* Section IV. See also John M. Clum, *STILL ACTING GAY* 207 (2000).

<sup>262</sup> See Mart Crowley, *THE BOYS IN THE BAND* (2008).

environment, *The Boys in the Band* offers an imagined community that, in a modern revival, could defy historical perceptions and sensibilities by blurring the line between past and present.<sup>263</sup> Through such literary and dramatic imaginary, one can begin to ask questions through these characters as proposed by the Supreme Court Justices and legal advocates in the marriage equality cases. One of the most important issues facing society and legal structures is not what opposite-sex couples have that same-sex couples do not (because some semblance of marriage equality has been achieved through litigation), but what do queer families and communities actually need that reflect their unique and varied kinship networks and queer family structures?<sup>264</sup>

Preoccupation with equality has stifled language and rhetoric for considering the diversity and scope of vision for queer futures in their full fantasticism.

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<sup>263</sup> See Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>264</sup> See Ryan Conrad, *Damn Right We're Here to Destroy Marriage!*, 437 *THE GAY AGENDA: CLAIMING SPACE, IDENTITY, AND JUSTICE* 108-109 (2014).

Without the restriction of the heterosexual status quo within *The Boys in the Band*,<sup>265</sup> one can imagine a community and family of individuals who secure their individual and collective material and affective needs through their own self-determination. To begin to see the community and production in such a queer sensibility, one must distance oneself from a historical relationship and understanding of the play, to reengage with the text and experience in a fresh and unadulterated way. A revival of this popular, though seemingly dated, gay drama offers an opportunity to engage with a literary text and experience that supplements and juxtaposes the language articulated amongst the various opinions and dissents within *Windsor* and *Obergefell*.<sup>266</sup>

## VI. CONCLUSION

Following in Eve Kosofsky Sedgwick's model, with a mix of queer sensibility and re-reading and

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<sup>265</sup> See Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>266</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

revivalist literary and dramatic imaginary, and aided by legal jurisprudence that reflects popular and now canonicalized notions of same-sex families, one can engage with lesbian and gay literature, particularly in theatre, like *The Boys in the Band*,<sup>267</sup> as “literature of oppression and resistance and survival and heroic making.”<sup>268</sup> Such literature depicts and defines the collective past of gay men to affirm their identity and solidarity, but also to educate the dominant culture on the perversion or obscuring of such gay history and the effects of such heteronormativity on the growth and progress of such society and community.<sup>269</sup>

Scholars have ignored, however, a more impactful impulse and opportunity within the intersection of dramatic literature and the law, namely, the impact and experience of revivals in theatre to allow audiences and readers to reexamine, celebrate, criticize, love, and claim space within the

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<sup>267</sup> See Mart Crowley, *THE BOYS IN THE BAND* (2008).

<sup>268</sup> See John M. Clum, *STILL ACTING GAY* 161 (2000) (citing Eve Kosofsky Sedgwick, *Pedagogy in the Context of an Anti-Homophobic Project*, 89 *S. Atl. Q.* 142 (1990)).

<sup>269</sup> See John M. Clum, *STILL ACTING GAY* 161 (2000).

canon and popular understanding of literary and societal expectations and experiences. By adding to the historical, anarchic, romantic, and canonical impulses in gay theatre, the revivalist impulse provokes some of the necessary convergence of ideology, imagination, practice, and expectations, a closer alignment to the importance and recurrence of legal precedent on judicial decision-making that can further humanize and join the law and dramatic literature.

# MEDICALIZATION OF SOCIAL PROBLEMS: IS ATTENTION DEFICIT/HYPERACTIVITY DISORDER (ADHD) DIAGNOSIS A WAY OF SOCIAL CONTROL?

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Norbert Ebisike•

## I. INTRODUCTION

Currently, certain human behaviors are being classified by medical practitioners as mental disorders, and Attention Deficit/Hyperactivity Disorder (“ADHD”) is one disorder that has generated a wide range of discord among scholars.<sup>1</sup> Several studies addressed the link between ADHD and criminal behavior,<sup>2</sup> the role of a defendant’s

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<sup>1</sup> See *infra* Sections II-V.

<sup>2</sup> See for instance, L. A. M. Osterman, *Critical Reflections on Attention Deficit Hyperactivity Disorder (ADHD) in the Criminal Justice System: Swedish Female Ex-Offenders’ Narratives of Diagnosis*, 57 HOWARD J., 453, 454-455 (2018).

ADHD diagnosis in criminal trials,<sup>3</sup> and whether ADHD should be a legal disability in employment law.<sup>4</sup> ADHD has also been described by some psychologists and legal scholars as “a neglected vulnerability, which can leave a suspect disadvantaged when interviewed by the police and also during court proceedings.”<sup>5</sup> Unlike these previous studies, this Article takes a more socio-legal approach and maintains that ADHD diagnosis is primarily a way of social control.<sup>6</sup> This Article asks several questions: Are we medicalizing youth behavior?<sup>7</sup> Do we have more cases of ADHD because recent laws restrict what parents and teachers can do to correct children's behavior?<sup>8</sup> Why

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<sup>3</sup> O. Calderon, *Youth Defendants with ADHD and the Criminal Justice System: A Qualitative Analysis of Court Decisions*, 1 THE ADVANCED GENERALIST: SOCIAL WORK RES. J., 15-36 (2014).

<sup>4</sup> M. W. Sweeney, *Working Towards a Better Understanding of Attention Deficit Hyperactivity Disorder as a Legal Disability in Employment Law*, 21 J. CONTEMPORARY HEALTH L. & POL'Y, 67-98 (2004).

<sup>5</sup> G. Gudjonsson, & S. Young, *An Overlooked Vulnerability in a Defendant: Attention Deficit Hyperactivity Disorder and a Miscarriage of Justice*, 11 LEGAL & CRIMINOLOGICAL PSYCHOL., 211-218 (2006).

<sup>6</sup> See *infra* Sections II-V.

<sup>7</sup> See *infra* Section V.

<sup>8</sup> See *infra* Section III.



are more boys diagnosed with ADHD than girls?<sup>9</sup> In the future, how will medical authority classify certain behaviors as diseases?<sup>10</sup> Not all behaviors classified as ADHD symptoms are mental disorders.<sup>11</sup>

Section II of this Article provides an overview of ADHD and discusses the emerging trend of medicalizing social problems. Section III focuses on racial, class, and cultural bias inherent in the diagnosis and construction of ADHD. This Section also addresses how current laws contribute to the high number of ADHD cases in the United States. Here, we examine how current laws restrict what parents and teachers can and cannot do in disciplining children. Section IV addresses whether we are medicalizing youth behaviors. This Article concludes that there is over-diagnosis of ADHD because these diagnoses are being used partly as a way of social control.<sup>12</sup> This approach is not justified

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<sup>9</sup> *Id.*

<sup>10</sup> *See infra* Section V.

<sup>11</sup> *See infra* Section II.

<sup>12</sup> *Id.*

because there are alternatives and better ways of social control.<sup>13</sup>

There should be clear separation of convenience from efficacy.<sup>14</sup> We must revise current laws that have placed extreme limits on how, and which ways, parents and teachers discipline children.<sup>15</sup> Because of the criminal laws and social stigmas restricting what parents and educators can and cannot do to manage and correct children's behaviors at home and in the classroom, the number of cases of ADHD continue to increase.<sup>16</sup> The medical profession is now performing a social control function, without any restraint. This Article helps readers to understand how behaviors and bodies are controlled and governed through a particular kind of space.<sup>17</sup> We describe how certain forms of behavior in children have become defined as a medical problem and how medicine has become a major agent for their social

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See infra* Section III.

control.<sup>18</sup> Parents and teachers should be given adequate powers to discipline children.

## II. ATTENTION DEFICIT/HYPERACTIVITY DISORDER (ADHD)

### A. Discovery or Invention?

The Diagnostic and Statistical Manual of Mental Disorders (the “DSM-5”) classified ADHD as a mental disorder and a neurological condition.<sup>19</sup> This classification of ADHD as a mental disorder has generated a wide range of discord amongst scholars, medical officials, school personnel, and parents.<sup>20</sup> Despite the range of attitudes and the varying approaches employed by such individuals, ADHD is

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<sup>18</sup> *Id.*

<sup>19</sup> Diagnostic and Statistical Manual (DSM-5), Fifth Edition, American Psychiatric Association (2013).

<sup>20</sup> See, e.g., A. Thaper, M. Cooper, O. Eyre & K. Langley, *Practitioner Review: What Have We Learned About the Causes of ADHD?*, 54 J. OF CHILD PSYCHOLOGY & PSYCHIATRY, 1 (2012); M. W. Sweeney, *Working Towards a Better Understanding of Attention Deficit Hyperactivity Disorder as a Legal Disability in Employment Law*, 21 J. CONTEMP. HEALTH L. & POL’Y 67, 71-72 (2004); L. A. M. Osterman, *Critical Reflections on Attention Deficit Hyperactivity Disorder (ADHD) in the Criminal Justice System: Swedish Female Ex-Offenders’ Narratives of Diagnosis*, 57 HOWARD J. 435, 454-55 (2018).

generally seen as a behavioral disorder diagnosed in early childhood.<sup>21</sup> A recent study found that “the median age at ADHD diagnosis was [seven] years, and about one in three children (30.7%) was diagnosed before age [six]. Approximately three out of four children (76.1%) were diagnosed with ADHD before age [nine].”<sup>22</sup> One scholar argued that ADHD may be an invention, not a discovery.<sup>23</sup> A significant amount of scholarship posits overlapping interpretations of ADHD.<sup>24</sup>

Three major types of ADHD have been identified by the American Psychiatric Association.<sup>25</sup> The first type is ADHD Impulsive/hyperactive, categorized with impulsive and hyperactive behaviors but no inattention and distractibility.<sup>26</sup> The second is ADHD Inattentive and Distractible.<sup>27</sup> This type is

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<sup>21</sup> Centers for Disease Control and Prevention (CDC), *What is ADHD?*, available at <https://www.cdc.gov/ncbddd/adhd/facts.html>.

<sup>22</sup> S. N. Visser, et. al, *Diagnostic Experiences of Children With Attention-Deficit/Hyperactivity Disorder*, 81 NAT'L HEALTH STAT. REPORTS, 2 (2015).

<sup>23</sup> James J. Chriss, *Social Control: An Introduction*, 172 (2013).

<sup>24</sup> *Id.* at 170-172.

<sup>25</sup> Diagnostic and Statistical Manual (DSM-5), Fifth Edition, American Psychiatric Association (2013).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

characterized by inattention and distractibility, but no hyperactive behaviors are present.<sup>28</sup> The third is ADHD Combined, where there are impulsive and hyperactive behaviors as well as inattention and distractibility.<sup>29</sup> ADHD entered common parlance after the introduction of hyperactivity in the 1960s as “a new form of deviant behavior and as a medically defined social problem,” and became an area of interest and research for many scholars, researchers, medical professionals, and educators.<sup>30</sup> The introduction of the term followed public knowledge about deviant behavior by school children, and commonplace usage of the term “hyperactivity” to describe children who were seen as different in activity levels from their peers.<sup>31</sup> ADHD is generally referred to as the most commonly diagnosed mental health disorder in American children.<sup>32</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> G. Kiger, *Economic Transformations and the Processing of Hyperactive School Children*, 10 MID-AMERICAN REVIEW OF SOCIOLOGY, 65-85 (1985).

<sup>31</sup> *Id.*

<sup>32</sup> P. L. Morgan, et al, *Racial and Ethnic Disparities in ADHD Diagnosis from Kindergarten to Eight Grade*, 132 PEDIATRICS, 85-93 (2013).

Children are a vulnerable demographic because they, with the permission of their parents, are governable and controllable by those same teachers and educators who are employed to instruct and educate, not to diagnose.<sup>33</sup> Children by their own volition, and in so many ways, lack agency—they do not have the full ability to resist.<sup>34</sup> When dealing with children, it becomes almost permissible to allow drug therapy as a social control practice/strategy, with implications for classroom management strategies and promises of better classroom conduct.<sup>35</sup> There are different views of normative youth behavior and different approaches to addressing ADHD.<sup>36</sup> For instance, Canadian mothers with children who are perceived as “different” will encounter an educational or developmental psychologist with an aim to categorize and label the child.<sup>37</sup> Parents ought to learn parent-training

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<sup>33</sup> Section II.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> C. Malacrida, *Medicalization, Ambivalence and Social Control: Mothers' Descriptions of Educators and ADD/ADHD*, 8 HEALTH 61 (2004).

strategies before the doctors start writing prescriptions for medicine to protect the welfare of the child.<sup>38</sup>

## B. The Emerging Trend of Medicalization

Medicalization is “a process by which nonmedical problems become defined and treated as medical problems, usually in terms of illnesses or disorder”<sup>39</sup> There is also de-medicalization, which is when certain conditions and behaviors previously defined as medical problems are no longer seen and treated as medical problems.<sup>40</sup> A cultural element is associated with the emerging trend of medicalization.<sup>41</sup> Many scholars assert that there is no biological or organic deficiency that cause ADHD.<sup>42</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> P. Conrad, *Medicalization and Social Control*, 18 ANNUAL REV. SOCIAL, 209 (1992).

<sup>40</sup> *Id.* at 210.

<sup>41</sup> *See infra* Section III.

<sup>42</sup> *See Sweeney, supra* note 4 indicating that “no theory on the cause of ADHD has been proven, and it remains an open topic for discussion.”

Recent research shows a high incidence of ADHD among parents of children who have been diagnosed with the same condition. This causes some researchers to speculate that ADHD is a learned behavior, following a pattern similar to child or spousal abuse. Other researchers suggest that ADHD is the result of poor dietary habits, which can also account for generational patterns of the condition. Some of the most popular scientific explanations for the condition come from studies that implicate neurotransmitter defects, genetics, and perinatal complications.<sup>43</sup>

It was discovered by physicians, however, that some drugs could alter or reduce problematic behavior, and achieve conformity and discipline.<sup>44</sup> A social and cultural problem was transformed into a problem for medical intervention.<sup>45</sup>

The diagnosis of ADHD has become more of the rule (or norm) than the exception. One scholar addressed an important question: On what basis we

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<sup>43</sup> Sweeney, *supra* note 4 at 72.

<sup>44</sup> Chriss, *supra* note 23 at 172.

<sup>45</sup> *Id.*



can differentiate a "discovery" from an "invention"?<sup>46</sup> This scholar contended, under certain frameworks, that the trend towards over-medicalization led analysts to exaggerate the extent of medicalization in contemporary society.<sup>47</sup> Culture has changed overtime as formal and informal rules regulate and govern lives and help shape behaviors.<sup>48</sup> In the absence of discipline, researchers adopt new measures for correcting and, sometimes, even condemning deviance.<sup>49</sup> Scholars argue that mental illness is a myth.<sup>50</sup> "Therefore, rather than seeing medicalization as an either/or situation, it makes sense to view it in terms of degrees. Some conditions are almost fully medicalized (e.g. death, childbirth), others are partly medicalized (e.g. opiate addiction,

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<sup>46</sup> M. R. Bury, *Social Constructionism and the Development of Medical Sociology*, 8 *SOCIOLOGY OF HEALTH & ILLNESS*, 137-69 (1986).

<sup>47</sup> *Id.*

<sup>48</sup> See Section II.

<sup>49</sup> *Id.*

<sup>50</sup> Thomas Szasz, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (1961).

menopause), and still others are minimally medicalized (e.g. sexual addiction, spouse abuse).”<sup>51</sup>

### III. RACE, CULTURE AND ADHD

#### A. ADHD Diagnosis: A Social and Cultural Phenomenon

The process of categorizing and diagnosing behaviors is as much a cultural trend as a social phenomenon.<sup>52</sup> There is cultural bias with the diagnosis of ADHD and the related treatment that follows.<sup>53</sup> How bodies are made and re-made, monitored, governed, and maintained at different times reflect dominant discourses and hegemonic notions of race and class. Through the ways in which culture and power are displayed not only through practice but through race, class, and culture, researchers can recognize the highly diverse ways in which behaviors are deeply culturally infused.<sup>54</sup>

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<sup>51</sup> Conrad, *supra* note 39 at 220.

<sup>52</sup> See Section III.

<sup>53</sup> See, e.g., Morgan et al., *supra* note 32 at 91.

<sup>54</sup> See Section III.

Thus, people reflect on some of the ways in which power exists (and is so imbedded) within that domain.<sup>55</sup> For instance, Black families are less likely to accept the diagnosis of their children with ADHD than White, middle-income families.<sup>56</sup> “Researchers have shown that African American families prefer to manage ADHD within the family instead of seeking professional care. Smaller, more supportive social networks in African American communities have been correlated with a lower likelihood of receiving treatment for ADHD.”<sup>57</sup> This finding is not alarming because this reaction mirrors that for which racialized parents have towards therapy for a perceived mental illness. One study found that African American children are diagnosed with ADHD at “only two-thirds the rate of white children despite displaying greater ADHD symptomatology, and Hispanic children have also been reported to be

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<sup>55</sup> *Id.*

<sup>56</sup> See Morgan, et al., *supra* note 32.

<sup>57</sup> S. dosReis, et al., *Attitudes about Stimulant Medication for Attention-Deficit/Hyperactivity Disorder among African American Families in Inner City Community*, 33 J. OF BEHAVIORAL HEALTH SERVICES & RESEARCH, 423, 424 (2006).

underdiagnosed.”<sup>58</sup> A study of the importance of neighborhood socioeconomic status (the “SES”) on ADHD medication found that “African American teachers and teachers in low SES areas were less favorable to medication use and tended to note personality change and medicalization as attitudes in opposition.”<sup>59</sup> The study also found that “white teachers and teachers in upper-class areas tended to support the use of medication for ADHD and highlighted behavioral and academic normalcy as potential attitudes.”<sup>60</sup> The above discussion supports the argument that ADHD is a cultural and social phenomenon.

## B. Social Control in School Children: Power and Governance

Social control is a central and important concept in sociology, especially as it relates to law,

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<sup>58</sup> Morgan et al., *supra* note 32 at 86.

<sup>59</sup> Z. R. Simoni, *Medicalization, Normalization, and Performance Edge: Teachers’ Attitudes about ADHD Medication Use and the Influence of Race and Social Class*, 61 *SOCIOLOGICAL PERSPECTIVES*, 642, 657 (2018).

<sup>60</sup> *Id.*

regulation, and governance.<sup>61</sup> How power is associated and articulated through law and authority is important for this Article as it relates to how children are regulated and governed in particular ways.<sup>62</sup> Law informs and opposes educators in the classroom for their decisions pertaining to children.<sup>63</sup> Because of a loss of liberalism (the “freedom” to discipline), educators are finding alternative ways to accommodate for this lack of power; some educators are choosing to “regulate” children through other means.<sup>64</sup> This shift in classroom social control practices reflects economic transformations.<sup>65</sup> Currently, we live “in a society where delaying personal gratification is favored and the efficient use of time and energy to attain positions of wealth and power is idealized, labeling and medicalizing children who are distractible, seemingly lack motivation, or are impulsive may simply be a way of

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<sup>61</sup> See Section III.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Malacrida, *supra* note 37 at 63.

<sup>65</sup> Kiger, *supra* note 30.

protecting and reinforcing cherished social values.”<sup>66</sup> One commentator argued that in the process of medicalization, our day-to-day life is increasing under medical control.<sup>67</sup> Another study found that where schools have adequate and various forms of social control to use in classrooms, there is less medicalization of ADHD.<sup>68</sup> Based on her study of the United Kingdom, Claudia Malacrida posits that “medicalization is not simply a way of making a group of behaviors more easily labeled and managed: it is also a means by which medicalizing agents exercise social control over ‘patients’ (or, in the case of ADD/ADHD, over ‘students’).”<sup>69</sup>

The alternative to medicalization for such behaviors is to give adequate disciplinary powers to parents and teachers.<sup>70</sup> Over time, the United States Supreme Court has upheld the rights of parents to

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<sup>66</sup> Chriss, *supra* note 23 at 173.

<sup>67</sup> I. K. Zola, *SOCIO-MEDICAL INQUIRIES: RECOLLECTIONS, REFLECTIONS AND RECONSIDERATIONS*, 295 (1983).

<sup>68</sup> Malacrida, *supra* note 37 at 63.

<sup>69</sup> *Id.*

<sup>70</sup> Some scholars will support this assertion. See for instance, K. REYNOLDS-LEWIS, *THE GOOD NEWS ABOUT BAD BEHAVIOR: WHY KIDS ARE LESS DISCIPLINED THAN EVER AND WHAT TO DO ABOUT IT*, (2019).

make decisions regarding the rearing of their children. In *Troxel v. Granville*,<sup>71</sup> for instance, the Supreme Court stated that;

The Fourteenth Amendment's Due Process Clause has a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests,' *Washington v. Glucksberg*, 521 U.S. 702, 720, including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651. Pp. 5-8.<sup>72</sup>

The major problem is the state and local laws that tend to limit the powers of parents and teachers to discipline children.<sup>73</sup> The "child's best interests" approach is usually adopted by state courts in cases involving children.<sup>74</sup> The definition of the best interest of a child is subjective and has different interpretations based on the circumstances of the

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<sup>71</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>72</sup> *Id.*

<sup>73</sup> Discussed in this Section.

<sup>74</sup> *Id.*

case.<sup>75</sup> Other researchers continue to explore the problems with the current state and local laws for how to discipline students.<sup>76</sup>

But today principals lack the tools they used to have for dealing even with the unruliest kids. Formerly, they could expel such kids permanently or send them to special schools for the hard-to-discipline. The special schools have largely vanished, and state education laws usually don't allow for permanent expulsion. So at best a school might manage to transfer a student felon elsewhere in the same district. New York City principals sometimes engage in a black-humored game of exchanging these 'Fulbright Scholars,' as they jokingly call them: 'I'll take two of yours, if you take one of mine, and you'll owe me.'<sup>77</sup>

Some children have less self-control.<sup>78</sup> Some children threaten to report their parents to Child

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<sup>75</sup> *Id.*

<sup>76</sup> See for instance, K. S. Hymowitz, *Who Killed School Discipline?* City Journal (Spring 2000), available at <https://www.city-journal.org/html/who-killed-school-discipline-11749.html>.

<sup>77</sup> *Id.*

<sup>78</sup> Reynolds-Lewis, *supra* note 70.



Protective Services because their parents corrected their bad behaviors.<sup>79</sup> Many school districts in the United States have adopted a “non-punitive approach” for dealing with unruly students.<sup>80</sup> “[These] liberal discipline policies are making schools less safe.”<sup>81</sup> “[The] Chicago Teachers Union complained the city’s revised student-discipline code has left teachers struggling to control unruly kids.”<sup>82</sup> The current state and local laws limiting the ways parents and teachers can discipline children has led to the continuing rise in ADHD diagnoses.

#### IV. MEDICALIZING YOUTH BEHAVIORS

Are we medicalizing youthful behaviors?<sup>83</sup> Certain normal behaviors typically found and expected in some children have been medicalized, especially boys’ behaviors.<sup>84</sup> Hence, unsurprisingly,

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<sup>79</sup> Personal correspondence (2019).

<sup>80</sup> P. Sperry, *How Liberal Discipline Policies are Making Schools Less Safe*, N.Y. POST, March 14, 2015.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See Section IV.

<sup>84</sup> *Id.*

more boys are diagnosed with ADHD than girls.<sup>85</sup> More boys are diagnosed with ADHD than girls because “school teachers, pediatricians and school psychologists are all more likely to be female” and that “girl behavior has become the standard by which we judge all kids”<sup>86</sup> One study comparing Canada and Britain found that, in Canada, there are fewer “alternative forms of social control” available to teachers, while, in Britain, “medicalization remains incomplete, and where teachers and special educators have more stringent alternative forms of social control available to them.”<sup>87</sup> The study found that, in Britain, educators may “refuse the label or to administer medication.”<sup>88</sup> Though differences exist in how teachers and educators handle “ADHD” type conduct, certain types of behavior more commonly contribute to a structure whereby professionals could

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<sup>85</sup> Chriss, *supra* note 23 at 172.

<sup>86</sup> K. Lunau, *Is ADHD a Mental Health Crisis, or a Cultural One? The Reasons Behind the Rapid Rise in Diagnosis Rate*, available at <https://www.macleans.ca/society/health/is-adha-a-mental-health-crisis-or-a-cultural-one/>.

<sup>87</sup> Malacrida, *supra* note 37 at 61.

<sup>88</sup> *Id.*

identify, diagnose, and treat disorderly children.<sup>89</sup> Reiterating this contingent relation of alternate forms of social control with diagnoses of ADHD dismantles the naturalness, genuineness, and seriousness of the actual disorder. Yet, forms of social control implemented in the classroom and the labeling of disorderly behavior are not necessarily free-floating references exempt from body-regulating or school-governing principles.

Arguably, boys and girls tend to be socialized differently. Therefore, boys are more likely to be diagnosed with ADHD than girls.<sup>90</sup> Twelve percent of American male schoolchildren are prescribed Ritalin for their ADHD symptoms.<sup>91</sup> Educators, teachers, and school psychologists are adopting the roles and responsibilities for making children more manageable and docile by medicalizing their behaviors and habits.<sup>92</sup> In a study involving British parents, Malacrida noted that British teachers

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<sup>89</sup> Kiger, *supra* note 30.

<sup>90</sup> Chriss, *supra* note 23 at 172.

<sup>91</sup> *Id.*

<sup>92</sup> See for instance, Malacrida, *supra* note 37 at 70.

strongly discouraged diagnosing a child with ADHD, contrasting Canadian parents, arguing that “ADHD is just a label to excuse bad [behavior], and it won’t be doing him any [favors] if we just slap a label on him.”<sup>93</sup> Hence, there is cultural and social bias with the diagnosis and construction of ADHD.

## V. CONCLUSION

ADHD is over-diagnosed, partly because teachers and parents are using these diagnoses as social control.<sup>94</sup> This behavior is unjustified because teachers and parents have alternatives and better ways of social control.<sup>95</sup> We must separate convenience from efficacy. ADHD diagnosis and the consequent treatment is convenient for parents and teachers; is it beneficial for the patients? Researchers must consider: Who benefits, and who is suffering from these diagnoses and treatments? More often than not, all agents and agencies of social control fail.

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<sup>93</sup> *Id.*

<sup>94</sup> *See supra* Section III.

<sup>95</sup> *Id.*

Informal social control breaks down. For instance, drugs, passion, ambition and insanity can hamper and abridge personal controls. Sometimes, formal social control agents, including medical and legal institutions, are absent or ineffective. We must revise current laws that have placed extreme limits on how and which ways parents and teachers can discipline children.<sup>96</sup> Most of the behaviors currently being diagnosed as ADHD symptoms are just normal behaviors.

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<sup>96</sup> *Id.*

## A RIGHT NOT TO PARENT ONE'S CHILDREN

Carmen M. Cusack

### I. INTRODUCTION

The right to privacy includes a right to surrender one's children to the state.<sup>1</sup> In Section Two, this essay discusses 1) fundamental rights and the right to privacy; 2) the right to parent; and 3) the established and implied right not to parent.<sup>2</sup> The decision to parent supersedes alternate courses in many cases. It is a fundamental right and lifestyle that must be respected. Section Three discusses 1) the best interest of a child and the right of a child to receive care from a natural parent; and 2) balancing a parent's prior choice to parent against a right not to parent and the best interest of the child.<sup>3</sup> Section Four discusses the state's interest in family life, morality, children's

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<sup>1</sup> U.S. Const. Am. V. U.S. Const. Am. XIV.

<sup>2</sup> *Id.*

<sup>3</sup> *See e.g.*, Fla. Stat. § 61.13(3) (2019).

rights, and avoiding dependency.<sup>4</sup> Section Five concludes that the established right not to parent (e.g., birth control) exists after a parent exercises the right to parent. To exert this right, a parent's prior decision must be placed on one side of the scale with the best interest factors and the state's interest in avoiding dependency.<sup>5</sup> On the other side of the scale is the right not to parent and the best interest factors.<sup>6</sup> The right not to parent is not an unlimited right, yet it is a fundamental right that must be considered in light of a child's natural and fundamental right to receive appropriate care from a birth parent.<sup>7</sup>

## II. EXERCISE OF A FUNDAMENTAL RIGHT

A fundamental right is rooted in a traditional firmly held in the United States.<sup>8</sup> Family traditions and private matters that were inviolable (e.g., sex between married partners) in England, the colonies,

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<sup>4</sup> *Id.*

<sup>5</sup> *See e.g.*, Fla. Stat. § 61.13(3).

<sup>6</sup> *Id.*

<sup>7</sup> U.S. Const. Am. V.

<sup>8</sup> *Id.*

and throughout the history of the United States form the basis of fundamental rights. The right to privacy is a Court-made description not precisely described in the United States Constitution, a document which expands, and yet, literally protects rights by denoting minimum and exact requirements to propagate freedom.<sup>9</sup> Right to privacy includes, but is not limited to, right to have sex, reproductive freedom, and right to parent. No right is limitless. The Court and legislature have consistently recognized the power of abstention.<sup>10</sup> It is sometimes described as a reciprocal, implied, or dormant aspect of a right.<sup>11</sup> One may exercise a right in one scenario, and then abstain from exercising the same right. One may have sex with one's spouse, and then choose to abstain. Although the partner who suffers a loss may feel alienated, the recourse is divorce or dissolution of the marriage. Marital rape is no longer an exception under the law. Similarly, a person may exercise the right to procreate and the right to

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<sup>9</sup> *Id.*

<sup>10</sup> CARMEN M. CUSACK, *SEX CASE LAW* (2019).

<sup>11</sup> *See*, U.S. Const. Art. I, Sec. IIX, Clause III.



parent.<sup>12</sup> Although the right to procreate may be dimmed through abstention, the right to parent socially appears to be irrevocable. There appears to be no right to terminate parental rights. Yet, there must be. Although courts and legislatures have established best interest factors of a child, including enforcement of protective orders and support orders, the Court has not established a parent's right not to parent.<sup>13</sup> This is necessary because the state may not violate the right to privacy.<sup>14</sup> However, in light of the seriousness of the exercise of this right, the original decision may not easily be disturbed.

### III. CHILD'S BEST INTEREST

Children's rights to life, liberty, and the pursuit of happiness and property are protected using best interest factors.<sup>15</sup> When matters arise that affect children (e.g., a child's right to receive support

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<sup>12</sup> U.S. Const. Am. V.

<sup>13</sup> See e.g., Fla. Stat. § 61.13(3).

<sup>14</sup> U.S. Const. Am. V. U.S. Const. Am. XIV.

<sup>15</sup> See e.g., Fla. Stat. § 61.13(3). U.S. Const. Am. V. U.S. Const. Am. XIV. *Declaration of Independence* (1776).

money), the Court may analyze best interest factors to determine the best way to enforce the child's right.<sup>16</sup> The best interest factors include various provisions, such as psychological well-being, spiritual health, access to medical care, companionship, nuclear family ties, pleasant home environment, and disruption to education and community. Implied is a child's fundamental and obvious right to be paired with one or both parents who reproduced the child. No right to privacy is more apparent than the right to be related to one's parent. Generally believed to be bestowed at birth, the child's right to be with a parent is protected by the state.<sup>17</sup> The parent's right to impinge on this right by terminating parental rights must be balanced against the child's right to continue this relationship. During the best factor analysis, a child may provide his or her preference (e.g., guardian ad litem).<sup>18</sup> The exercise of this right cannot trump the parent's right *per se*, and yet the parent's previous exercise must

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<sup>16</sup> See e.g., Fla. Stat. § 61.13(3).

<sup>17</sup> CARMEN M. CUSACK, TWINS AND DEVIANCE (2016).

<sup>18</sup> See e.g., Fla. Stat. § 61.403 (2019).

not easily be violated. Thus, a child who exercises his or her right may outweigh a parent who exercises a right not to parent when the Court finds that it is not in the child's best interest to remain with the natural parents. Parental rights may be terminated.

#### IV. DISRUPTING THE EXERCISE OF RIGHTS

The state has an interest in protecting children, maintaining families, and exercising morality.<sup>19</sup> The state also has an interest in avoiding the burden of maintaining other people's rights. The state cannot participate in a legislative scheme that permits people to exercise a right to parent to the detriment of the state, the public, and other residents. The state may and does require individuals to care for children.<sup>20</sup> Although the government cannot institute a total ban or denial of procreative rights to those who exercise them without regard for the linked right to parent and right to be parented, the state has

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<sup>19</sup> CARMEN M. CUSACK, *LAWS RELATING TO SEX, PREGNANCY, AND INFANCY* (2015).

<sup>20</sup> Fla. Stat. §§ 827.03, 827.10 (2019).

incapacitated individuals who are unable to comply with court orders to provide care (e.g., contempt and arrears).<sup>21</sup> Individuals who are unwilling to care for children and threaten to harm children under their care may be subject to termination proceedings.<sup>22</sup> The state may place their children into dependency.<sup>23</sup> The state's exercise of this authority demonstrates the severability of the natural bond, and yet also demonstrates the severity of this measure. Thus, the state's interest in maintaining traditional rubrics and avoiding economic and social costs associated with disruption cannot easily be overcome by an exercise of a right not to parent that ends the exercise of a right to parent. The state may require residents to take alternate measures in lieu of fully exercising their rights.

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<sup>21</sup> Fla. Stat. §§ 38.23, 409.2558 (2019).

<sup>22</sup> Fla. Stat. § 63.087 (2019).

<sup>23</sup> Fla. Stat. § 39.507 (2019).

## V. CONCLUSION

A parent's right to end a natural relationship with the child may be exercised. It may be viewed as unideal, however the right cannot be unarticulated simply because it is implied or dark at times. Many individuals exercise the right through alternative family structures and lifestyles. Informality and privacy support their decisions to exercise a right not to parent. These individuals have support networks and their actions do not involve the government. Yet, individuals without easily identifiable support networks possess the same right. Their needs may be met through more effective community strategies; and children's rights to be with natural parents should be additionally raised in any considerations of rights to procreate and parent.

**BOOK REVIEW: *BIRDS AND WOMEN  
IN MUSIC, ART, AND POLITICS* BY  
CARMEN M. CUSACK**

LSD Journal Book Reviewers

*Birds and Women in Music, Art, and Politics* (Cambridge Scholars Publishing, \$119.95) hosts a variety of topics tying together the treatment of birds and women to and within music, arts, and politics. The chapters, “Music,” “Art,” and “Politics,” delve into these connections with the final chapter, “Rotten Egg,” focusing on species management and survival and the impact and enrichment felt by all involved. The research is novel and gripping. Although scholarly and well researched, the book provides levity to otherwise serious and heavy discussions with its, at times, sarcastic and playful tone.

*Birds and Women in Music, Art, and Politics* repeatedly discusses mistreatment of mothers and children. The work describes why children and family are essential in the grand scheme. Unexpected and tragic arguments defend children from media,

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sexual abuse, and pornography. It discusses birds' hardships and how their lives may be brutal, while some birds' lives are full of play and whimsy, and the book aptly compares these lucky strokes to human women's fates and decisions. The sections of each chapter include surprising and unexpected pairings of some species of birds with specific people to help illustrate the point.

*Birds and Women in Music, Art, and Politics* includes dozens of illustrations that ground and enliven the literature. Research helps readers emotionally to resonate with the subjects, concretizing law. The assistive analyses facilitate reimagining of icons, including Big Bird, who connects with nearly anyone's childhood. Other important figures, including Martin Luther King and Outkast, are brought into serious discussions.

Cusack tenderly explicates why animal and human suppression and aspiration are depicted by great stars, such as Audrey Hepburn's portrayal of Holly Golightly in *Breakfast at Tiffany's*. These connections are at the heart of this excellent book and

give the reader a conduit through which to understand the suffering of birds and women as well as the relevant law.