

# RHETORICAL HOLY WAR: POLYGAMY, HOMOSEXUALITY, AND THE PARADOX OF COMMUNITY AND AUTONOMY

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*I would not give a fig for the simplicity this side of*

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*complexity, but I would give my life for the simplicity on the other side of complexity.*

—Oliver Wendell Holmes, Jr.

## INTRODUCTION

In 1872, an American newspaper called the *Woman's Exponent* began publication. The *Exponent's* subtitle trumpeted “the Rights of Women of all Nations,”<sup>1</sup> and during more than forty years of twice-monthly publication, the paper remained focused on women’s issues in a “tone . . . neither self-conscious nor cautious, and it firmly and directly discussed feminist ideas. . . .”<sup>2</sup> For example, one early column asserted that “[w]oman was designed to be something more than a domestic drudge,”<sup>3</sup> and a few years later, in 1877, the paper editorialized: “Woman feels her servitude, her degradation, and she is determined to assert her rights.”<sup>4</sup>

The editors of the *Exponent* shared the convictions of many nineteenth-century feminists, echoing in print the credo of the famous feminist and suffragette Elizabeth Cady Stanton that “[w]omen must stand up and speak for themselves.”<sup>5</sup> To that end, the paper regularly “reported on the triumphs of women around the globe in achieving special awards or recognition.”<sup>6</sup> In one story about a young San Francisco girl who had won an academic competition for a trip to Paris, the *Exponent* writer proclaimed that this was “quite a victory for the girls, and proves the oft repeated assertion that the brains of girls are not inferior to the brains of boys!”<sup>7</sup> The *Exponent* also reported “progress made in the area of women’s rights around the country and around the world,” often reprinting speeches given at women’s political gatherings. In 1890, the paper devoted a long article to documenting “the need for equal pay for equal work,”<sup>8</sup> and, according to a prominent *Exponent* editor named Emmeline Wells, “[f]rom its first issue it was the champion of the suffrage cause. . . .”<sup>9</sup>

In light of the *Exponent's* devotion to progressive feminism in the late nineteenth century, it would be hard to overestimate the commitment of the women who produced the journal to the cause of empowering women

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<sup>1</sup> Judith Rasmussen Dushku, *Feminists, in* MORMON SISTERS: WOMEN IN EARLY UTAH 178-79 (Claudia L. Bushman, ed., 1976).

<sup>2</sup> *Id.* at 178.

<sup>3</sup> *Id.* at 183.

<sup>4</sup> *Id.* at 178.

<sup>5</sup> *Id.* at 179.

<sup>6</sup> *Id.* at 183.

<sup>7</sup> *Id.* at 184.

<sup>8</sup> *Id.* at 182-83.

<sup>9</sup> *Id.* at 184 n.21 (citing Susan B. Anthony, *The History of Woman Suffrage*, 6 vols., 4:936-37 (Susan B. Anthony & Ida Husted Harper, eds., 1902)).

everywhere or to the principle that women were as entitled to the pursuit of social independence, personal accomplishment, and political autonomy as men were. Why, then, would so important an advocate for women's (and human) rights as Harriet Beecher Stowe, author of the abolitionist classic *Uncle Tom's Cabin*, excoriate these same women for being complicit in "degrading bondage," for being party to "a cruel slavery whose chains have cut into the very hearts of thousands of our sisters."<sup>10</sup> Why would the popular nineteenth-century American author Jennie Froiseth declare that these activist women were part of a community that supported the "degradation of woman," a community that could "flourish only where she [woman] is regarded and treated as a slave."<sup>11</sup>

Stowe, Froiseth, and many others were harshly critical because the robust feminists who produced the *Woman's Exponent* were Mormons, members of Joseph Smith's controversial Church of Jesus Christ of Latter-day Saints – a religion best known for its practice of polygamy.<sup>12</sup> Indeed, observers then and now have found it difficult to understand how these compelling advocates of women's progress could simultaneously countenance or even engage in plural marriage, which would seem to have been inherently coercive, sexist, and unfair. This particular paradox, the dilemma of nineteenth-century Mormon women, is the initial focus of this article, as well as the point of access to a larger theme: the enduring paradox of community and autonomy – of the collective and the individual – in American society.

Two principal terms of my analysis here, "community" and "autonomy," are themselves rich with ambiguity, even *paradoxical*. Part of what makes the community-autonomy tension a genuine paradox, rather than merely an interesting dichotomy, is that there exists no clean practical line separating the two ideals; to some degree, depending on one's life circumstances, every human is simultaneously an autonomous individual (or at least lives by the necessary fiction of being a coherent self, capable of

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<sup>10</sup> MRS. T. B. H. (FANNY) STENHOUSE, *TELL IT ALL, THE STORY OF A WOMAN'S LIFE IN POLYGAMY*, at vi (1890).

<sup>11</sup> Carrel Hilton Sheldon, *Mormon Haters*, in (Bushman, ed., *supra* note 1) 121 (quoting KIMBALL YOUNG, *ISN'T ONE WIFE ENOUGH?* 11 (1954)).

<sup>12</sup> The term "polygamy" may properly refer to *any* kind of plural marriage, although generally the term has come to mean a marriage consisting of one husband and several wives, probably (in American society, at least) because that is how Mormons practiced plural marriage in the nineteenth century and how current Mormon fundamentalists practice it in the intermountain West. Here I will use "polygamy" and "plural marriage" interchangeably in this conventional sense, denoting the marriage configuration of one man and more than one woman. To be precise, though, the term "polygyny" defines the arrangement of one husband and plural wives, while "polyandry" means the opposite – one woman and plural husbands. American law has tended to complicate this terminology, generally using the term "bigamy" (meaning, literally, one husband and two wives) to define all plural marriage situations.

meaningful agency) *and* a member of various communities (family, ethnic, religious, professional, etc.), such that it matters a great deal how we characterize the *balance* one might strike between the two ideals in a given situation, and, more important still, how we *assess* that particular choice of balance.

Mormon polygamy, what many nineteenth-century critics called the “Mormon Problem,” provides a truly distinct historical context in which to explore this ongoing tension in American law and culture between the ideals of community and autonomy. Its uniqueness notwithstanding, what the social phenomenon of Mormon polygamy produced in high relief was a variation on a quintessential American theme, played out in a clash of public narratives. Nineteenth-century Mormon women found themselves in an exquisitely difficult position morally, emotionally, and practically: whether and how to reconcile their religious faith, which included polygamy, with their political and social commitments to the progress of women. Put more broadly, these women experienced a deep conflict between community and autonomy, for their loyalty to religious community appeared incompatible with their loyalty to the progressive vision of advancing the rights and individual autonomy of American women, including their own.<sup>13</sup>

The uniqueness of Mormon polygamy illuminates this classic paradox in new and instructive ways, especially as to issues of sexual politics, social identity, personal autonomy, and cultural legitimacy.<sup>14</sup> The particular, concrete dilemmas that invariably issue from the paradox of community and autonomy are complex to begin with; their “telling” is more complicated still, and more consequential, because we come to “know” any particular social reality only by “reading” or “hearing” it as represented by other voices. This narrative *mediation* of things is thus an inevitable, necessary process that is both hermeneutic (i.e., informing how we

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<sup>13</sup> Of course, we might talk also of a “community” of progressive women and men far larger than the religious community of Mormons to which I refer. By the same token, we might emphasize the individualistic, autonomy-oriented aspects of Mormonism, a nascent American religion that claimed First Amendment protection for the actions of its members – namely, plural marriage – undertaken in order to practice their religious beliefs. This chicken-and-egg quality of the relationship between community and autonomy underscores the richness of the paradox.

<sup>14</sup> As I shall discuss in Part III, a remarkably similar cluster of community-autonomy issues arises regarding the cultural and legal status of homosexuals in contemporary society, particularly on the question of same-sex marriage. Indeed, the cultural and legal narratives that people use to portray gays and lesbians, and the social dynamics that attend those narratives, are rhetorically quite similar to the nineteenth-century clash of narratives over Mormon polygamy. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) for “anti-gay” narratives; *see, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003) for “pro-gay” narratives.

*interpret*) and epistemological (i.e., influencing how we *know*). Once we recognize this all-encompassing condition of the narrative *textuality* of discourse,<sup>15</sup> we can “look behind” any particular narrative – someone’s distinct *telling* of things – to analyze the rhetorical strategies that produced the narrative in the first place: How are such dilemmas narrated on the public stage? By whom? For what purpose, and with what interests in mind? With what imagery? To what audience – and thus to what values – is this narrative meant to appeal?

Understanding both the mediating influence of narratives and the importance of evaluating those narratives from a rhetorical standpoint is crucial to analyzing *legal* discourse in all of its operations – from legislators’ big picture debates about social values, to trial attorneys’ common sense courtroom narratives deployed to persuade juries, to judges’ precedent-minded policy rationales meant to justify court decisions (the dimension of legal discourse on which I will focus here), to law professors’ theoretical jurisprudential discussions in law journals. At whatever level, legal discourse is, after all, the *language of the law*, whose purpose is to determine, establish, and legitimize the rules of human society. As to Mormon polygamy, a seminal example of such discourse is the 1878 U.S. Supreme Court case of *Reynolds v. United States*.<sup>16</sup>

In *Reynolds*, the Court upheld the constitutionality of federal anti-polygamy laws. In authoring the opinion, Chief Justice Morrison Waite presented and justified the decision through a narrative championing the institution of conventional, monogamous marriage as the prime guarantor of social stability. As part of this justifying narrative,<sup>17</sup> the High Court

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<sup>15</sup> For a more law-oriented discussion of the notion of textuality and related issues, see Gregory C. Pingree, *Afterword: Toward Stable Principles and Useful Hegemonies*, 78 CHL.-KENT L. REV. 807 (2003).

<sup>16</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>17</sup> What I call here the Court’s “justifying narrative” is closely related to the more conventional concepts of the “judicial reasoning” or the “judicial rationale” of the opinion. However, by “narrative” I mean a more encompassing, less circumscribed idea of textuality than these conventional terms connote. As I have discussed above, narrative, understood broadly, properly characterizes all purposeful discourse. The judicial opinion is nothing if not purposeful in various important ways, from the purpose of maintaining or revising precedent to the purpose of legally, historically, and culturally justifying the position taken and the values espoused. Much of this rhetorical activity is implicit, of course, but that does not diminish the reality that judicial opinions, like all texts, are complex narratives, *themselves* made of layers of other narratives. The subject of narrative in legal discourse has been actively explored in legal scholarship for nearly two decades. See generally Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, (1983); *Special Issue: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); *Special Issue: Judicial Opinion Writing*, 62

affirmed the trial court's warnings about the dangers that polygamy posed to "pure-minded women and . . . innocent children," "victims" who would "multiply and spread themselves over the land."<sup>18</sup> The Court's determination that Mormon polygamy was "subversive of good order,"<sup>19</sup> and thus not protected under the Free Exercise Clause of the First Amendment, came at the expense of a particular group's claim of religious freedom. As such, *Reynolds* highlighted one important ground upon which the law tends to side with the community over the individual. More precisely, the decision established a standard for privileging the more communal value of "good social order" over the more individualistic right of a particular community's unconventional religious practice.<sup>20</sup>

I have here introduced two kinds of public narrative – cultural and legal – by which Mormon polygamy was known in nineteenth-century America, and I have articulated the fundamental community-autonomy paradox that those narratives serve to illuminate. I will pursue this discussion further in three parts. In Part I, I will briefly review fundamental aspects of Mormon history, particularly those related to the practice of plural marriage. In Part II, I will selectively consider how nineteenth-century Mormon polygamy was represented on the public stage through both cultural and legal narratives. I will analyze the rhetorical strategies at play in what became a nineteenth-century narrative battle over the legitimacy of Mormon polygamy. In Part III, I will suggest how this rhetorical approach to the American "telling" of Mormon polygamy – a study of narratives meant to legitimize or delegitimize a core aspect of cultural identity – might usefully be applied to a contemporary social controversy that underscores the paradox of community and autonomy: homosexuality and the so-called culture wars over family values and the meaning of marriage. I will conclude by briefly situating my rhetorical analysis of nineteenth-century Mormon polygamy within the ongoing philosophical debate about the fate of liberalism in a democratic society.

## I. A BRIEF HISTORY OF MORMON POLYGAMY

*The mark of religion is that it is the practice of an ultimate concern that orders all other concerns, an unconditioned loyalty that trumps all other loyalties.*

– Reinhold Niebuhr

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U. CHI. L. REV. 1363-1519 (1995); *Symposium: Rethinking Robert Cover's Nomos and Narrative*, 17 YALE J.L. & HUMAN. 1 (2005).

<sup>18</sup> *Reynolds* 98 U.S. at 168.

<sup>19</sup> *Id.* at 164.

<sup>20</sup> *Employment Division v. Smith*, 480 U.S. 916 (1990).

According to Mormon history,<sup>21</sup> in 1820, Joseph Smith, fourteen years old and part of a large, religiously diverse family in upstate New York, sought divine guidance regarding the many Christian sects competing for public attention during the Second Great Awakening. In response to his efforts, the boy was visited by God the Father, Jesus Christ, and the Holy Spirit. God informed Joseph that none of the churches then existing had the full truth; that God intended to restore to earth the true church as Christ had organized it two millennia earlier; and that he (Joseph Smith) would be the instrument of this restoration, the first prophet of modern times.

Over the next twenty-four years, Smith received various revelations about church organization and doctrine. In 1830, he officially established The Church of Jesus Christ of Latter-day Saints<sup>22</sup> (indicating that Christ's original church was now restored), members of which were called "Mormons" by most people because of the *Book of Mormon*, which Smith had translated from ancient records. The Mormons considered (and still consider) the revelations that Joseph Smith received, as well as the Book of Mormon and the Bible, to constitute their body of holy scripture.

The Mormons came to the Great Basin desert after suffering years of social and legal persecution in New York, Ohio, Missouri, and Illinois, culminating in the June 1844 assassination of Joseph Smith in Carthage, Missouri. General public hostility to the Mormons, at first a product of their cultish devotion to Smith, had increased significantly with the discovery, sometime during the late 1830s or early 1840s, that the church leader and some of his followers had commenced the practice of plural marriage.

After Smith's martyrdom in 1844, the Mormons made the arduous journey westward under the leadership of Brigham Young. They settled in what is now the Salt Lake Valley in the summer of 1847, choosing this "largely uninhabited desert as the center place for the kingdom" so that they could "be left alone to freely establish a distinctive way of life that other

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<sup>21</sup> Many authors have published histories of the Mormons generally and of Mormon polygamy in particular. A very good general history written by Mormon historians is LEONARD J. ARRINGTON AND DAVIS BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* (1979). A useful history of polygamy by a Mormon author is RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* (1989). Probably the most widely respected general history of the Mormons is by a non-Mormon: JAN SHIPPS, *MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION* (1987). Two especially erudite histories by non-Mormon authors come from the literary critic HAROLD BLOOM, *THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION* (1992), and the legal historian SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002). Finally, for an excellent examination of the politics of Mormon polygamy in early twentieth-century America, see KATHLEEN FLAKE, *THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE* (2004).

<sup>22</sup> Hence the common appellation "LDS," which stands for "Latter-day Saints."

communities had found so threatening and offensive.”<sup>23</sup> Polygamy continued to be a central if not widespread<sup>24</sup> part of this “distinctive way of life”; church members referred to plural marriage as “The Principle,” and the church officially acknowledged the practice as part of its doctrine in 1852.

Joseph Smith had boldly preached to his followers that polygamous marriage was “*the* most holy and important doctrine ever revealed to man on the earth,”<sup>25</sup> a sacred tradition rooted in the Old Testament, a practice central to the full restoration of Christ’s true church, and a solemn ritual that “sealed” a man to each of his wives for all eternity. This theological justification for plural marriage, enabled by Smith’s invocations of both Old and New Testament doctrines, served to support the Mormons’ firmly held, officially published belief that polygamy, so integral a part of their exercise of religion in Christian America, surely would be protected by the “divinely inspired”<sup>26</sup> U.S. Constitution. In the words of one Mormon publicist:

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<sup>23</sup> Edwin B. Firmage, *Religion and the Law: The Mormon Experience in the Nineteenth Century*, 12 *Cardozo L. Rev.* 765, 771 (1991).

<sup>24</sup> Actually, a relatively small percentage of the Mormon community entered into plural marriage. See C. Peter Magrath, *Chief Justice Waite and the ‘Twin Relic’: Reynolds v. United States*, 18 *VAND. L. REV.* 507, 519, n.53 (1965). Nonetheless, polygamy became a central doctrinal, social, and later political, issue for Mormons in the nineteenth century. Moreover, polygamy was practically significant because, as has been variously observed, “by and large, the polygamists were also the Mormons’ leaders.” Hence the successful prosecution of polygamists “served to paralyze Mormon society by removing its leadership.” See, e.g., Firmage, *supra* note 23, at 775. An expanded version of Firmage’s analysis is presented in the first legal history of the Mormon experience, E. FIRMAGE AND R. MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1900* (1988).

<sup>25</sup> From a sworn statement made in 1874 by William Clayton, who had been private secretary to Joseph Smith and who had first transcribed Joseph Smith’s revelation on plural marriage. James L. Clayton, *The Supreme Court, Polygamy and the Enforcement of Morals in Nineteenth-Century America: An Analysis of Reynolds v. United States*, 7 *DIALOGUE: A J. OF MORMON THOUGHT* 46, 48, n.13 (Winter 1979). See also BLOOM, *supra* note 21, at 109.

<sup>26</sup> See, e.g., Noel B. Reynolds, *The Doctrine of an Inspired Constitution*, in *BY THE HANDS OF WISE MEN: ESSAYS ON THE U.S. CONSTITUTION* 1-28 (Ray C. Hillam, ed., 1979). This anthology, comprised of essays by Mormon scholars and church leaders, explores the basic Mormon belief in the inspired nature of the U.S. Constitution. It seems ironic that late twentieth-century Mormons would extol the inspired status of a national Constitution that had effectively been used against them a century earlier. On the other hand, orthodox Mormons would maintain that, as expressed both by church president John Taylor in 1879, *infra* note 56, and by the contributors to the volume mentioned here, Mormons have always held great reverence for the U.S. Constitution, and that it is only the erroneous *interpretation* and *application* of that founding document to which they have objected at different moments in American history. It complicates this issue further that the LDS Church has prohibited polygamy since the church officially ceased the practice in 1890. As I shall discuss in Part II of this article, while today’s Mormon church conducts itself strictly by that 1890 policy, such a straightforward, diplomatic position on polygamy



The constitution and laws of the United States being founded upon the principles of freedom, do not interfere with marriage relations, but leave the nation free to believe in and practice the doctrine of a plurality of wives, or to confine themselves to the one wife system, just as they choose.<sup>27</sup>

Despite the persecution that had driven them westward, the Mormons were confident that they could safely practice their religion in the Utah desert, where they could build and populate God's kingdom.

American society, by and large, did not share this view. Unlike the increasingly common present-day image of Mormons as honest, frugal, hard working, and prosperous (an image that most contemporary Mormons cultivate), many nineteenth-century Americans, like some today, perceived Mormons as a bizarre cult of religious fanatics who had rejected conventional Christianity to form an insular spiritual community based on an exclusive and ambitious theology.<sup>28</sup> Mormons called themselves "Saints," and non-believers, "Gentiles";<sup>29</sup> Mormons believed in modern-day revelations, visiting angels and golden plates, and the possibility of eventual godhood; and, most sensational of all, Mormons practiced polygamy.

## II. THE NARRATIVE BATTLE OVER THE LEGITIMACY OF MORMON POLYGAMY

*No Western nation is as religion-soaked as ours, where nine out of ten of us love God and are loved by him in return. That mutual passion centers our society and demands some understanding, if our doom-eager society is to be understood*

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obscures a far more conflicted historical experience for the evolving nineteenth-century Mormon church during its roughly fifty-year polygamous period.

<sup>27</sup> Young, *supra* note 11, at 45-46. See also Clayton, *supra* note 25, at 49.

<sup>28</sup> Magrath, *supra* note 24, at 514.

<sup>29</sup> In both doctrine (i.e., as God's chosen people) and experience (i.e., persecution and exodus), Mormons identify with the Israelites of the Old Testament. Mormons still occasionally refer to themselves as "Saints," though rarely to non-Mormons as "Gentiles," which would seem consistent with the end of persecution and the general Mormon trend toward assimilation of mainstream American social and cultural norms over the last hundred years. See, e.g., Armand L. Mauss, *Assimilation and Ambivalence: The Mormon Reaction to Americanization*, 22 *DIALOGUE: A J. OF MORMON THOUGHT* 30 (Spring 1989); Martha S. Bradley, *Changed Faces: The Official L.D.S. Position on Polygamy, 1890-1990*, 14 *SUNSTONE: MORMON EXPERIENCE, SCHOLARSHIP, ISSUES, AND ART* 26 (1990); *How Mormons Cope with 'Deterioration in Morals,' U.S. NEWS & WORLD REPORT*, December 19, 1977; GUSTIVE O. LARSON, *THE AMERICANIZATION OF UTAH FOR STATEHOOD* (1971); Clayton, *supra* note 25, at 58; BLOOM, *supra* note 21, at 107, 256.

*at all.*<sup>30</sup>

– Harold Bloom

Before discussing examples of nineteenth-century narratives of Mormon polygamy, I think it important to establish the theoretical framework in which I will “read” those narratives. This calls for a brief discussion of the critical concepts that inform my analysis – narrative, reading, textuality, and rhetoric. I will define and illustrate my understanding of these and related ideas in Sections A and B, after which I will devote Sections C and D to analyzing cultural and legal narratives of polygamy in nineteenth-century America.

#### A. NARRATIVE, TEXTUALITY, AND “FUNDAMENTALIST” VERSUS “LITERARY” READING

The endless variety of definitions and uses of narrative – as a style, a trope, a theme, a discursive method – reflects the protean usefulness of narrative in human communication. The philosopher and literary critic Roland Barthes has argued that every reader of a given narrative or text is necessarily a reader of countless layers of overlapping narratives or texts, just as every reader is also a writer and re-writer, through reading, of consequent, related texts. In a seminal essay on the nature of narrative, Barthes articulates what Porter Abbott calls “[p]erhaps the fullest statement regarding the universality of narrative among humans”<sup>31</sup>:

The narratives of the world are numberless. Narrative is first and foremost a prodigious variety of genres, themselves distributed amongst different substances – as though any material were fit to receive man’s stories. Able to be carried by articulated language, spoken or written, fixed or moving images, gestures, and the ordered mixture of all these substances; narrative is present in myth, legend, fable, tale, novella, epic, history, tragedy, drama, comedy, mime, painting (think of Carpaccio’s *Saint Ursula*), stained-glass windows, cinema, comics, news items, conversation. Moreover, under this almost infinite diversity of forms, narrative is present in every age, in every place, in every society; it begins with the very history of mankind and there nowhere has been a people without narrative. All classes, all human groups, have their narratives, enjoyment of which is very often shared by men with different, even opposing,

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<sup>30</sup> BLOOM, *supra* note 21, at 30.

<sup>31</sup> H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 1 (2002).

cultural backgrounds. Caring nothing for the division between good and bad literature, narrative is international, transhistorical, transcultural: it is simply there, like life itself.<sup>32</sup>

Although Barthes' definition emphasizes the innumerable *forms* that narrative takes, his catalogue is by no means exhaustive. For example, later I will argue that legal argument is also a form of narrative, just as narrative, conversely, is a form of argument, in that all narrative has a purpose and works according to its own internal logic.<sup>33</sup>

Furthermore, the last two sentences of Barthes' passage, beyond merely anatomizing narrative as a ubiquitous meta-genre, identify the intrinsic mediating *process* of narrative – narrative's continuous role in literally

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<sup>32</sup> Roland Barthes, *Introduction to the Structural Analysis of Narratives*, in A BARTHES READER 251-52 (Susan Sontag ed. 1982).

<sup>33</sup> The law does not work by *pure* formal logic, of course. Rather, analogical and syllogistic reasoning, when skillfully used, are valuable *rhetorical* tools, appealing to the legal reader on emotional, ethical, and rational levels and thus enabling *persuasion*. Were the law purely logical, it would not differ from algebra; fact pattern X would *always* yield ruling Y – an ideal but not a reality in the American common law system, which is more precisely a highly structured rhetorical system. Thus “logic” in the conventional sense is just one of many rhetorical tools used to persuade the legal reader of the validity of the argument being presented; the skillful legal writer might also invoke ideals such as consistency, objectivity, neutrality, precedent, tradition, and fairness. Each of these tools or values contains its own narratives (e.g., “the law promises us fairness, so judges must square their decisions with some clear notion of what is fair”), and, conversely, the skillful deployment of one or several of these narratives makes a legal argument that much more “logical” and thus persuasive to the legal reader. For an excellent practical discussion of the rhetorical nature of judicial opinions, see Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995). Judge Wald concludes her essay with a telling characterization of judges as rhetoricians, observing that within the structural constraints of the common law system,

judges still use rhetoric to maneuver. The way they present the facts, the way they describe rules and standards of review, the way they ‘handle’ precedent, their decisions to write separately or stay with the pack, all provide wide avenues in which to drive the law forward. A judge’s individual skill at working these levers of power, and doing so in a way that does not overly antagonize colleagues, continues to have a powerful influence on decision making. That is why, in the end, judges – as well as their words – matter so much. *Id.* at 1419.

The rhetorical realities of legal reasoning and discourse undermine the traditional assumption that law is only about reason and argument, not emotion. For insightful interdisciplinary discussions of the complex relationship between reason and emotion, see THE PASSIONS OF LAW (Susan Bandes ed., 2000); MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995); PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 85-124 (1987).

constituting, as well as organizing, the context in which we interpret, understand, and represent our lived experience. Perhaps this is why the rhetorician Robert Scholes chooses to open *Protocols of Reading*, his discussion of reading as the quintessential human cognitive activity, with a statement from Barthes related to, but pithier than, that quoted above: “And no doubt that is what reading is: rewriting the text of the work within the text of our lives.”<sup>34</sup> This lyrical, evocative epigraph about reading is *itself* a compact, implicit narrative (i.e., a narrative about narrative), for it contains at least several possible referents of a compelling story: “reading,” “rewriting,” “the text,” “the work,” “our lives.” To illustrate with a metaphor rooted in common experience, Barthes’ tightly packed little statement is like an icon on a computer desktop, which, if mouse-clicked, will spring open to display its parts (“reading,” “rewriting,” etc.), which themselves may be clicked open to reveal multiple meanings, which might contain further elements, and so on.

Were we to click open Barthes’ sentence and proceed as described above, we would produce an expanded version, a story that, when “played out,” might go something like this: *We are all readers, and we are always reading, however consciously. This means that texts – let’s call the infinite universe of them “the textuality of things” – are always around us, inescapable, like water to fish. But that is only part of the equation, because each time we read a text, we bring our own hermeneutical machinery – reflecting our education, values, preferences, memories, experiences, beliefs, feelings, convictions, commitments, ideologies – to bear, so that what was an “objective” external text is now our own unique version. Thus we are authors (rewriters) at the same time (always) that we are readers; both inhere in the unending operation of reading. This seamless cycle of reading-and-authoring is a simple yet profound way of explaining our interior experience of life and the world around us. But what is “the work”? This seems the most ambiguous and challenging aspect of this little story. Is “the work” the original text, the template for all ensuing related texts, an ideal form in the Platonic sense? (If that is so, are not all texts to some degree templates or rewritings of all other texts? Barthes’ statement, read in its totality, seems to suggest this.) Is “the work” something transcendent and mysterious, ever present and intuitively palpable, but never fully comprehensible, requiring our faith, like Joseph Campbell’s notion of that yearned-for source of immanence to which we give the name “God”?<sup>35</sup> Or is “the work” a necessary, instrumental, interpretive metaphor, a provisional marker for all signs, which are always “floating” somewhat due to the unanchored nature of signification itself?*

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<sup>34</sup> ROBERT SCHOLES, *PROTOCOLS OF READING* 1 (1989).

<sup>35</sup> See, e.g., JOSEPH CAMPBELL, *THE MYTHIC DIMENSION: SELECTED ESSAYS 1959-1987* 156-79, 204-19 (1997).

(*Is this last understanding yet another way of saying that every reading is a rewriting?*)

I have “read” at some length Barthes’ single observation on reading and textuality because I want to demonstrate at the outset of this article several crucial points of my definition of narrative, points that will serve as touchstones in the pages that follow. It is worthwhile to discuss these points now, to establish more clearly what I mean by narrative and how I will use that definition.

First, narrative is a resident dimension of all texts – of textuality – and is thus endemic to all human communication.<sup>36</sup> As such, narrative functions to *mediate* how we understand and represent our experiences. Abbott observes “the presence of narrative in almost all human discourse,” such that some theorists “place it next to language itself as *the* distinctive human trait.”<sup>37</sup> Such theorists include Frederic Jameson, who has called narrative an “all-informing process” and “the central function or instance of the human mind,”<sup>38</sup> and Jean-François Lyotard, who has described narrative as “the quintessential form of customary knowledge.”<sup>39</sup> As these statements suggest, *narrativity* is at least roughly equivalent to *textuality*; we are always already *both* inside and outside innumerable narratives, a notion argued forcefully in literary and linguistic theory during the last several decades. Yet to acknowledge the inescapable mediating presence of narrative is not to relinquish the goal of some kind of meaningful, principled understanding of narrative.<sup>40</sup>

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<sup>36</sup> See generally SCHOLES, *supra* note 34; THE CRAFTY READER (2001); ABBOTT, *supra* note 31. For a probing discussion of the notion of textuality in relation to the law, see generally GOODRICH, *supra* note 33; see also STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 37-47, 436-502 (1989); THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING TOO (1993).

<sup>37</sup> Abbott, *supra* note 31.

<sup>38</sup> FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT 13 (1981).

<sup>39</sup> JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION 19 (Geoff Bennington & Brian Massumi trans., 1984).

<sup>40</sup> In other words, just because language is “slippery” does not mean that we must give up hope of meaningful communication. Rather, as readers, it behooves us to find interpretive methods and principles stable enough to provide *traction* as we navigate texts, especially given all of the intellectual log-rolling that characterizes postmodern thought. And the law, perhaps more than any other discipline, relies on *at least* the necessary fiction that words and their meanings remain relatively stable if we adhere to principled, consistent forms of reading and interpretation. Relativism is not the same thing as nihilism; what matters is the *quality* of our choice and application of principles by which to read and interpret texts. For a discussion of these issues in a focused legal context, see Pingree, *supra* note 15, at 808, n.3.

A useful, concrete way to think about the rather ephemeral concepts of narrative and textuality is to consider the *metaphorical* quality of all language – metaphorical in the

In *The Crafty Reader*, Scholes presents a lucid, timely discussion of a principled methodology of reading in a chapter called “Sacred Reading: A Fundamental Problem.” He situated his discussion in the context of contemporary religious and cultural debates among “fundamentalist” and “literary” readers. Scholes makes these two terms opposite ends of the “reading” spectrum and defines them in ways useful to my discussion here. He defines “fundamentalist” readers as “literal” readers – though the “concept of ‘literal meaning’ is itself an exaggeration, a metaphor, a paradox. Nevertheless, it [literal meaning] is an expression of the desire to get at the truth or meaning of a text.”<sup>41</sup> Scholes defines “literary” readers as those “attempting to situate the text and the writer of these letters in their own time, constructing, from the clues in the text, the persona of this writer, paying particular attention to his [the author’s] self-fashioning.”<sup>42</sup> Scholes advocates the ideal of “crafty” reading, a kind of “selective literalism” that takes seriously the desire of “fundamentalist” readers to get at the truth, while “resisting the [fundamentalist] zeal that often results in interpretive leaps to an unearned certainty of meaning.”<sup>43</sup> Scholes resolves that “[t]he crafty reader must seek an authorial intention, while recognizing that there are many reasons why we shall never close the gap that separates us from the author.”<sup>44</sup>

The philosopher Richard Rorty praises “literary” reading by suggesting that it enables us to participate in *creating*, rather than merely *inheriting*, the narratives of ourselves and our lives. In an essay called “The Contingency of Selfhood,” Rorty invokes Nietzsche’s thinking about the creation of self as a way to describe, quite poetically, a process of self-substantiation through narrative:

In his [Nietzsche’s] view, in achieving . . . self-knowledge we are not coming to know a truth which was out there (or in here) all the time. Rather, he saw self-knowledge as self-creation. The process of coming to know oneself,

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sense that, as an ongoing part of life, we come to understand unfamiliar concepts or things when they are explained to us *in terms of concepts or things that are familiar to us*. My mention of “mouse-clicking” Barthes’ brief narrative to find its other meanings, and my equating people-and-textuality to fish-and-water, are two examples. Those metaphors are effective to the readers of this article to the extent that those readers know something about computers and fish – an assumption I feel safe in making. Hence the essence of metaphor is to communicate one thing in terms of something else – which, if one thinks about it, is the central cognitive process at work in *any* communication, however pedestrian. For an excellent, common sense discussion of the metaphorical nature of language, see GEORGE LAKOFF AND MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

<sup>41</sup> SCHOLES, *supra* note 36, at 219.

<sup>42</sup> *Id.* at 238.

<sup>43</sup> *Id.* at 219.

<sup>44</sup> *Id.* at 230.

confronting one's contingency, tracking one's causes home, is identical with the process of inventing a new language – that is, of thinking up some new metaphors. For any *literal* description of one's individuality, which is to say any use of an inherited language-game for this purpose, will necessarily fail. One will not have traced that idiosyncrasy home but will merely have managed to see it as not idiosyncratic after all, as a specimen reiterating a type, a copy or replica of something which has already been identified. To fail as a poet – and thus, for Nietzsche, to fail as a human being – is to accept somebody else's description of oneself, to execute a previously prepared program, to write, at most, elegant variations on previously written poems.<sup>45</sup>

While using a somewhat different set of terms, Rorty is nonetheless concerned with how we respond to the mediating narratives of our lives – literally, the inherited words, concepts, paradigms, histories, and ideologies that constitute the thinking-and-expressing medium of our experience. Rorty asserts that although none of us chooses the “hand we are dealt,” our formative community or communities, each of us has the agency and power to determine how to “play our hand” in original ways – how to achieve a meaningful degree of personal autonomy. Indeed, Rorty contends that, in confronting the contingent forms of our own construction and ongoing mediation, we may achieve even more than a meaningful kind of self-realization – an “owned” if inherited subjectivity; we may move toward genuine autonomy by actually undoing the inherited architecture of our subjectivity and rebuilding ourselves through narrative. As he puts it, “the only way to trace home the causes of one's being as one is would be to tell a story about one's causes in a new language.”<sup>46</sup>

As if taking her cue from Scholes and Rorty, the philosopher Honi Fern Haber characterizes this “literary” perspective on narrativity as a kind of enlightened compromise, a critical antidote to the kinds of dangerously “fundamentalist” narratives that I will discuss later in this article:

There is no view from nowhere. We can never leave all our prejudices behind and operate from a wholly disinterested standpoint, but our prejudices become dangerous only when they are dogmatic, kept hidden from view and not open to discussion. . . . We cannot think or speak, much less act, in any purposeful manner without having structured our world

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<sup>45</sup> RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* 27-28 (1989).

<sup>46</sup> *Id.* at 28.

and our interests in some heuristically useful way. Without some notion of structure (unity) and some allowance for a legitimate recognition of similarities between ourselves and others, there can be no subject, *community*, language, culture.<sup>47</sup>

In her own terms, Haber here engages two critical aspects of narrative and their implications for the paradox of autonomy and community: the impossibility of standing outside narrative textuality; the imperative of remaining mindful that rhetorical strategies of narrative, neutral in the abstract, will carry moral implications and political consequences when deployed in the service of living narrative; and the need to recognize our common values in order to reason together to navigate our differences as autonomous individuals. Indeed, recognizing the impossibility of neutral narration, rather than undermining the credibility of the process or the narrator, actually frees its readers to consider more realistic, meaningful avenues of evaluation. In contrast to the “literary” methodologies of Scholes, Rorty, and Haber, of course, is the more common human tendency toward “fundamentalist” narrative, which often produces a problem I will call “rhetorical reductivism.”

#### B. THE “FUNDAMENTALIST” PROBLEM OF “RHETORICAL REDUCTIVISM”

During the 1860 Congressional debate about Mormon polygamy, Congressman McClernand of Illinois laid down this warning:

As to polygamy, I charge it to be a crying evil; sapping not only the physical constitution of the people practicing it, dwarfing their physical proportions and emasculating their energies, but at the same time perverting the social virtues, and vitiating the morals of its victims. . . . It is a scarlet whore. It is a reproach to the Christian civilization; and deserves to be blotted out.<sup>48</sup>

Although this kind of righteous rhetoric was not uncommon in nineteenth-century America generally, it appears to have been especially typical of public feeling toward Mormons and their plural marriages.<sup>49</sup> For

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<sup>47</sup> HONI FERN HABER, *BEYOND POSTMODERN POLITICS: LYOTARD, RORTY, FOUCAULT* 1, 5 (1994) (emphasis added).

<sup>48</sup> CONG. GLOBE, 36th Cong., 1st Sess., 1514 (1860).

<sup>49</sup> See Magrath, *supra* note 24, at 514-20.



example, around the time of Congressman McClelland's thunderous pronouncement, professor Frances Lieber, a leading figure in the development of American political science, denounced Mormonism as a "repulsive fraud" and a "wicked idea";<sup>50</sup> not long thereafter, a prominent clergyman in Chicago declared that "Mormonism ought to be dynamited";<sup>51</sup> and elsewhere, social commentators popularized the idea that the Mormon Church was a "society for the seduction of young virgins."<sup>52</sup> One critic announced that Salt Lake City was "the biggest whorehouse in the world."<sup>53</sup>

The Mormons did not accept these public verdicts quietly. In October 1879, after Congress had acted to outlaw polygamy<sup>54</sup> and the Supreme Court had upheld that law and ruled that the First Amendment did not protect plural marriage as an exercise of religion,<sup>55</sup> Mormon Church President John Taylor aired this response in the Church's general conference:

We might ask – will they derive any benefit from any course taken against the Latter-day Saints? No! A thousand times no!! I tell you that the hand of God will be upon them for it . . . We do not want them to force upon us their drinking saloons, their drunkenness, their gambling, their debauchery and lasciviousness. We do not want these adjuncts of civilization.<sup>56</sup>

Just as Congressman McClelland's moralistic diatribe against Mormon polygamy was typical of contemporary public discourse on the issue, so President Taylor's indignant and equally pious rebuke was characteristic of the Mormons' style of return volley.

Indeed, the Mormons, already wary of the federal government because of past conflict, had become increasingly antagonistic after Congress acted to proscribe polygamy in 1862. Subsequently, Mormon spokesmen frequently portrayed the "non-Mormon world . . . as wicked, adulterous and corrupt. Church members began to describe monogamy pejoratively as 'the

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<sup>50</sup> FRANCES LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 320 (2d ed. 1859).

<sup>51</sup> See Magrath, *supra* note 24, at 514 (citing RAY B. WEST, JR., *KINGDOM OF THE SAINTS* 322 (1957)).

<sup>52</sup> *Id.*, note 24, at 515.

<sup>53</sup> See IRVING WALLACE, *THE TWENTY-SEVENTH WIFE* 15 (1961), "a popular biography of Ann Eliza Young, the stormy and apostate twenty-seventh wife of Brigham Young." Magrath, *supra* note 24, at 515, n.41.

<sup>54</sup> The Morrill Act of July 1, 1862, ch. 126, sec. 1, 12 Stat. 501.

<sup>55</sup> *Reynolds*, 98 U.S. 145.

<sup>56</sup> JOHN TAYLOR, 20 *JOURNAL OF DISCOURSES* 316, 320-21 (1880).

one-wife-system' or 'serial marriage'. . . ."<sup>57</sup> John Taylor represented this increasingly strident outlook when, in the same 1879 sermon, and without a trace of irony, he claimed that working within the federal government were "religious fanatics and corrupt politicians" who "would not hesitate to sweep us off the face of the earth to get elected."<sup>58</sup> Then, appealing to the basic Mormon reverence for the Constitution,<sup>59</sup> Taylor concluded that these politicians "care nothing about human rights, liberty, or life, if they can bring about the results desired."<sup>60</sup>

Public statements concerning Mormon polygamy abounded in nineteenth-century America. What stands out about them – indeed, what they nearly always shared, regardless of their source – was a zealous, polarized quality, an unyielding insistence on the exclusive moral rightness of their position. Such stark representations of polygamy might seem inconsonant to anyone familiar with the convoluted history of plural marriage in America; since its inception with the Mormons in the nineteenth century, the American practice of polygamy has been, for those who have lived it as for those who have studied it, a complex matter. This was perhaps especially true for nineteenth-century Mormons, for whom polygamy, while a galvanizing, purportedly spiritual way of life, was also confusing, traumatic, and divisive.<sup>61</sup>

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<sup>57</sup> Clayton, *supra* note 25, at 48.

<sup>58</sup> Taylor, *supra* note 51, at 320.

<sup>59</sup> This basic Mormon belief in the inspired nature of the U.S. Constitution is explored in *Reynolds*, *supra* note 26 (Hillam, ed., 1979).

<sup>60</sup> Taylor, *supra* note 51, at 320.

<sup>61</sup> Accounts of life in Mormon polygamy range from the autobiographical to the fictional to the scholarly, and from the apologist to the excoriating to the satirical. See, e.g., Martha Sonntag Bradley & Mary Brown Firmage Woodward, *Plurality, Patriarchy, and the Priestess: Zina D.H. Young's Nauvoo Marriages*, 20 *J. OF MORMON HIST.* 84 (Spring 1994); JESSIE L. EMBRY, *MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE* (1987); Kahlile Mehr, *Women's Response to Plural Marriage*, 18 *DIALOGUE: A J. OF MORMON THOUGHT* 84 (Fall 1985); VALEEN TIPPETTS AVERY AND LINDA KING NEWELL, *MORMON ENIGMA: EMMA HALE SMITH: PROPHET'S WIFE, "ELECT LADY," POLYGAMY'S FOE*, (1984); Julie Dunfey, *'Living the Principle' of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century*, 10 *FEMINIST STUDIES* 523 (Fall 1984); ORSON SCOTT CARD, *FATHER, MOTHER, MOTHER, AND MOM AND A WOMAN OF DESTINY* (1984); Bushman, ed., *supra* note 1, see especially Stephanie Smith Goodson, *Plural Wives*, Judith Rasmussen Dushku, *Feminists*, and Laurel Thatcher Ulrich, *Fictional Sisters*; MAURINE WHIPPLE, *THE GIANT JOSHUA* (1976); SAMUEL WOOLLEY TAYLOR, *FAMILY KINGDOM* (1974) and *I HAVE SIX WIVES: A TRUE STORY OF PRESENT-DAY PLURAL MARRIAGE* (1956); PAUL BAILEY, *POLYGAMY WAS BETTER THAN MONOTONY: ONE MAN'S MEMORIES OF MORMON PIONEER LIFE IN UTAH* (1972); STENHOUSE, *supra* note 10, and *EXPOSE OF POLYGAMY IN UTAH: A LADY'S LIFE AMONG THE MORMONS* (1872); MRS. JENNIE A. FROISETH, *THE WOMEN OF MORMONISM, OR THE STORY OF POLYGAMY AS TOLD BY THE VICTIMS THEMSELVES* (1887); JENNIE A. BARTLETT, *ELDER NORTHFIELD'S HOME; OR SACRIFICED ON THE MORMON ALTAR, A STORY OF THE BLIGHTING CURSE OF POLYGAMY* (1883); ANN ELIZA YOUNG, *WIFE #19, A*

The *experiential* complexity of polygamy is precisely what I will emphasize in this section, contrasting the recorded reality of this unwieldy social phenomenon with the moralistic, simplifying perspectives that fueled a fierce narrative battle between the Mormons, on the one hand, and the U.S. government and much of the American public, on the other. In this narrative battle, each side tended to present argument-narratives of the other that invoked grand ideologies and thus obscured the nuanced reality of the experience, further polarizing the public debate by narrowing the scope of possible meanings about life in polygamy.

In particular, I want to consider the function and implications of this kind of narrative process, in which each side sought legitimacy for its vision of American religious identity by representing polygamy in morally simplistic terms and images for purposes of gaining ethical leverage in the ongoing public dialectic. How, and why, did this sort of fundamentalist narrative process – an example of *rhetorical reductivism* – succeed in producing the predominant American moral narrative about polygamy? Of course, *all* representations – all narratives – inevitably reduce their subject matter in the sense that narratives must impose some kind of order on the unruliness of experience, with language always an approximation of what is intended.<sup>62</sup> Thus I am talking about a matter of degree in my discussion of the kind of narrative produced by rhetorical reductivism. Still, because this kind of overweening, two-dimensional narrative tends to be common and influential as an element of public discourse, I think it worth examining as part of my analysis of narrative and the desire for cultural legitimacy. Why did partisans in the public debate over polygamy depict so complex a cultural and religious phenomenon in such singular, imperious moral terms? How did the innumerable authors of these dueling narratives, all invoking, to some degree, the institutional voices of God and state, effectively divest the experience of polygamy of any moral ambiguity? More generally, how might we explain the collective impulse to deploy rhetorical reductivism in representing socially divisive issues so as to maintain an established moral order, often at remarkable intellectual cost?

Of course, unyielding language such as that used by Congressman McClelland or church President Taylor often has characterized public, official, and institutional representations of nettlesome social issues in American life. In fact, once we account for a century's worth of linguistic

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LIFE IN BONDAGE, A FULL EXPOSE OF MORMONISM (1875); MARIA WARD, FEMALE LIFE AMONG THE MORMONS: A NARRATIVE OF MANY YEARS PERSONAL EXPERIENCE, BY THE WIFE OF A MORMON ELDER, RECENTLY FROM UTAH (1855).

<sup>62</sup> This does not contradict the notion of textuality; to be inescapably *inside* the medium of language does not preclude the equally inescapable, ongoing necessity of forging, for external (e.g., social, political, legal, cultural) purposes, meaningful communication within that medium – something like the need to continually repair and orient one's sailboat while sailing in various weather conditions.

shift, we might find it difficult to distinguish the bellicose statements I have quoted from the holy rhetoric we are served today on controversial public issues – abortion, drugs, pornography, affirmative action, and homosexuality, to name a few. But often such grandiose language is, to risk an oxymoron, grandly reductive, invoking sweeping authority to preempt doubt or, as Scholes asserts, to conceal conflict or disagreement. In these ways rhetorical reductivism prevents meaningful public discussion, for it blinds us to the ethical and experiential complexity of a social practice like polygamy.

Still, we should not be surprised that such binary rhetoric mediates public accounts of controversial social issues; perhaps just this kind of simplification is necessary to repress or otherwise manage – to order in an acceptable way – the public and personal anxiety that attends controversial issues. Indeed, I suggest that righteous, simplistic public responses to controversial issues are tokens of anxiety, signs of an underlying ambivalence that emerges when we are forced to consider difficult questions about who we are, individually and collectively.<sup>63</sup>

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<sup>63</sup> Regarding the markedly divisive effects (including the rhetorical reductivism I posit here) that certain matters of social controversy tend to produce, sociologist Jerome Skolnick offers a useful theory of how people process controversial social issues. Jerome H. Skolnick, *The Social Transformation of Vice*, 51 LAW AND CONTEMP. PROBLEMS 9 (Winter 1988). Skolnick has long studied behavior that mainstream society views as “vice” – gambling, drugs, adultery, and prostitution, for example. *Id.* at 10. He suggests that public controversy about such issues stems from our moral ambivalence towards them, so that vice is not merely or exclusively “evil or immoral” behavior, but rather conduct that connotes “pleasure and popularity, as well as wickedness.” *Id.* Hence the claim about moral ambivalence, for vice “is conduct that a person may enjoy and deplore at the same time.” *Id.* This theory of vice offers interesting possibilities for our analysis of narratives about the Mormon polygamy controversy.

For example, given that Mormon polygamy was genuinely controversial in nineteenth-century America, we may read rhetorically reductive responses to polygamy as a possible indication of dividedness and uncertainty, not only within those who *criticized* polygamy, but also within those who *engaged* in it. Indeed, this view of social behavior enables us meaningfully to critique what we might think of as a whole dialectic of vice about Mormon polygamy – that is, engagement by someone in the practice of polygamy, public reactions against that engagement, counter-response and justification, and so on. In a sense, this broad, open-ended notion of vice helps us address the very problem at issue here – simplistic, two-dimensional analysis – as we work to understand the meaning of reductive representations of social controversy, for it allows us to view mainstream definitions of vice, not merely as straightforward (i.e., literal-fundamentalist) statements of political affiliation or identity, but also, in Skolnick’s term, as a sign of deeper “cultural contradiction.” *Id.* at 11.

This may seem just an academic version of the self-fulfilling cliché “me thinks thou dost protest too strongly,” or “homophobia conceals a latent homosexual desire.” Yet it seems indisputable that these worn maxims carry a kernel of truth about why people tend to feel unusually strongly about certain issues. How else to explain a fierce attack on a relatively unknown *other*, unless we at least recognize that the speaker *gives a damn* one way or another? Polygamy mattered, for good or ill, to those who engaged so extensively

### C. CULTURAL NARRATIVES OF MORMON POLYGAMY

Polygamy was repugnant to mainstream American values regarding the configuration and politics of marriage,<sup>64</sup> and public response was fierce. In 1856, for instance, the first Republican Party platform proclaimed “both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism – Polygamy and Slavery.”<sup>65</sup> This statement reflected the common fear that polygamy, like slavery, would spread to the territories. Polygamy *had* spread to the Utah territory, of course, but perhaps more interesting for our purposes here is that some Americans linked the narrative of polygamy with that of slavery, equating the ostensibly consensual practice of the former with the undeniably coercive practice of the latter. Novelist and social activist Harriet Beecher Stowe spoke for many who viewed plural marriage as anything but consensual; polygamy was merely a different *kind* of “degrading bondage, . . . a cruel slavery whose chains have cut into the very hearts of thousands of our sisters.”<sup>66</sup> And Jennie Froiseth, the well known author of *The Women of Mormonism, or the Story of Polygamy as Told by the Victims Themselves*, declared that “[t]he cornerstone of polygamy is the degradation of woman, and it can flourish only where she is regarded and treated as a slave.”<sup>67</sup>

In the face of this harsh public narrative of Mormon polygamy as women’s serfdom, the Church dug in its heels, repeating its institutional narrative about the role of women through a series of official statements that did nothing to refute the public impression that Mormon wives, polygamous or otherwise, lived in servitude to their husbands. On the contrary, the Church seemed bent on reinforcing the general Victorian

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in excoriating or exalting it, and the evidence is in the telling.

Skolnick’s theory is also helpful to us if we want to understand the dynamic relationship between vice and culture – between what is publicly represented and what is personally felt and experienced – because the theory gives us one principled way to read narratives about polygamy in more of a literary, rather than a literal-fundamentalist, mode. That is, Skolnick’s interest in searching for signs of “cultural contradiction” is precisely to emphasize the possible ambiguity of the subtext – to look beyond cleanly drawn lines of simplistic moral representation to the underlying complexity of a controversial social practice and its intricate relations to history, circumstance, ideology and will.

<sup>64</sup> See, e.g., RICHARD A. POSNER, *SEX AND REASON*, 253-60 (1992). In an incisive commentary, Posner suggests that polygamy threatened the ideal of “companionate” marriage that anchors western notions of monogamy.

<sup>65</sup> PORTER AND JOHNSON, *NATIONAL PARTY PLATFORMS 1840-1960* 27 (1961). This hard line on polygamy appeared again in the Party’s 1876 platform, and in 1880 the Republicans called for the elimination of polygamy and, if necessary, the militarily enforced separation of “the political power from the ecclesiastical power of the so-called Mormon church.” *Id.*

<sup>66</sup> Stenhouse, *supra* note 10, at vi.

<sup>67</sup> Sheldon, *supra* note 11, at 121 (quoting Young, *supra* note 11, at 11).

narrative of women as subject to male authority. For example, in 1852, at the behest of Brigham Young, Church Apostle Orson Pratt prepared “Celestial Marriage,” a lengthy defense of polygamy that coincided with the Church’s 1852 public announcement of plural marriage. Pratt, probably the Church’s chief apologist for polygamy, characterized the woman’s place in the family in distinctly Pauline terms:

The husband is the head of the family, and it is his duty to govern his wife or wives, and the children, according to the laws of righteousness; and it is the duty of the wife to be subject unto him in all things, even as the church is subject unto Christ.<sup>68</sup>

That such patriarchal pronouncements echoed the familiar New Testament metaphor of Christ’s church as a “body” seems to have been an attempt at theological justification of polygamy through the invocation of a well-known, orthodox Christian image – one in which patriarchal order was unobjectionable.

Yet the Mormons’ expansion of the well-known narrative of Christ’s church “body” to include polygamy offended mainstream Christians, much as, in principle, the attempt to include same-sex unions within the grand narrative of traditional marriage would offend many Americans more than a century later. Indeed, the Mormons’ revised narrative of the patriarchal family order undoubtedly contributed to the popular notion that Mormons, regardless of their theological justifications, had constructed their polygamous system to imitate “the Oriental concubines, in which the women were near-slaves.”<sup>69</sup> Clearly, the public embrace of Paul’s “body of Christ” narrative did not also yield acceptance of the radical departure from convention that polygamy represented. Joseph Singer has observed that the persuasion process turns on whether the speaker succeeds in compelling the audience to recognize or discover common ground (e.g., shared values) with a person or position that the audience initially does not support.<sup>70</sup> This conception of persuasion has its limits, however: the nineteenth-century American public’s “discovery” or “recognition” of values already held about marriage decidedly did *not* lead many to accept the argument, implicit in the Mormons’ narrative of Christ’s body, that a significant deviation from monogamy was legitimate, even if rooted in selective Old Testament precedent.

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<sup>68</sup> Young, *supra* note 56, at 50.

<sup>69</sup> Magrath, *supra* note 24, at 518.

<sup>70</sup> Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2444 (1989). *See also* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1002-04 (1991).

This particular clash of narratives is worth considering a little further, as it raises an important point about *cultural legitimacy*. Generally speaking, the public read Mormon polygamy within a narrative of slavery; that is, people generally were persuaded that Mormon plural marriage fettered and devalued women in ways sufficiently analogous to how slavery fettered and devalued black Americans that the slavery narrative should include polygamy as well as the southern institution of owning and using black people as property. The Mormons, on the other hand, read their practice of polygamy as divinely inspired, part of several otherwise legitimate nineteenth-century American narratives: the narrative of reverence for the prophets of the Old Testament, some of whom had had plural wives; the narrative of devotion to the Apostle Paul's patriarchal New Testament teachings that made women subservient to men; and the narrative that the Constitution, divinely inspired, protected distinct religious practices like polygamy, *themselves* inspired by God.

Each set of narratives served to legitimize the cultural identity of its proponents, which in this situation amounted to being obedient to the expressed doctrines of the Christian God, and thus legitimate in the eyes of that God. Such a starkly binary clash of narratives, often both the source and the product of rhetorical reductivism, meant a zero sum game as to legitimacy in the eyes of one or the other audience (Mormon or American public). That is, narrative that seeks to legitimize the cultural identity – and thus the worldview – of the speaker often serves, just as effectively, to *de-legitimize* the cultural identity of the “other” in the narrative battle. This should not be surprising; these binary functions are typically inseparable, flip sides of the same coin: a narrative that undermines the cultural legitimacy of a certain person or group will almost certainly have the effect, whether intended by a specific author or communicated as a more diffuse cultural sensibility, of legitimizing the position of the author.

Nevertheless, the phenomenon of “zero sum” legitimacy will operate roughly to the extent that the narratives in conflict are literal-fundamentalist, binary narratives, leaving little room for hermeneutic negotiation. And although this need not be the case when narratives clash, it seems that the greater the perceived religious stakes, the greater the human tendency to batten down the rhetorical hatches to ensure a sense of certainty and legitimacy, even if (or, in Scholes' view, *especially* if)<sup>71</sup> that rhetorical strategy expresses itself in the cloak of highly figurative language.

Some Mormon plural wives would likely have disputed the typically categorical characterizations of their polygamous lifestyle, for most of their first-hand accounts suggest that the experience of polygamy was

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<sup>71</sup> Scholes, *supra* note 36 at 13.

heterogeneous.<sup>72</sup> Historian Kahlile Mehr concludes his detailed survey of such women's personal narratives with this observation:

Plural marriage was a complex phenomenon in both theology and practice. It was no less complex psychologically. Some LDS women ardently accepted it as a divine principle. Others viewed it as an unwelcome but necessary sacrifice to achieve salvation. A few loathed it. There were women who coaxed reluctant husbands to take an additional wife. Others quietly acquiesced--either in initial discussions or when presented with a *fait accompli*, and still others left the household rather than accept a sister wife. Sometimes the inner and outer persons were in conflict. Inwardly repelled and outwardly obedient, many women faced a struggle that for some led to triumphant self-control and for others to shattering disillusionment.<sup>73</sup>

Notwithstanding the rhetorical reductivism at work in most public narratives about polygamy, the experience itself, like any experience involving intimate social relationships, did not lend itself to transparent or uniform interpretation at either a personal or a symbolic level.

Still, many Americans derived their impression of Mormon polygamy almost exclusively from the nightmarish personal narratives published in popular books like Jennie Bartlett's *Elder Northfield's Home; or Sacrificed on the Mormon Altar, A Story of the Blighting Curse of Polygamy*.<sup>74</sup> *The New York Times* also contributed significantly to this national impression, consistently inveighing against Mormons and polygamy. In 1882, for example, after *The World* had published a benign report on the Mormons, the *Times* reprinted the article, followed by the demand, "What can [the editor's] object be in making his paper the apologist for a false and degrading religion?"<sup>75</sup> According to the *Times*, the editor of the *World* must have been angling to provide himself "with as many wives as he now holds shares of stock."<sup>76</sup> A year later, after many Protestant churches had organized mass meetings in most large American cities to draft resolutions urging Congress to take further action against the Mormons, *The Times'* editorial page seemed to relish the chance to point a finger at the Mormons,

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<sup>72</sup> See, e.g., Goodson, *supra* note 61, at 95-99; Dushku, *supra* note 1, at 177-97; Bradley and Woodward, *supra*, note 61, at 111-118; BAILEY, *supra* note 61 at 33-37; Mehr, *supra* note 61, at 84-88. See generally WHIPPLE, *supra* note 61; AVERY and NEWELL, *supra* note 61.

<sup>73</sup> Mehr, *supra* note 61, at 84.

<sup>74</sup> *Id.* at 117, n.14; 121.

<sup>75</sup> *Id.* at 120, n.25, citing *The New York Times*, June 13, 1882.

<sup>76</sup> *Id.*, note 26.



calling them “a class of sinners . . . providentially supplied for the purpose of enabling eloquent ministers to preach powerful sermons without offending any possible pewholder.”<sup>77</sup>

Editorial page hyperbole aside, it says much about public sentiment that *The New York Times*, arguably the national journalistic voice of record, felt confident speaking for “any possible pewholder” in presenting a narrative of Mormons as so immoral that God must have produced them to give all other Christians a reason to unite in opposition. To use William Handley’s phrase about growing up Mormon,<sup>78</sup> the *Times*’ characterization signifies a “totalizing narrative” among Americans regarding the Mormons, one in which, morally speaking, there appeared to be no middle ground.

Such sweeping condemnations of polygamy, like the Church’s dogmatic pronouncements, created a morally stark dialectic of public narratives that could only have obscured the complex nature of the polygamous experience, especially for the Mormon women asked to embrace it. Thoughtful voices were few, but notable. For example, John Stuart Mill, perhaps annoyed with the sheer volume of ridicule applied to Mormon polygamists, or alert to the hypocrisy of a larger culture blind to its own conventional forms of misogyny and marital inequality, called for a more careful approach to the Mormon question. Marveling at “the language of downright persecution which breaks out from the press of this country whenever it feels called on to notice the remarkable phenomenon of Mormonism,” Mill argued a kind of “pro-choice” position on the issue of plural marriage:

It must be remembered that this relation is as much voluntary on the part of the women concerned in it . . . as is the case with any other form of marriage institution. . . . I cannot admit that persons entirely unconnected with them ought to step in and require that a condition of things with which all who are directly interested appear to be satisfied, should be put an end to because it is a scandal to persons some thousands of miles distant who have no part or concern in it.<sup>79</sup>

From our vantage point, Mill’s position may seem somewhat archaic, even gratuitous. That is, whether Mormon women were making a genuinely voluntary choice in accepting plural marriages now seems highly debatable

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<sup>77</sup> *Id.* at 118, n.16, citing *The N. Y. Times*, October 9, 1883.

<sup>78</sup> WILLIAM R. HANDLEY, “MORMONISM AND OTHER NARRATIVES OF THE LIVING DEAD,” ONE NATION UNDER GOD? RELIGION AND AMERICAN CULTURE 240-43 (Marjorie Garber & Rebecca L. Walkowitz, eds. 1999).

<sup>79</sup> JOHN STUART MILL, ON LIBERTY, 92-94 (1947).

in the glare of the post-modern universe, where the idea of the autonomous will of the liberal subject, and the machinery of individual consent, have been considered increasingly problematic.<sup>80</sup> Yet Mill, for one, was consistent on the question of gender equality, having published writings that opposed sex discrimination, including the sex discrimination of nineteenth-century marriage laws.<sup>81</sup>

Moreover, to fairly evaluate the nineteenth-century Mormon woman's choice to accept plural marriage, we must consider the difficult and complex implications of that choice in historical context.<sup>82</sup> Martha Bradley and Mary Woodward have pointed out that for nineteenth-century Mormon women, choosing to believe in the divine calling of Joseph Smith was itself a kind of threshold paradigm choice of epistemological significance, which narrowed ensuing practical decisions. In this sense, polygamy was another version of the classic narrative of faith versus reason:

A feminist interpretation of . . . plural marriage sees that, although women were willing to restructure their lives along new and often radical lines, they believed Joseph Smith was expressing the will of God by recreating patriarchal precedents from the Bible. Mormon patriarchy reflected his attempt to redefine, reorder, and maintain social control through male priesthood. He did this by invoking the moral authority of revelation, priesthood power, and the principle of obedience. We must not underestimate the impact of

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<sup>80</sup> See, e.g., Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY* 635, 636 (1983); Anne Kasper, *Consciousness Re-evaluated: Interpretive Theory and Feminist Scholarship*, 56 *SOCIOLOGICAL INQUIRY* 30, (1986).

<sup>81</sup> See, e.g., JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869).

<sup>82</sup> Literary and religious scholar Paul Ricoeur argues that such contextualization requires that we consider also the terms of the spiritual narrative by which such women were living their lives:

[F]or a philosophical inquiry, a religious faith may be identified through its language, or, to speak more accurately, as a kind of discourse. This . . . contention does not say that language, that linguistic expression, is the only dimension of the religious phenomenon; nothing is said – either pro or con – concerning the controversial notion of religious experience, whether we understand experience in a cognitive, a practical, or an emotional sense. What is said is only this: whatever ultimately may be the nature of the so-called religious experience, it comes to language, it is articulated in a language, and the most appropriate place to interpret it on its own terms is to inquire into its linguistic expression.

PAUL RICOEUR, *FIGURING THE SACRED* 35 (1995).

Smith's prologue of visions and angels in his private instructions to young women. If they believed, the logical consequence was their total submission to his judgment, his authority, and his power. If they did not believe this, there was no way for them to remain members of his church.<sup>83</sup>

Bradley and Woodward further observe that for nineteenth-century American women generally, marriage was a categorical decision of inestimable impact, "the first moment in their adult lives when they were empowered. Choosing to marry or not to marry, and whom to marry, radically changed the boundaries of their lives."<sup>84</sup>

Given the dramatic nature of the marriage decision, it becomes comprehensible that a woman might have entered plural marriage out of what anthropologist Rex Cooper has called "a real fear for survival."<sup>85</sup> Indeed, if a woman came to invest her belief in what she felt was the grandeur of Mormon theology, accepting polygamy "might be regarded as an attempt to maintain Mormon group identity and provide for Mormon salvation despite any eventuality."<sup>86</sup> Were these women sophisticated enough to be "tracing their own causes home,"<sup>87</sup> or were they making life-altering choices heavily mediated by their belief in Joseph Smith's narrative of sacrifice and salvation? Although the latter seems the more likely scenario, the sheer novelty of plural marriage for most of these women suggests that there was, at least for some, something of "telling a story about one's causes in a new language" – that is, in the radical choice to

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<sup>83</sup> Bradley and Woodward, *supra* notes 29 and 61, at 116. Lucy W. Kimball's account of being proposed to by Joseph Smith himself is telling:

When the Prophet Joseph Smith first mentioned the principle of plural marriage to me I became very indignant, and told him emphatically that I did not wish him ever to mention it to me again, as my feelings and education revolted against any thing of such a nature. He counseled me, however, to pray to the Lord for light and understanding . . . [and] after I had poured out my heart's contents before God, I at once became calm and composed; a feeling of happiness took possession of me, and at the same time I received a powerful and irresistible testimony of the truth of plural marriage, which testimony has abided with me ever since.

Goodson, *supra* note 61, at 91 (citing THE HISTORICAL RECORD 6:229-30 (1887)).

<sup>84</sup> Bradley and Woodward, *supra* notes 29 and 61, at 114.

<sup>85</sup> REX COOPER, PROMISES MADE TO THE FATHERS, 137 (1990). For example, Mercy Thompson, who became a plural wife of Hyrum Smith, Joseph Smith's brother, remarked that "I dared not refuse to obey the counsel [to enter plural marriage], lest peradventure I should be found fighting against God." Goodson, *supra* note 61, at 91 (citing THE HISTORICAL RECORD 6:229 (1887)).

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

<sup>87</sup> RORTY, *supra* note 42, at 14.

accept life as a plural wife.

Of course, the clash of narratives never ceases. For instance, somewhat ironically, some Mormon women also linked these concerns about survival and identity to what they viewed as a larger, more progressive sensibility about their religion: “[w]hen they chose to enter a patriarchal religious community, they did so because they believed that the gender system was organized around family-centered and woman-oriented values. The network of familial relationships created through plural marriage created a new and unique sense of community, of family and of self.”<sup>88</sup> From this perspective, many Mormon women saw polygamy as “a new social institution that they were able to accept by redefining it in terms of a female world view.”<sup>89</sup>

These progressive images of self and community reflect more a narrative of nineteenth-century American utopian yearning than they do the predominant nineteenth-century Christian narrative of patriarchal order. And despite the obvious contextual differences, such images seem similar to what Catherine MacKinnon has suggested is the Sisyphean narrative of feminist methodology – to make possible the “expression of women’s situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred.”<sup>90</sup>

Some Mormon women chose ways to experience the polygamy narrative as one that enabled expanded identity and self-empowerment; as discussed at the opening of this article, such women engaged in a surprising political activism that made patriarchal Church declarations seem incongruous with these women’s real experiences and opinions. For example, Mormon women organized the successful campaign for suffrage in Utah, which left anti-Mormon critics perplexed as to “why the ‘last outpost of barbarism’ should have extended the vote to women in 1870, fifty years before the nation adopted the Nineteenth Amendment and decades before women’s suffrage had acquired respectability elsewhere.”<sup>91</sup>

As discussed in the opening of this article, some Mormon women also published the *Woman’s Exponent*,<sup>92</sup> a journal that was decidedly outspoken on political and social matters of the day. One editorial said this of the relative importance of men in women’s lives:

Is there then nothing worth living for, but to be petted,

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<sup>88</sup> Bradley and Woodward, *supra* notes 29 and 61, at 117.

<sup>89</sup> *Id.* at 112.

<sup>90</sup> MACKINNON, *supra* note 80, at 636.

<sup>91</sup> Dushku argues that “Utah’s women [in the nineteenth century] were indeed misunderstood. In important respects, they still are.” *Supra*, note 1, at x.

<sup>92</sup> Part of the legacy of that journal is *Exponent II*, an independent quarterly published in Arlington, Massachusetts, by contemporary Mormon women.

humored, and caressed, by a man? That is all very well as far as it goes, but that man is the only thing in existence worth living for I fail to see. . . . And when men see that women can exist without their being constantly at hand, that they can learn to be self-reliant or depend upon each other for more or less happiness, it will perhaps take a little of the conceit out of some of them.<sup>93</sup>

The idea of depending “upon each other for more or less happiness” makes sense within the “empowerment” narrative of plural marriage when one considers the significant personal implications of plural marriage for a Mormon woman:

. . . the practical requirements of living as plural wives challenged the limiting stereotype of women accepted by civilized America. A plural wife could not be the helpless, fainting, protected female or she would likely faint alone. Plural wives often had to look to themselves rather than their husbands for financial support and physical labor. For practical purposes many were more like widows than traditional wives. The regular absence of their husbands simplified their housekeeping chores, allowing them to participate in a broader range of activities than their eastern sisters. In one of the neatest ironic contradictions of the period, the “enslaved harems” of Utah produced some of America’s most efficient early feminists.<sup>94</sup>

From these accounts, it is difficult not to see something of a cultural anomaly in the complex experience of Mormon polygamous women, notwithstanding simplistic public narratives coming from both the Church and its critics.

Still, I am mindful that in suggesting *another* cultural narrative for Mormon polygamy (an “empowerment narrative,” coexistent with the dialectical “women-in-bondage” and “spiritual superiority” narratives championed by many critics and proponents of polygamy), I am relying on a *current* historical narrative constructed by present-day Mormon feminist scholars. I point this out because of the importance, in doing “literary,”<sup>95</sup> reading, of candidly “tracing the causes of one’s own narrative,”<sup>96</sup> as it

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<sup>93</sup> Dushku, *supra* note 1, at 194-95, n.49, (citing 3 WOMAN’S EXPONENT 67 (30 September 1874)).

<sup>94</sup> Bushman, *supra* note 1, at xix.

<sup>95</sup> SCHOLES, *supra* note 36.

<sup>96</sup> RORTY, *supra* note 42.

were. I believe this approach enriches “literary” and avoids “fundamentalist” reading, because it acknowledges the real ambiguities that reside in a given narrative.

Here, for example, the motives and values of the contemporary women writing the nineteenth-century polygamy “empowerment narrative” are quite possibly diverse and conflicted: being women, scholars, and Mormons *themselves* might encourage any number of “empowerment” and “bondage” feelings about their early Mormon counterparts, depending on the writers’ intellectual values, historical methodologies, identity politics, personal relationships to the Mormon Church, and so on. To read the experience of Mormon plural wives with a fundamentalist sensibility, on the other hand, would yield a more ideologically beholden, homogenous, and settled narrative – one more likely to conceal, however unwittingly, uncertain facts and attitudes that do not cleanly square with the overarching, mediating narrative being expounded.

Whatever our assessment of this contemporary “empowerment” narrative of nineteenth-century polygamy, it is clear that some of the women who experienced that life *forged* and *lived by* this “empowerment” narrative. Of course, this may have been the most meaningful alternative for women who were typically strong and educated, and often well beyond their teenage years.<sup>97</sup> Perhaps there is something apologist about the “empowerment” narrative being told by these current Mormon scholars. Yet is it not human nature (especially among the religious) to seek or create narratives that justify one’s self, family, or community? This alone is not fatal to good reading; rather, it would seem to be an inevitable aspect of self-narration. Haber eloquently reminds us of what is truly indispensable to the literary reader – recognizing that “there is no view from nowhere,” that where our reading and writing energies actually matter is in remaining vigilant and honest about our mediating backgrounds and convictions.

Thus there is no shame, nor need there be harm, in recognizing, if indeed we see them, meaning and value in past and present “empowerment” and “bondage” narratives of women in polygamy. I see much value, for example, in the “empowerment” narrative constructed by late twentieth-century Mormon feminist historians, if only because their research and writing about the complexity of a woman’s polygamy experience produces a literary counter-narrative to the generally sanitized, fundamentalist, “unknowing”<sup>98</sup> narrative of polygamy maintained by today’s mainstream

<sup>97</sup> See, e.g., Jill C. Mulvay, *Zion’s Schoolmarms*, in Bushman, ed., *supra* note 1.

<sup>98</sup> BLOOM, *supra* note 21. Bloom suggests that, ultimately, the “American Religion” may not be any sect or faith so much as a narrow, settled, habit of mind, an unwillingness to know ourselves honestly and thus an incomprehension as to our spiritual identity – all, ironically, the product of our dogged determination to “know” things with reassuring certainty more than with nuanced understanding. As Bloom’s laments: “the American Religion, which is nothing if not a *knowing*, does not know itself. Perhaps this is a

LDS Church.<sup>99</sup> And in the end, the clash of polygamy narratives *across* time opens a door to more interpretive possibilities still, as well as a glimpse of the endless, trans-historical, trans-cultural nature of narrativity.<sup>100</sup>

Mormon polygamy was not unique as an occasion in which the complexity of women's experience was appropriated by dominant moral narratives of a patriarchal culture. By any account, that has been going on since the beginning. But polygamy forced an unusually excruciating decision on the women asked to practice it, a decision whose complexity was seldom if ever acknowledged in the rhetorical battles waged on the stage of public morality. As Claudia Bushman has described it:

For the women of Zion the importance of polygamy cannot be overstressed, even though only a small proportion of the

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permanent and general American irony. . . ; we may be uniquely the nation where the knowers cannot know themselves." *Id.* at 263-4.

<sup>99</sup> The official LDS Church position on historical scholarship, particularly regarding the controversial experience of polygamy, resides on the "literal-fundamentalist" side of the reading and narrative spectrum. Scholes could well be referring to the perspective of today's mainstream LDS Church as to its own past when he observes that "fundamentalist reading is always marked by shifts from the literal to the figurative – as a way of concealing conflicts." SCHOLES, *supra* note 36, at 231. Because the history of Mormonism is effectively a history of conflicts, there is much to conceal. Indeed, because the mainstream Mormon church has devoted itself to, and achieved, a remarkable assimilation into mainstream American culture over the last century, see Mauss, *supra* note 29, there is no shortage of motives for the church to address its own history with a fierce commitment to an apologist kind of literalism characteristic of fundamentalist reading.

Thus, for example, Mormon orthodoxy requires a strict reading of the peculiar and astonishing facts of Joseph Smith's visions and revelations (including the conspicuous fact that the gold plates from which Smith translated the Book of Mormon were promptly taken from the earth by the angel Moroni). Yet regarding polygamy, which, as discussed in Part I, was central to Smith's vision of Christ's true "latter-day" church and was *the* defining ordeal for nineteenth-century Mormons, the contemporary church waxes so figurative as to be virtually unresponsive to serious historical inquiry, whether from external critics or its own members. See HANDLEY, *supra* note 78, at 240-43; see generally THE NEW MORMON HISTORY: REVISIONIST ESSAYS ON THE PAST (D. Michael Quinn, ed. 1992); QUINN, THE MORMON HIERARCHY: EXTENSIONS OF POWER (1997); JAN SHIPPS, MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION (1987); BLOOM, *supra* note 21, at 77-128 (1992). Quinn, formerly an LDS church member in good standing and a history professor at the church's Brigham Young University, was excommunicated from the church in 1993 for his scholarly interrogations of sensitive aspects of Mormon history and doctrine, including polygamy.

<sup>100</sup> For example, a growing number of cultural critics argue today that it makes little or no sense to continue criminalizing polygamy, so long as the plural marriages in question are truly consensual. See, e.g., Steve Chapman, *Two's Company: Three's a Marriage*, SLATE 4 June 2001 (observing that "[w]ith divorce rates high, out-of-wedlock births rampant, and most kids fated to spend at least some of their childhood in single-parent homes, the American family obviously has some serious problems. [Polygamist] Tom Green is not one of them.")

populace was directly involved. The Mormon sisters were required to defend the Principle or leave the Church entirely. They had to make plural marriage work to prove they were right. The Principle, more than anything else, set up a competition between the Mormons and the Gentiles, the first intent on proving their righteousness and the second on forcing the miscreant group to recant their evil ways.<sup>101</sup>

These conditions likely guaranteed that, among nineteenth-century Mormon women, the very choice whether to accept plural marriage, its heavy personal consequences, and the constant rhetorical reductivism that controlled its representation in public debate – all created an airless atmosphere of stringent moral competition in which nuanced and meaningful public dialogue about plural marriage, let alone about underlying issues of family configuration, gender politics, and identity, was virtually impossible.

The principal clash of public narratives over Mormon polygamy in nineteenth-century America was, by any standard, fundamentalist, although some subsidiary narratives, whether of the libertarian kind expressed by John Stuart Mill or the communitarian-feminist kind forged by a number of Mormon polygamous wives, occasionally lifted the camouflage of self-righteous, disingenuously figurative oratory that concealed the monopolistic, literalist, “through-line” of the main combatants in the narrative battle over plural marriage.

It is only now that the ambiguous narrative of those women, at that time, in those circumstances, is being thoughtfully reconstructed, and as such, the narrative of women living in “the Principle” in the nineteenth century assumes a measure of authenticity, and thus cultural legitimacy, at least among some of us who read that narrative today, identify with conflicts and concerns it evokes, and are compelled to think about ourselves more deeply and to read and write our narratives more circumspectly.

#### D. LEGAL NARRATIVES OF MORMON POLYGAMY

Nineteenth-century Mormon polygamy was contested on the public stage, not only through cultural narratives, but also through legal narratives – narratives of social order preserved through the highly formalized medium of judicial discourse. In particular, I want to examine one truly consequential judicial narrative of polygamy: the Supreme Court’s 1879 decision in *Reynolds v. United States*, in which the Court upheld federal laws illegalizing polygamy, thus declaring that the practice was not protected as an exercise of religion under the First Amendment’s Free

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<sup>101</sup> Bushman, *supra* note 1, at xix.



Exercise Clause.<sup>102</sup>

Leaving aside for now the outcome of the Court's decision, the *Reynolds* opinion is a telling narrative of the preeminence of social order because the opinion exemplifies the dynamics and implications of judicial rhetoric, especially the necessary acts of *judicial framing* of and *sylogistic reasoning about* social conflicts, and the judicial bequest of cultural legitimacy that follows from those operations. The opinion also embodies, and is mediated by, several other powerful "authority" narratives of American law, including the ideals of social tradition, legal precedent, value neutrality, and principled decision-making, which serve to uphold the larger narrative of maintaining social order. Understanding this matrix of legal narratives is crucial to understanding how the law uniquely frames and resolves social conflict.<sup>103</sup>

In his introduction to *Law and the Order of Culture*,<sup>104</sup> Robert Post identifies the dynamic relationship between law – in the largest sense, our system of social order – and the ambient culture. Post argues that "social order requires the mediation of social meaning, and that social meaning arises through the operation of systems that are simultaneously symbolic and practical."<sup>105</sup> This formulation provides us with an enlarged view of how law functions to both reflect and stimulate our ongoing sense of "the order of things."<sup>106</sup> Michel Foucault deftly located this sense of order in the relation between a society's "ordering codes" and its "reflections upon order itself" – and we could recast this relation as that between society's "narratives of order" and its "overarching, evolving narrative about order itself."<sup>107</sup> This order-oriented framework of the law is important because it helps us think about how the American judiciary, as the foremost formal source of our "ordering codes," frames social controversies so as to maintain the larger social order.

More concretely, if "bondage instead of empowerment of women" and "the deviant, immoral sexuality of polygamy" were salient tropes deployed by critics of polygamy in nineteenth-century America, legal discourse on the subject of polygamy centered on the value of the narrative of social order. Yet *how* the judiciary works to regulate and maintain this narrative

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<sup>102</sup> Among other reasons for distinction, *Reynolds* was the decision through which "Jefferson's famous phrase 'wall of separation between Church and State' first entered into American law." Clayton, *supra* note 25 at 46.

<sup>103</sup> I will discuss these judicial operations further in Part III, in the context of the legal treatment of homosexuals.

<sup>104</sup> Robert Post, *The Relatively Autonomous Discourse of Law*, LAW AND THE ORDER OF CULTURE vii (Berkeley, CA: U of California P, 1991).

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

<sup>106</sup> The term is Foucault's. See *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1970).

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

of order is a complicated, multi-faceted process. In executing its role at the center of the Anglo-American common law system, the Supreme Court labors under a truly unique rhetorical burden, constructing and presenting its opinions, in which it publicly represents and resolves complex social questions, in ways that maintain what it perceives to be the prevailing social order and justify its decisions in legally legitimate terms and principles. These terms and principles amount to compact narratives of legitimacy, for each enables the necessary public justification of the opinion and thus adds weight to the court's decision as a social template – as a precedent for future similar situations.

James Boyd White, as astute reader of judicial opinions, provides a rich characterization of all that is at work in a judicial opinion, the highest form of legal narrative:

The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and in the process it connects the case with earlier cases, the particular facts with more general concerns. It translates the experience of the parties, and the languages in which they naturally speak of it, into the language of the law, which connects cases across time and space; and it translates the texts of the law – the statutes and opinions and constitutional provisions – into the terms defined by the facts of the present case. The opinion thus engages in the central conversation that is for us the law, a conversation that the opinion itself makes possible. In doing these things it makes two claims of authority: for the texts and judgments to which it appeals, and for the methods by which it works.<sup>108</sup>

With this critical orientation in mind, let us briefly follow the public debate about the perceived threat of Mormon polygamy to the social and political order of nineteenth-century America, before we turn to the *Reynolds* decision itself.

In 1856, Brigham Young, in one of many such imperious statements, declared that “[t]he sound of polygamy is a terror to the pretended republican government. Why? Because this work is destined to revolutionize the world and bring all under subjection.”<sup>109</sup> Young’s

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<sup>108</sup> James Boyd White, *What’s An Opinion For?* 62 U. Chi. L. Rev. 1363, 1367-68 (1995); see also JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 215-69 (1990); HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 28-48 (1985).

<sup>109</sup> Sheldon *supra* at 115, note 7.

towering predictions of social revolution were not exclusively concerned with the governmental order, but with the larger social order as well. As historian Michael Quinn describes it,

The Saints spoke directly to questions absorbing many others at the time – sexuality, health, and home, but posited polygamy as the solution to these ills. Mormon polygamy was not simply counter-cultural, it was the highest form of marriage relationship. The Latter-Day Saints did not recognize the disaster if non-Mormons believed Mormon defenses of polygamy. If polygamy was the real answer to society’s ills, then ‘Gentiles’ had every reason to fear that Mormon polygamy was the marriage relationship to end all other marriage relationships.<sup>110</sup>

Official Mormon representations of polygamy were understandably threatening, especially to those concerned with the American legal order. Indeed, such seemingly hegemonic projections, however figuratively they may have been intended, would lead someone like Congressman Cradlebaugh of Nevada to issue the warning that I discussed in Chapter One (“People in our midst . . . are building up, consolidating and daringly carrying out a system, subversive to the Constitution and laws, and fatal to morals and true religion.”<sup>111</sup>).

In light of such apocalyptic predictions, the public understandably perceived Mormonism as a threat to the ideals of individualism, the monogamous family, and the rule of law – cherished elements of the nineteenth-century American cultural order. Historian David Brion Davis has summarized this tension in terms quite sympathetic to the Mormon narrative of community:

[The Mormon] gospel of work was communal rather than individual, and they took out to the frontier with them an organization and an outlook that was guaranteed to alienate the selfish and violent individualists who were to surround them. If you followed a new Enoch west in order to build a new Zion, then you were engaged in nation building of a kind very different from your neighbors’ mode of enlarging the republic.<sup>112</sup>

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<sup>110</sup> D. Michael Quinn, *Plural Marriage and the Mormon Twilight Zone*, 16 *Sunstone: Mormon Experience, Scholarship, Issues, and Art* 58 (1993).

<sup>111</sup> Honorable John Cradlebaugh, *Utah and the Mormons*, a Speech on the Admission of Utah as a State delivered in the House of Representatives, 7 February 1863, 1 (1863).

<sup>112</sup> BLOOM, *supra* note 21, at 103.

This incompatibility of narratives of community and individualism characterized much of the relationship of American law to Mormon polygamy in the second half of the nineteenth century. Indeed, fear of the Mormon threat to the American cultural order seemed to animate the entire public legal conversation about the Mormons.

As I have mentioned, the Mormon polygamous threat infused Congressional debate (especially when slavery was at issue) in the 1850s and 1860s, leading to Congressional passage of The Morrill Act in 1862, the first of several pieces of federal legislation designed to eliminate Mormon polygamy. The Morrill Act invalidated all Utah laws that “establish, support, maintain, shield, or countenance polygamy” and made bigamy a crime punishable by a maximum fine of \$500 and a maximum incarceration of five years.<sup>113</sup> Yet the Morrill Act, while “constitutionally pure, . . . was practically worthless”<sup>114</sup>

Indeed, in a territory where three-quarters of the population was Mormon, bigamy prosecution became a farce: “polygamists went into hiding in the ‘Underground,’ key witnesses disappeared, plural wives refused to testify against their husbands, and sympathetic juries would not convict.”<sup>115</sup> Moreover, the Civil War and Reconstruction occupied the federal government until the mid-1870s, after which the government more forcefully turned its attention to “the Mormon Question.” Congress responded to President Ulysses Grant’s call for new legislation to outlaw this “barbarism” by passing the Poland Act of 1874, which divested the Mormon-controlled probate courts of their power to hear civil, chancery, and criminal actions and transferred jurisdiction over all important cases to the federal territorial courts.<sup>116</sup>

Hence the Morrill Act had little effect until 1874, when its constitutionality was tested in the case against George Reynolds, private secretary to Brigham Young and a practicing polygamist. That case reached the U.S. Supreme Court in 1879. Generally speaking, the Court addressed the question of whether plural marriage, which the Mormons asserted was essential to their religion, was protected as the free exercise of religion guaranteed under the First Amendment to the U.S. Constitution. Specifically, the question presented to the Court was whether George Reynolds, who was married to two women, could be prosecuted under a federal bigamy law<sup>117</sup> that criminalized plural marriage of any kind. Although the Mormons expected the Court to rule in their favor, the justices

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<sup>113</sup> Act of July 1, 1862, ch. 126, sec. 1, 12 Stat. 501

<sup>114</sup> Ray J. Davis, *The Polygamous Prelude*, 6 AMERICAN J. OF LEGAL HIST. 1, 9-10 (1962).

<sup>115</sup> Magrath, *supra* note 24, at 534.

<sup>116</sup> *Id.* at n.58.

<sup>117</sup> The Poland Act, U.S.C. § 5352 (1874).

made this the occasion for establishing a critical distinction in First Amendment doctrine between religious belief and religious conduct – a doctrinal boundary that remains valid today.<sup>118</sup>

The *Reynolds* opinion, authored by Chief Justice Morrison Waite, is interesting for many reasons, but here I will focus on how Waite moved rhetorically to frame and resolve the fundamental problem that this case presented: the threat to social order posed by Mormon plural marriage. In setting the context for the Court's decision, the Chief Justice began by problematizing the meaning of religion itself:

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision [the First Amendment] was adopted. The precise point of the inquiry is, what is the religious freedom that has been guaranteed.<sup>119</sup>

Waite then drew on the deepening historical and philosophical roots of First Amendment doctrine, quoting Thomas Jefferson's flowery formulation to assert the crucial distinction between belief and practice:

. . . to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," such that "it is time enough for rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and *good order*." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.<sup>120</sup>

Having initiated his approach to the problem of plural marriage by setting himself firmly on Jefferson's unassailable shoulders, Waite proceeded to build and refine that framework, quoting Jefferson's famous articulations

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<sup>118</sup> The Supreme Court has continued to rely on this distinction since *Reynolds*. The reader may recall the 1990 case of *Employment Division v. Smith*, in which the Court prohibited a native American tribe from using peyote for the purpose of experiencing religious visions, reasoning that the practice was in conflict with federal and state narcotics laws. 480 U.S. 916. Justice Scalia, writing for the majority, invoked *Reynolds* on this point. 98 U.S. 145. Scalia also relied on the belief-conduct distinction in his dissent in *Romer v. Evans*. 517 U.S. 620 (1996).

<sup>119</sup> *Reynolds* 98 U.S. at 162.

<sup>120</sup> *Id.* at 163 (emphasis added).

that “religion is a matter which lies solely between man and his God” and “that the legislative powers of the government reach actions only, not opinions”; these axioms, Waite suggested, formed the basis for America’s proverbial “wall of separation between church and State.”<sup>121</sup>

In this deep historical soil Waite planted a standard by which to evaluate the problematic social practice of Mormon polygamy:

Coming as this does from an acknowledged leader of the advocates of the . . . [First Amendment], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach *actions which were in violation of social duties or subversive of good order.*<sup>122</sup>

The rhetorical decision to twice frame the problem this way – to make subversion of *good order* the threshold criterion for First Amendment protection of religious behavior – helps illuminate the subtle, easily effaced and naturalized, but deeply significant relationship between the putatively clean pronouncements of the American judiciary and the complex, concrete social issues that give rise to those abstract decisions.

Let us recall Robert Post’s observation about the dynamic, if uneasy, relationship between law and the surrounding culture in which law, our official system of order, lives and breathes. Post emphasizes the fluid and far-ranging interpretive possibilities that reside in judicial acts (“social order requires the mediation of social meaning, and that social meaning arises through the operation of systems that are simultaneously symbolic and practical.”)<sup>123</sup> Post’s formulation of the relationship between law and culture, beyond acknowledging the heavy social ramifications of judicial decisions (as opposed to, say, the less immediately pragmatic consequences of the public utterances of literary theorists), provides an enlarged view of how law functions both to reflect and to stimulate our evolving sense of the order of things.

I continue to focus here on this basic sense of social order because it helps us think about how the American judiciary, a salient source and the primary arbiter of our ordering codes, frames cultural controversies like polygamy so as to serve and maintain the larger social order itself (whatever that might be), which in turn determines how particular definitions of identity – both community and individual – may or may not legitimately inhabit the larger culture. Thus in 1879 Chief Justice Waite could invoke

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<sup>121</sup> *Id.* at 164.

<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> Post, *supra* note 7, at vii.

well known and authoritative political, social, and moral narratives inherited from the Founding Fathers in order to frame the legal question regarding polygamy as a simple, if vague, query about whether it was “subversive of good order.”

Yet having reduced the legal resolution of the problem to this single question, Waite would not ponder the seemingly complex meanings of good order, let alone consider what behaviors could amount to subversion of it, even though he had paused earlier to meditate on the problem of defining religion, something equally fundamental to the Court’s determination of whether polygamy should receive Constitutional protection. Rather, Waite moved directly from framing the legal question as whether polygamy was subversive of good order to concluding, through terse historical summary, that polygamy was indeed problematic to the established social order of western civilization:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people. At common law, the second marriage was always void . . . , and from the earliest history of England polygamy has been treated as an offence against society.<sup>124</sup>

Whatever one’s view of plural marriage, the Chief Justice’s reasoning here seems somewhat conclusory and detached, suggesting that historical precedent alone justifies what we desire in our social order and implying that a practice such as polygamy could be accommodated only by the social order of cultures foreign to our own.

Such one-dimensional cultural analysis, although not uncommon in judicial discourse, raises difficult questions about what precisely the Court meant in defining religion *a la* Jefferson as a “matter which lies solely between man and his God.” Surely even this robust concept had its limits, for Chief Justice Waite had no compunctions about condemning the faith of those who “believed human sacrifices were a necessary part of religious worship,”<sup>125</sup> just as, for example, Congressman Ward of Illinois, in an influential Congressional debate five years before *Reynolds*, had seen no valid legal distinction between Mormon polygamy, which “sacrifices women to the lusts of men,” and those so-called “religions” in whose name “the widow mounts the funeral pyre of India,” or for which “helpless infants are sacrificed in the waters of the Ganges.”<sup>126</sup> Rather, such arguments

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<sup>124</sup> *Reynolds*, 98 U.S. at 164.

<sup>125</sup> *Id.* at 166.

<sup>126</sup> VAN WAGONER, *supra* note 21, at 105, n.2 (citing CONG. REC., 43rd Cong., 1st

seemed secondary to the deeper anxiety that Mormon polygamy was, as the Chief Justice had concluded, subversive of good order.

Despite the inconsistencies and selective myopia of the *Reynolds* decision, from a rhetorical standpoint we see also the careful construction of a compelling legal narrative, the telling of a story based on reasoning that serves to justify a clear legal answer to a pressing social question in the eyes of the story's intended readership: e.g., "Polygamy should not receive Constitutional protection simply because it stems from religious belief; otherwise, any social conduct, however harmful to individuals or society at large, would be constitutionally protected so long as that conduct was undertaken in the service of sincere religious belief. Thus to give legal protection to polygamy potentially jeopardizes us all in ways beyond the specific social harm that many believe polygamy does by itself." Here the author of the legal narrative, Chief Justice Waite, appeals widely to sources of authority which he knows the audience will respect: established moral traditions, legislative decisions, and recognized and established processes of rational argument. In short, we see here American law's unique blend of rhetoric and logic, a story of core values confirmed and preserved in a principled way.

First, in Waite's argument for history and tradition, he gives the follow account:

In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I [prohibiting polygamy], death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or poligamy [sic] be punishable by the laws of this Commonwealth." 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.<sup>127</sup>

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Sess., June 2, 1874, 447).

<sup>127</sup> *Reynolds* 98 U.S. at 165.



In effect, Waite is saying that this behavior should be criminalized merely because it has been so for a very long time, just as, more than a century later, Justice Byron White would invoke tradition as a compelling ground for upholding state laws making consensual homosexual conduct a crime.<sup>128</sup>

Next, Waite relies on popular political theory of the time to argue that polygamy is a kind of dictatorship at the family level, which can lead lead to a breakdown in democracy at the national level:

In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.<sup>129</sup>

In the end, there are reasons to admire the Chief Justice's handiwork here. Throughout the *Reynolds* opinion, Waite weaves together on the loom of legal reasoning strands of history, tradition, legislative process and intent,

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<sup>128</sup> *Bowers* 478 U.S. at 192. In a now infamous concurrence, Chief Justice Burger relied exclusively on the role of moral tradition – “Judeo-Christian moral standards” and “millennia of moral teachings” against “homosexual sodomy” – to argue for upholding Georgia’s anti-sodomy law. *Id.* at 197.

<sup>129</sup> *Id.* at 165-66.

and sociological theory, all to create a rhetorically sturdy fabric of argument to support the prohibition of Mormon polygamy in order to maintain the prevailing family order.

Yet there is more to judicial narratives than the aesthetics of the crafting; when a court reaches one conclusion instead of any other, that choice makes *concrete* things happen. Here, the Court's story of the need to preserve social order put George Reynolds in prison and compelled dramatic change in a community and its social and religious practices. The practical consequences of the Chief Justice's framing of the polygamy question give this decision teeth sharper and jaws more powerful than come with most rhetorical choices. In ruling that the Constitution could not protect Mormon polygamy because it was criminal conduct, rather than the necessary behavioral manifestation of an unconventional belief system (and this being a judicial decision, it indeed had to be one or the other), the Court in 1879 performed its necessary function of framing urgent social issues in order to determine what was legally and, at least to a refracted degree, culturally acceptable. That this judicial function is necessary does not mean that the justices' concrete acts of framing are themselves immune to our scrutiny; on the contrary, it is the very quality – the social justification and general persuasiveness – of those framing decisions that makes a difference to us as members of the American polity.

The late Robert Cover argued that in discursive acts such as those discussed above, there inheres a kind of social violence,<sup>130</sup> and Stephen Carter has suggested that through such legally legitimate forms of rhetorical framing, a culture may marginalize, and thus “rid itself of [the] movements . . . and religions” that threaten its prevailing order.”<sup>131</sup> While these ominous claims are debatable, the fact – and the impact – of judicial framing are undeniable. Much more could be said here about the necessary politics of the judicial process, but for our discussion, suffice it to say that this socially crucial judicial function – the framing of issues for legal disposition – is, as an especially formal and practically influential version of public discourse, also a potentially specialized medium for rhetorical reductivism. Whether that actually is the case depends, of course, upon the quality and candor of the judicial expression at issue, but neither the institutional authority in which it is robed nor the immediacy of its social impact should prevent us from seeing that, like the other forms of public discourse examined here, judicial discourse can wield its own problematic power in the representation

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<sup>130</sup> Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986). See generally ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993); MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (Boston: Beacon Press 1995).

<sup>131</sup> STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 128-29 (1993).

– and thus the public understanding and treatment – of social controversies like Mormon polygamy.

To the shock of most Mormons, George Reynolds' conviction was upheld, and after failing to secure either a pardon from President Rutherford Hayes or a rehearing before the Supreme Court, Reynolds went to prison in Lincoln, Nebraska, and later in the Utah Territory. Still, the *Reynolds* decision empowered Congress to punish polygamy only through the Morrill Act, an unwieldy instrument at best. It wasn't until 1882, with passage of the Edmunds Act, that Congress developed a truly efficient method for prosecuting polygamists:

[The Act made it] easier to secure bigamy convictions by making it a crime for any male in the United States territory merely to cohabit – not marry – with more than one woman. It disqualified from jury service in bigamy and cohabitation prosecutions all who believed in or practiced either polygamy or unlawful cohabitation. In addition, convicted bigamists and 'cohabs,' as they were quickly dubbed, lost their eligibility to vote and to hold public office.<sup>132</sup>

The results were significant: by 1893, after the Church had renounced polygamy and prosecutions had largely ceased, "there had been 1004 convictions for unlawful cohabitation and thirty-one for polygamy."<sup>133</sup>

The government dealt a final blow to Mormon polygamy in 1887, when Congress passed the Edmunds-Tucker Act, which effectively dissolved the Church as a corporation, allowed for the confiscation of most Church assets, and repealed the Utah legislation granting women the right to vote. In 1890, the Church issued "The Manifesto," purportedly the product of divine revelation, which promised that Church members would cease the practice of plural marriage.<sup>134</sup>

As I suggested at the outset of this section, polygamy, like communism or abortion or drugs or pornography, raises complex ethical questions about who we are, which is precisely why these issues generate in us moral ambivalence and stir in our society public controversy; it is also why we typically yield to the intoxicating power of didactically ordered narratives in our public representation and response. But we stand to lose much in that kind of telling, for if the reach of our desire for mutual understanding exceeds the grasp of our public discourse, and this because we habitually frame the difficult moral issue as the easily decidable one,

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<sup>132</sup> Magrath, *supra* note 24, at 535. See also Firmage, *supra* note 23, at 775.

<sup>133</sup> *Id.*

<sup>134</sup> ARRINGTON AND BITTON, *supra* note 21, at 183-84.

then we have learned to live in a kind of collective denial about ourselves and each other.

### III. NOTES FROM A CURRENT NARRATIVE HOLY WAR: THE ANALOGY OF SAME-SEX MARRIAGE

*Small wonder, then, that the self is a public topic and that its “betterment” is regarded not just as a personal matter but as meriting the care of those charged with maintaining a proper moral order – the church, the school, the family, and, of course, the state itself.*<sup>135</sup>

– Jerome Bruner

*The only politics that can survive an encounter with this world, and still speak convincingly of freedom and justice and democracy, is a politics that can encompass both the harmonics and the dissonance. The frazzle, the rubbed raw, the unresolved, the fragile and the fiery, and the dangerous: These are American things. This jangle is our movement forward, if we are to move forward; it is our survival, if we are to survive.*<sup>136</sup>

– Tony Kushner

### A. INTRODUCTION: MORMON POLYGAMY AS A WINDOW ON THE SAME-SEX MARRIAGE CONTROVERSY

Throughout our history, Americans have done battle over ideas of community and autonomy through various languages of our culture<sup>137</sup> – including religion, politics, sexuality, and, most certainly, the law. Of course, ideas of community and autonomy – of the collective and the individual – have been in tension throughout the history of western civilization, particularly from the Enlightenment through modernity and

<sup>135</sup> JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 77 (2002).

<sup>136</sup> TONY KUSHNER, *American Things*, in THINKING ABOUT THE LONGSTANDING PROBLEMS OF VIRTUE AND HAPPINESS 10-11 (1995).

<sup>137</sup> For purposes of organization and focus, thus far I have used the idea of “culture” primarily to characterize non-legal narratives of Mormon polygamy (i.e., “cultural narratives” versus “legal narratives” in Part II). I recognize, however, that this is a necessarily artificial distinction; the term “culture” is, of course, extraordinarily broad in its meanings, connoting virtually every aspect of life in the communities of human beings. See, e.g., Naomi Mezey, *Law as Culture*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM 37 (Austin Sarat & Jonathan Simon, eds., 2003). For an excellent introduction to the growing field of law and culture studies, see AUSTIN SARAT & THOMAS R. KEARNS, *The Cultural Lives of Law*, in LAW IN THE DOMAINS OF CULTURE 1 (1998).

postmodernity. In recent decades, for example, this ongoing public conversation about community and autonomy has manifest itself with special intensity in the work of liberals, like John Rawls,<sup>138</sup> and communitarians, like Michael Sandel.<sup>139</sup>

Contemporary cultural debates about the relative virtues of autonomy and community are, effectively, variations on the fundamental question that motivated Socrates, Plato, and Aristotle: What makes a good society? In every epoch this question has particular context and character; in the last two centuries, issues that have shaped that core social question include the nature of human subjectivity, the politics of state and social power, and the role of language in mediating cultural conflict – the issue that this article addresses by focusing on how the classic community-autonomy tension shaped the public debate about Mormon polygamy. As we have seen, nineteenth-century polygamy posed a profound threat to prevailing notions of family, sexuality, and social order generally.

Using the “case” of nineteenth-century Mormon polygamy, I have explored some of the manifold rhetorical strategies that writers or speakers use to pursue their discursive goals. Broadly speaking, such goals are invariably related to the desire to persuade others of the legitimacy of a certain value, opinion, perspective, ideology, or the like. I have considered nineteenth-century *cultural*<sup>140</sup> narratives concerned with criticizing or embracing the experience of American women who chose to be part of the Mormon church and thus to accept the practice of polygamy. I have also considered nineteenth-century *legal*<sup>141</sup> narratives of Mormon polygamy, narratives produced by judges to explain why plural marriage undertaken in the name of religious belief could be prohibited, and why plural marriage had to yield to the tradition of monogamous marriage so as to maintain “good social order.” Both kinds of narratives tended to be more “fundamentalist” than “literary,” although legal (judicial) narratives were perhaps more deliberately principled in their stated commitment to the related values of legal precedent and social tradition.

My rhetorical approach to the American “telling” of Mormon polygamy over a century ago illuminates a set of contemporary social controversies that underscore the paradox of community and autonomy – namely, controversies surrounding homosexuality, including job and housing discrimination, military service, private sexual conduct, and, most recently, same-sex marriage. In this last section, I will suggest ways in which the

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<sup>138</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999); POLITICAL LIBERALISM (1996).

<sup>139</sup> See, e.g., Michael Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 *FORDHAM L. REV.* 1 (1997); *Keynote Address: Democracy’s Discontent: America in Search of a Public Philosophy*, 85 *GEO. L.J.* 2073 (1997).

<sup>140</sup> See my brief qualification of the notion of “culture,” *supra* at note 137.

<sup>141</sup> *Id.*

method of rhetorical analysis that I have established as to Mormon polygamy might inform our understanding of the same-sex marriage debate.

First, I will briefly describe the same-sex marriage controversy and how it embodies the community-autonomy paradox in ways similar to those that animated the clash of public narratives over nineteenth-century Mormon polygamy. Next, I will analyze several narratives of homosexuality that are essentially *fundamentalist*, narratives mainly having to do with the issue of homosexual marriage. In contrast, I will then read several narratives of homosexuality that demonstrate *literary* qualities and thus approximate the ideal of producing *crafty* narratives of marriage, a social institution far more complex than most current public narratives would suggest.

#### B. THE COMMUNITY-AUTONOMY PARADOX IN POLYGAMY AND HOMOSEXUALITY

Anyone remotely interested in American politics during the last several years will have noticed the enormous amount of attention focused on the question of whether homosexuals should be allowed to enter into legally recognized relationships, whether in the form of civil unions, or, more controversially, marriage. David Blankenhorn of the Institute for American Values, an organization that opposes homosexual marriage, has aptly captured the state of public discourse on this question: “The only way anybody is talking about marriage these days is in the context of same-sex marriage.”<sup>142</sup> Indeed, in the wake of both the U.S. Supreme Court’s decision in *Lawrence v. Texas*<sup>143</sup> and the Supreme Judicial Court of Massachusetts’ ruling in *Goodridge v. Department of Public Health*,<sup>144</sup> the question of same-sex marriage has fueled innumerable cultural debates, influenced many political campaigns, emboldened some citizens to engage in civil disobedience, and led to calls for state and federal legislators to amend their constitutions. The political air is thick with narratives about marriage, homosexuals, and whether they belong together.

Whether one individual or group “belongs” within a larger community (be it physical or ideological) is one of the major fault lines of the community-autonomy paradox, and perhaps the most salient in the eyes of the law, which must concern itself with problems and principles of fairness and justice in matters including exclusion, association, and identity. In the case of nineteenth-century Mormon polygamy, we have seen that the Supreme Court decided that a singular religious community could be

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<sup>142</sup> William Raspberry, *Reasons for Marriage*, WASH. POST, Feb. 23, 2004, at A21.

<sup>143</sup> 539 U.S. 558 (2003) (holding that a Texas law prohibiting homosexual sodomy was unconstitutional).

<sup>144</sup> 798 N.E.2d 941 (Mass. 2003) (holding that a Massachusetts licensing statute that prohibited same-sex couples from marrying violated the Massachusetts Constitution).

excluded from the protection of the Constitution because that community engaged in conduct that, although religiously motivated, was deemed harmful to marriage, family, and social order.<sup>145</sup>

Consider the matrix of community and autonomy dynamics at work in that situation: Mormons, after years of searching for (and finally finding) geographic autonomy, sought legal autonomy as a unique religious community; many female members of that autonomous religious community fought for the autonomy of individual women everywhere, such that those Mormon women were part of an ideological community devoted to the value of personal autonomy; many members of that broad ideological community of feminists seeking autonomy excoriated the marriage practices of their Mormon sisters on the ground that such practices were destructive to the very ideal of individual autonomy that united all of them in the first place; and those anti-polygamy feminists were also members of a still larger general community that tended to excoriate Mormons because they viewed polygamy as destructive to proper Christian religion, to the conventional family structure, and to the stability of the prevailing social order.

For each individual embedded in this matrix, the tension between the ideals of community and autonomy truly was a paradox – an inevitable, complex, and unsettling state of affairs that required difficult personal, political, and religious choices. Every such choice about cultural values and identity perforce rests on threshold *interpretive* or *reading* choices – i.e., internal choices about what one believes is the right way to live; social choices about whether and how to represent one’s values to others and how to interpret what others are saying about their own values; and choices about how, in light of these other choices, one will speak and behave as a social actor. As discussed in Part II, many or all of these critical choices may be “settled” in the sense that they reflect an inherited, unexamined paradigm of values, in which case all other decisions are effectively pre-made.

This is common, though not necessary, to religious belief, which people often invoke as the trumping perspective by which to decide all other matters. Whether that dispositive perspective be religious, political, or other, this is what Scholes refers to as a “fundamentalist” way of reading – as “zeal that often results in interpretive leaps to an unearned certainty of meaning”;<sup>146</sup> what Rorty characterizes as “accept[ing] somebody else’s description of oneself, to execute a previously prepared program, to write, at most, elegant variations on previously written poems”;<sup>147</sup> and what Haber sees as allowing our “prejudices [to] become dangerous” because “they are

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<sup>145</sup> *Reynolds*, 98 U.S. 145.

<sup>146</sup> Scholes, *supra* note 36, at 219.

<sup>147</sup> Rorty, *supra* note 45, at 28.

dogmatic, kept hidden from view and not open to discussion."<sup>148</sup> In short, the dissonance and anxiety that come with such genuine paradoxes of autonomy and community tempt us to engage in our reading and narrating of the world simplistically, relying on inherited understandings to complex problems and expressing public narratives that reinforce this more intellectually comfortable state of affairs. When this is the avenue we take, we evade the challenge of creating our own authentic narratives that address the evolving realities of our society – realities such as the emergence of an openly gay community of people whose publicly narrated ways of being, much like those of the nineteenth-century Mormons, challenge many traditional narratives of family, sexuality, and social order.

This challenge has taken various forms over the last half century, and especially since the Stonewall riots of 1969, as the status of homosexuals in American society has evolved from near invisibility to active, open presence.<sup>149</sup> As to homosexuality, the most current example of this challenge of how to personally reconcile the community-autonomy paradox is the problem of same-sex marriage. Contemporary homosexuals<sup>150</sup> face a paradox similar to that experienced by nineteenth-century Mormon feminists.

Consider, for example, the matrix of possible community-autonomy dynamics at work in this situation: after years of social and legal struggle to achieve even a partial degree of cultural acceptance and legitimacy, many homosexuals find themselves torn between profound loyalty to a hard-won

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<sup>148</sup> Haber, *supra* note 47, at 1.

<sup>149</sup> Scholarship, history, memoir, and other resources on homosexuality are abundant. For an excellent annotated bibliography, see WAYNE DYNES, *HOMOSEXUALITY: A RESEARCH GUIDE* (1987). For a continually updated bibliography on virtually all publications related to homosexuality, see Paul Halsall, *Homosexuality in History: A Partially Annotated Bibliography*, at <http://www.fordham.edu/halsall/pwh/gayhistbib.html>. For perhaps the most complete collection of seminal theoretical and historical writings in Lesbian and Gay Studies, see *THE LESBIAN AND GAY STUDIES READER* (Henry Abelove, Michele Aina Barale, and David Halperin, eds., 1993). For an influential collection of memoirs and essays that thoughtfully tracks the evolution of homosexuality in American culture over the last several decades, see EDMUND WHITE, *THE BURNING LIBRARY: ESSAYS* (David Bergman, ed., 1995). Probably the preeminent voice in gay legal scholarship is William Eskridge. For a representative and fairly comprehensive collection of his work, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999). Finally, a usefully diverse index of contemporary gay voices is *GAY MEN AT THE MILLENNIUM: SEX, SPIRIT, AND COMMUNITY* (Michael Lowenthal, ed. 1997).

<sup>150</sup> In this article I have chosen to rely on the term “homosexual” as a fixed category, clearly distinct from the equally fixed category of “heterosexual.” Although this distinction is heuristically necessary for my purposes here, I recognize that so clean and categorical a division is debatable; some conceive of sexual identity as a fluid concept, not easily or simply defined. Indeed, the clash of diverse narratives about how sexual orientation should be defined is itself closely related to the narrative battle over same-sex marriage that I discuss in this section.



gay cultural identity and a long-desired freedom to gain full social recognition, through marriage, for their committed life relationships; most openly gay people have developed, through their culturally communal solidarity with other homosexuals, a crucial sense of personal autonomy for purposes of living in an often homophobic American society; yet for many, loyalty to this foundational, sustaining community of other homosexuals is now in some degree of conflict with the prospect of gaining the right to legally marry their partners, because marriage itself has been, and continues to be, symbolic of the exclusion of homosexuals from the larger community of prevailing beliefs and practices regarding religion, family, and sexuality; thus to fight for and exercise the right to marry creates division within what has largely been, but is less and less, a culturally unified, even insular, gay community, because the choice to marry is, quintessentially, both a personal, autonomous act and a gesture of assimilation into the larger American community – and thus a dilution, if not a betrayal, of the precious solidarity of the foundational gay community.<sup>151</sup>

Again, as with early Mormon women, individual homosexuals embedded in this matrix of personal and communal values and loyalties face a genuine paradox – a conflicted state of affairs that requires hard personal choices about ultimately irreconcilable matters of identity and self-representation. Also, then, for both advocates and opponents of same-sex marriage, the perils of fundamentalist reading, interpreting, and narrating are significant, for the temptation is great to embrace settled and certain – rather than ambiguous and challenging – narratives, especially on so central

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<sup>151</sup> One gay critic suggests that the greatest danger in this process of “narrative assimilation“ is that gays will lose touch with their sense of autonomy as a distinct, subversive community:

When the gay liberation movement was formed in 1969, we had a broad, expansive vision of social justice. We wanted to change the world and make it better – not just for gay men and lesbians . . . but for everyone. We wanted to find alternatives to the traditional structures under which we were raised, structures that many of us found insufficient to meet our needs and desires. We aligned ourselves with other movements and learned from them. We got “Gay is Good“ from the Black Power movement’s “Black is Beautiful.“ From the new feminist movement, we learned that patriarchy – especially when it mandated compulsory heterosexuality – was as bad for queers as it was for women. We also believed, like many feminists, that marriage was, at its best, an imperfect institution, and, at its worst, a dangerous one. . . . All this, obviously, has changed. The gay movement today has gone out of the radical-social-change business and taken up a franchise in the let’s-just-fight-for-equality business.

Michael Bronski, *Why Do Gays Want to Say “I Do?”*, Z MAGAZINE, vol. 16, no. 10 (2003).

a cultural matter.

C. SHOWCASING THE MORAL SYLLOGISM:  
FUNDAMENTALIST PUBLIC NARRATIVES OF HOMOSEXUALITY

In an editorial published in the *Washington Times* in April 2004, entertainer Pat Boone sounded a moral alarm that, for its sheer ominousness, is resonant of Congressman McClelland's 1860 warning about the evils of polygamy:

We're at war. And I'm not talking about the war against terrorism, with its dreadful daily reminders. I'm talking about the civil – and increasingly uncivil – culture war now raging across America . . . . If we win, we may be able to rebuild the institution of marriage as the sacred bedrock of American societies. If they win, we will have moral anarchy . . . . There are moral absolutes in this life – and the sacred institution of marriage is one of them.<sup>152</sup>

Boone's remarks are typical of the public narratives expressed in recent years by those who oppose gay marriage on religious (usually Christian) grounds: highly fundamentalist, in that such narratives deploy the language and imagery of holy war – framing the conflict in binary, us-versus-them terms and invoking an absolute moral authority to justify a conclusion of which their authors are certain.

Two aspects of Boone's cultural jeremiad are especially striking as to the community-autonomy paradox and the fundamentalist-literary spectrum of narrative. The first is that by painting this public controversy as a cleanly delineated "war" that, if lost, will result in "moral anarchy," Boone implies that America is composed of two warring communities, with little or nothing in between; the idea of an ambivalent, complex, or nuanced perspective on gay marriage seems unacceptable in this narrative. The second is that Boone taps into precisely the same narrative upon which the Supreme Court (and most of America) relied in the late nineteenth century to prohibit the Mormons from practicing polygamy: the moral syllogism that (1) traditional marriage is "the sacred bedrock of American societies"; (2) that permitting a different version of that sacred marriage concept will surely ruin marriage as we know it (this is the unarticulated, enthymemic minor premise); and thus (3) the ruin of the traditional marriage concept will ruin society – "[i]f they win, we will have moral anarchy."

Consistent with the rules of formal logic, if the reader accepts the major and minor premises, then the conclusion inexorably follows. Here,

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<sup>152</sup> Pat Boone, *Wedded to the Original*, WASH. TIMES, April 23, 2004.

while it is difficult to dispute the *empirical* validity of the major premise (i.e., conventional heterosexual, monogamous marriage *has* been, for better or worse, the structural center of modern western civilizations), the minor premise – the unspoken assumption that allowing any variation on the established order of marriage will necessarily denigrate that convention – seems, at least on its own, far from clear, regardless of one’s views on the sexual orientation of individuals.<sup>153</sup>

As in Boone’s editorial, some version of the logical syllogism is typically operative in all public narratives; this is especially the case in legal reasoning, where the value of “logic” is paramount. Jerome Bruner evocatively makes this point about the normative nature of all rhetorical acts of “framing,” whether in conventional stories or legal arguments:

Stories surely are not innocent: they always have a message, most often so well concealed that even the teller knows not what ax he may be grinding. For example, stories typically begin by taking for granted (and asking the hearer or reader to take for granted) the ordinariness or normality of a given state of things in the world – what *ought* to prevail when Red Riding Hood visits her grandmother, or what a black kid *ought* to expect on arriving at a school door in Little Rock, Arkansas, after *Brown v. Board of Education* struck down racial segregation.<sup>154</sup>

As Bruner suggests, to “tak[e] for granted (and asking the hearer or reader to take for granted) the ordinariness or normality of a given state of things in the world”<sup>155</sup> is, in principle, to posit the major premise of an argument,

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<sup>153</sup> As a preface to his core conventional-marriage-as-sacred-social-foundation narrative, Boone appeals to the contemporary American reader’s understandable concern about current dangers: “We are at war.” This otherwise common rhetorical strategy (appeal to something familiar to the reader in order to make a point about an analogically related matter) is notable for where it leads: as between the physical “war against terrorism” and the ideological war over the meaning of marriage, Boone’s ensuing narrative seems to suggest that the war about marriage is the more consequential of the two. If the reader is persuaded by Boone’s strategy and thus believes that the war for ownership of the *meaning* of marriage is paramount, then it is fair to say that devotion to the traditional concept of marriage has *itself* reached the status of religion, in addition to being an important component of religion. See Niebuhr, *supra* text accompanying note 21, at 6-9; *see also* BLOOM, *supra* note 21, at 30. (Recall Niebuhr’s wording that “[t]he mark of religion is that it is the practice of an ultimate concern that orders all other concerns, an unconditioned loyalty that trumps all other loyalties.”) Boone’s assertion that “[t]here are moral absolutes in this life – and the sacred institution of marriage is one of them” seems to comport with this reading of his marriage narrative as tantamount to scripture.

<sup>154</sup> BRUNER, *supra* note 135, at 5-6.

<sup>155</sup> *Id.*

whether explicitly (as in conventional arguments) or implicitly (as in conventional narratives – “stories”). Thus even where the speaker is a social commentator, like Boone, the framing of the terms of the argument – the “taking for granted . . . the ordinariness or normality of a given state of things” – is an inevitably *normative* act.

It is crucial to understand the rhetorical function and power of the moral syllogism, for these help demonstrate the basic relationship between the fundamentalist-literary narrative spectrum and the community-autonomy paradox. First, because the act of framing a moral syllogism – of positing the premises of one’s argument – inheres in all argument-narratives, it matters tremendously whether the speaker’s framing act if more or less fundamentalist or literary, for the character of the narrative follows directly from that threshold rhetorical decision. Boone’s narrative on marriage, for example, takes for granted *both* that marriage is “the sacred bedrock” of our society *and* that permitting a same-sex variation on that sacred idea will ruin our way of life. As I have pointed out, while the first of these premises is at least empirically sound, the second is far from clear or persuasive except to those who already believe it; this second premise does not even pretend to address alternative perspectives or beliefs, such that the terms of the discussion are firmly set, rather than open to discussion, and the conclusion that permitting same-sex marriage will create “moral anarchy” is inevitable. This makes for a narrative that leans heavily toward the fundamentalist end of the reading spectrum, since it both precludes open discussion and conceals any possible conflict or ambiguity.<sup>156</sup>

Second, once an author has framed a narrative so as to “draft” on the momentum of the moral syllogism embedded in that narrative, the author has essentially drawn lines of ideological community, rhetorically *including* those who agree with the author’s premises, *excluding* those who disagree, and possibly persuading those who are undecided. This three-part audience map will form and potentially evolve depending on how literary or fundamentalist the author makes the narrative. Thus, for example, a narrative framed according to a heavily fundamentalist moral syllogism, like Boone’s, will yield an audience map starkly divided into just two areas – the land of the converted and the land of the enemy – with no land for those in the middle. This fundamentalist narrative approach makes for clearly identifiable, strictly autonomous ideological communities, but tends to preclude open, meaningful exchange between the communities as well as the possibility that someone with mixed views might arrive at a thoughtful,

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<sup>156</sup> See SCHOLÉS, *supra* note 36, at 231 (reasoning that “fundamentalist reading is always marked by shifts from the literal to the figurative – as a way of concealing conflicts.”) Boone’s reliance on general, unsubstantiated, figurative terms like “sacred bedrock” and “moral anarchy” would appear to exemplify Scholes’ point.

educated conclusion.

The author of a more literary narrative, on the other hand, will tend to build upon a moral syllogism whose premises are transparent, openly articulated, and susceptible of reasonable inquiry and disagreement. This does not mean that the literary narrative must eschew commitment to particular values. On the contrary, the literary narrative must be especially *principled*, in that the moral syllogism upon which the narrative proceeds must be open to ambiguity, complexity, and difference – and the substantive ideology of that moral syllogism, *the speaker's values as to that narrative*, must survive or fail in the face of those tempering factors. Accordingly, the literary narrative will produce broader, more nuanced, more porously boundaried audience communities, because the underlying moral syllogism will not dictate a strictly divided map of the ideological landscape, but will instead allow for both overlap among communities and for one's membership in multiple communities.<sup>157</sup> In short, and at the risk of indulging in too many religious metaphors, the fundamentalist narrative will tend to “preach to the converted,” while the literary narrative will tend to engage with the multitudes.

Among legal narratives of homosexuality, Justice Byron White's 1986 majority opinion in *Bowers v. Hardwick* is exemplary of the fundamentalist narrative. Justice White's opinion rests on a moral syllogism<sup>158</sup> about homosexuality quite similar to the moral syllogism that Chief Justice Waite relied on in *Reynolds*.<sup>159</sup> In *Bowers*, White initially framed the opinion by adroitly sifting alternative threshold questions from

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<sup>157</sup> My characterization of ideological communities has much in common with the notion of “interpretive communities” that has emerged in literary theory in recent decades. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1978); *DOING WHAT COMES NATURALLY*, *supra* note 36.

<sup>158</sup> Judicial opinions typically proceed on the basis of at least one central syllogism, a rhetorical device well suited to the necessary judicial framing of the issues in a case. While few judicial opinions specifically identify all three formal parts of the syllogism (i.e., the major and minor premises and the conclusion), the syllogistic reasoning process is invariably at work, given the need in the common law judicial process to frame issues and reach conclusions on the authority of established precedent. That is, the major premise of the opinion's reasoning is typically some version of an established precedent – this is where the judge's critical framing decision comes into play. Once a judge frames that major premise, the scope of possible minor premises narrows, and, more important, the conclusion that follows from both premises is nearly inevitable. This syllogistic mechanism is a salient example of how “logic” matters in a *rhetorical* way in legal reasoning: the framing of the major and minor premises are authorial *choices*, shaped by a judge's discretion and values, be they principled or not; but the conclusion that follows is more predictable, as it is dictated by the initial premises. For a federal appellate judge's detailed discussion of the practical role of formal logic in the judicial process, see RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (1997).

<sup>159</sup> See *supra* text accompanying note 128, at 40-44.

the question upon which he would base his reasoning:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. *The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.*<sup>160</sup>

White re-emphasized this threshold question in observing that “[p]recedent aside, . . . respondent [Hardwick] would have us announce . . . a fundamental right to engage in homosexual sodomy.”<sup>161</sup>

The major premise of White’s moral syllogism can be stated as a straightforward question: Does the Constitution provide homosexuals the fundamental right to have sodomy? From here, Justice White follows the logical momentum of this major premise. In William Eskridge’s description:

*As narrowed in this way, Hardwick’s claim struck the Supreme Court as unlike those in earlier privacy cases, which had arisen in the context of heterosexual intimacy. Key to the Court’s analysis was its belief that the due process right of privacy could only be applied to protect those fundamental liberties “‘deeply rooted in this Nation’s history and tradition.’” Because “homosexual sodomy” had long been criminal in Anglo-American law, the Court held that there was no “‘deeply rooted’” liberty Hardwick could claim. In the light of history, the Court majority found Hardwick’s fundamental rights claim “at best, facetious.”<sup>162</sup>*

Eskridge identifies the minor premise of White’s syllogism, which can be stated in relation to the major premise like this: In order to receive the status of “fundamental” Constitutional right claimed here, the right must protect

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<sup>160</sup> *Bowers* 478 U.S. at 190 (emphasis added).

<sup>161</sup> *Id.* at 191.

<sup>162</sup> ESKRIDGE, *supra* note 149, at 150 (emphasis added).

behavior that is “deeply rooted in this Nation’s history and tradition.”<sup>163</sup>

It takes little imagination to surmise what the Court’s conclusion would be to the question raised, in effect, by the combined premises of Justice White’s moral syllogism: Is consensual homosexual activity “deeply rooted in this Nation’s history and tradition”?<sup>164</sup> It seems certain that in *no* nation’s “history and tradition“ is homosexual activity “deeply rooted.“ Accordingly, could the opinion logically proceed in any direction other than it did, summarily concluding that private sex between consenting homosexual adults is *not* protected by the Constitution?

It is worth noting that Justice White articulated another possible minor premise to go along with the requirement that the right be “deeply rooted in this Nation’s history and tradition.” Relying on language from *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), White reasoned that homosexual sodomy must be one of “those fundamental liberties that are ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed.’”<sup>165</sup> Although White summarily dispensed with this premise as well (“[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy”<sup>166</sup>), this “formulation” had the potential to produce a more literary analysis than its alternative.

Unlike the “deeply rooted in . . . tradition” minor premise that White relied on, which, in fundamentalist fashion, effectively precluded discussion by deferring the question to the Judeo-Christian moral tradition, this “implicit in the concept of ordered liberty” formulation might have enabled White to leaven his judicial narrative with greater nuance and thus engage a broader audience. Indeed, the term “implicit in the concept of ordered liberty,” combined with the admonition to consider whether “liberty” or “justice would exist if [the claimed right] were sacrificed,” would seem to open the discussion of homosexuality up to a broad, culture-sensitive analysis. For example, the term “implicit in the concept of ordered liberty” is far more open to different and changing behavioral norms than is the term “deeply rooted in this Nation’s history and tradition,” which narrows the scope of analysis to an easily categorized, fundamentalist recitation of the indisputable fact that Judeo-Christian history has not been kind to homosexuals. Similarly, to ask whether “liberty” or “justice would exist” if the right of homosexuals to have private, consensual, sex “were sacrificed” is a genuinely complex, open-ended question, at least in contemporary society. Thus both parts of this alternative premise would yield a more

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<sup>163</sup> *Bowers* 478 U.S. at 192.

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

<sup>165</sup> *Id.* at 191-92.

<sup>166</sup> *Id.*

literary analysis of the behavior at issue in *Bowers* than the opinion itself demonstrates.

In addition, the choice of determinative formulations that White applies here is crucial, for it defines *ideological communities* as to the outcome of the case – communities comprised of those readers who respond similarly to the decision according to shared values about, say, sexual identity or the right to privacy. As it was decided, *Bowers* tended to produce sharply divided reactions and thus distinct, adversarial ideological communities regarding the issues at stake. Such divisions, while not physical or geographic boundaries, nonetheless define two virtual communities with opposing values. As to public engagement and social change, the boundaries distinguishing such ideological communities would seem more consequential.

It may well be that the distinct communities defined by the controversial issue of homosexuality would be hard to integrate in any event, but honest, fair, meaningful dialogue is at least more possible if the opinion draws more flexible, negotiable ideological lines – a result that would have been more likely had White’s argument-narrative focused on the two alternative premises discussed above. For example, although the majority of Americans would not choose to engage in homosexual activity, neither does it seem likely that a majority would see “justice” in summarily “sacrificing” protection for the private sexual acts of others, even homosexuals – *at least not without thoughtfully exploring the ramifications of the question*. Indeed, such a malleable distinction would produce somewhat overlapping communities, reflecting at least a measure of shared ideology and thus the possibility of dialogue, understanding, and progress as to complex social controversies.

In the end, White’s judicial narrative, while not unsophisticated in its rhetorical style, is remarkably fundamentalist in its substance, for it resolves the controversy before the Court by essentially asking a question from which only one answer could logically follow. White could have formulated other, more literary “framing” questions (i.e., major premises)<sup>167</sup> or, as discussed above, contemplated more culture- and context-sensitive minor premises and still have arrived at the same conclusion – but with the result that *Bowers* would undoubtedly have earned greater legitimacy, if not agreement, within both the legal community and the general population. This has become increasingly clear over time given the enduring criticism

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<sup>167</sup> The most obvious alternative is *Lawrence v. Texas*, *supra* note 143, in which the Court overruled *Bowers*: “[it] was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” *Id.* at 578.



of the opinion<sup>168</sup> – culminating in the Court’s pointed overruling of *Bowers* in 2003.<sup>169</sup>

Fundamentalist narratives of homosexuality are not exclusive to those who oppose gay rights, of course, and we can look to the same-sex marriage debate for evidence that narrators on the other side of the issue are capable of the fundamentalist tendency to simplify the complexities of both social controversy and the community-autonomy paradox. Although most gays and lesbians appear to be unified behind the push to legalize same-sex marriage as a matter of *equality*, homosexuals nonetheless face a version of the community-autonomy paradox in this context as well: they fear that the assimilation required to embrace marriage – that most mainstream of cultural “sacraments” – will mean the erosion, if not the surrender, of their rich, distinct sense of communal autonomy, in exchange for a generic, suffocating cultural status. This fear, however justified, has led to narratives of same-sex marriage that embody some of the same categorical tendencies that characterize the fundamentalist narratives that I have discussed above.

For example, the lesbian feminist writer Cheryl Clarke has remarked that “permanency for gays, lesbians, and other same-sex variants is the very prong we ‘gets hung on’<sup>170</sup> when the arguments for marriage equality come up. We want that *forever* thing or the *thing* forever.”<sup>171</sup> Asserting that “Marriage trivializes our partnerships,” Clarke inveighs against the mainstreaming of “our movement” by “liberals”:

I am calling upon bulldaggers, dykes, faggots, feminist femmes, fierce sissies, and other outrageous progressive queers to have a major multicultural sexual liberation confabulation to take our movement back from liberals. Because marriage equality with its *rhetoric of sameness* is not why we came out of the closet in 1969 or before. We came out to dismantle marriage as an institution.<sup>172</sup>

Although marriage is indeed one of the most dominant, idealized, heavily mediated (and *mediating*) of American cultural narratives,<sup>173</sup>

<sup>168</sup> See, e.g., ESKRIDGE, *supra* note 149, at 150.

<sup>169</sup> *Lawrence*, 539 U.S. 558, 578, *supra* note 143.

<sup>170</sup> Cheryl Clarke, *The Prong of Permanency: A Rant*, in *I DO/I DON’T: QUEERS ON MARRIAGE* (Greg Wharton and Ian Phillips, eds., 2004). Clarke takes the concept and phrasing of “getting hungs on” from ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD*, (1937).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (emphasis added).

<sup>173</sup> As Michael Bronski puts it,

marriage, like any other human relationship, is nonetheless inherently ambiguous, challenging, and unpredictable – a relationship at least as complex as the parties involved. Thus marriage would genuinely “trivialize“ a gay relationship only to the extent that the people involved took a fundamentalist, rather than a literary, view of the whole adventure.

No relationship can avoid *some* kind of categorization, even a relationship that which defines itself by defying all categories. But it is not the mere fact of *belonging* to a category, however top-heavy it may be with social expectation, that makes one’s experience and narration of that relationship a fundamentalist one. Rather, what invites the bondage of fundamentalist categorization is one’s unwillingness to develop literary habits of mind and action, one’s failure to remain vigilant toward the dangers of living and narrating one’s relationships in settled, inherited, unthinking ways. While those who have experienced hurtful social or cultural marginalization (here, as to sexual identity) are attuned to the harms of cultural myopia and self-righteousness in ways that beneficiaries of the status quo usually are not, the choice to construct literary over fundamentalist narratives is just that – a choice, not a given. So to dismiss (as Clarke seems to) all marriage relationships as irreversibly mediated by a “rhetoric of sameness“ and beholden to the insurmountable ideal of “heteronormativity“ is to mimic *that very rhetoric of sameness*. This serves only to perpetuate the kind of narrative fundamentalism unabashedly proclaimed by Pat Boone,<sup>174</sup> albeit probably not as close to that end of the narrative spectrum.

#### D: TOWARD A “CRAFTY“ NARRATIVE OF MARRIAGE

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[m]arriage is so much the expectation and norm that even heterosexual couples have to explain why they don’t want to get married. It is what we are all brought up to want and never given much permission to question. It is a cultural myth many of us still embrace, despite all the evidence suggesting that “happily ever after“ is more aptly applied to fairy tales than marriages. For some couples – straight and gay – getting married is easier than not getting married. It is a learned cultural response that is easier to give in to than to fight.

Bronski, *supra* note 151. Bronski’s point may find support in that a growing number of books on how gays can plan for their weddings seem, at least by their titles, to imitate the nuptial narratives advertised by America’s massive marriage industry. See, e.g., DAVID TOUSSAINT WITH HEATHER LEO, *GAY AND LESBIAN WEDDINGS: PLANNING THE PERFECT SAME-SEX CEREMONY* (2004); K.C. DAVID, *THE COMPLETE GUIDE TO GAY AND LESBIAN WEDDINGS* (2005).

<sup>174</sup> *Supra* note 152.

In bringing this article to a close, I want to return to Scholes' notion of the "crafty reader,"<sup>175</sup> an approach to public narrative that enables meaningfully principled yet open-ended debate about controversial issues – those most in need of nuanced understanding – and, in the process, sheds light on the community-autonomy fault lines that run through virtually all important social conflicts. I will consider a few examples of what might constitute a "crafty" reading of same-sex marriage, a stern test for any interpretive paradigm because of the import of the stakes and the seeming irreconcilability of the fundamentalist positions on either side of the issue. To purposefully revise an established cultural narrative, particularly one as deeply anchored as the traditional narrative of marriage, is a herculean task. Yet there is no acceptable alternative if we value the ideal of a pluralistic society. So I submit that, short of the ideal of full compatibility, crafty reading nonetheless offers all sides the possibility of enriched, elevated public discourse on this profoundly divisive issue.

Recall that Scholes characterizes the crafty reader as one who "acknowledge[s] the seriousness of fundamentalist readings, while resisting and criticizing the zeal that often results in interpretive leaps to an unearned certainty of meaning, achieved by turning a deaf ear to the complexity of the texts themselves, their histories, and their present situations."<sup>176</sup> In analyzing the rhetorical holy wars over nineteenth-century Mormon polygamy and present-day homosexuality, I have attempted to explore the merits of this narrative prescription by closely reading what are largely fundamentalist narratives and thereby demonstrating the costs and limitations of the rhetorical strategies that drive them.

In crafty narratives, by contrast, we see ways in which literary (or *more* literary) readers deploy rhetorical strategies to produce narratives that more accurately represent the realities of people who experience, by virtue of the politicized status of their cultural identities, dramatic versions of the paradox of community and autonomy. First, for example, consider how two judicial narrators frame the issues before them in two landmark legal decisions. The first is from Justice Kennedy's 1996 majority opinion in *Romer v. Evans*,<sup>177</sup> the other from Chief Justice Marshall's 2003 majority opinion in *Goodridge v. Department of Public Health*.<sup>178</sup>

Justice Kennedy's opening to the *Romer* opinion is, for being simply constructed and straightforwardly expressed, literary in the sense that it engages us by speaking to important cultural identity values that most of us actually share:

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<sup>175</sup> *Supra* note 36 and accompanying text.

<sup>176</sup> *Id.* at 219.

<sup>177</sup> *Romer*, 517 U.S. 620, *supra* note 14.

<sup>178</sup> *Goodridge*, 798 N.E. 2d 941, *supra* note 144.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution.<sup>179</sup>

This decision addressed the question of the constitutionality of Colorado’s voter-ratified Amendment 2, which would have precluded future anti-discrimination legislation protecting homosexuals in any state context.<sup>180</sup> However, the underlying issue here – homosexual rights, or, even more basically, the freedom to pursue one’s identity as an American, regardless of one’s sexual orientation – is neither mentioned nor even clearly implied. Yet Kennedy subtly creates a powerful opening to a narrative argument in which, to be effective, he must open his readers’ minds to the possibility of a concept of political identity that includes homosexuals.

Kennedy’s first rhetorical choice is to invoke the notorious Supreme Court decision in *Plessy v. Ferguson*,<sup>181</sup> the late nineteenth-century case in which the Court let stand Jim Crow laws that effectively preserved much of the inequality, if not the outright slavery, of ante-bellum America, even some thirty years after the end of the Civil War. The *Plessy* decision is commonly invoked in contemporary American culture – in high school and college history classes and textbooks, in law school lectures, in political debates, and so on – to represent wrong and outdated racist attitudes of the past. Thus in associating himself with Justice Harlan, who famously dissented from that now stigmatized decision, Justice Kennedy sets a tone and direction for the *Romer* opinion that suggest long-overdue rectification of a broad social wrong, here the formal exclusion of gays and lesbians from the protection of civil rights laws, and even from the legislative process necessary to enact those laws.

Kennedy’s next move reinforces, then builds upon, this show of judicial reparation: having supplied with *Plessy* a symbol of past racism and injustice, Kennedy comes to the present, reminding the reader that Harlan’s “[u]nheeded” words “now are understood to state a commitment to the

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<sup>179</sup> *Romer*, *supra* note 14, at 623.

<sup>180</sup> The textual opening of the amendment is remarkably direct in conveying its purpose: “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.” *Id.* at 625.

<sup>181</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

law's neutrality where the rights of persons are at stake."<sup>182</sup> Kennedy has not randomly drawn from the past to argue in the present; he has chosen Harlan's memorable cry in the American political wilderness as the starting point of his opinion because it provides an emotionally appealing and logically solid foundation on which to construct his explanation, indeed his justification, for the Court's decision to do in 1996 for gays and lesbians what the Court would not do in 1896 for black Americans. Kennedy's key rhetorical strategy is to link Harlan's now unobjectionable clarion call for racial justice to the esteemed narrative that the law must, of necessity, be *neutral*, especially when it affects people's rights. At first glance this may seem redundant, but it is by such incremental steps that today's legal arguments become tomorrow's legal rules and standards, as well as the basis for evolving social and cultural norms. Thus Kennedy has little to lose and much to gain, rhetorically, in stating what may seem obvious – that the law should be neutral toward all persons. This notion is, of course, basic to the American legal tradition and crucial to the continued political and social legitimacy of the nation's courts, most of all the Supreme Court.

Kennedy completes this moral syllogism, which will serve to flavor the tone and frame the reasoning of the entire *Romer* narrative-argument, by making the project of judicial rectification, and the ethic of legal neutrality that drives it, subject to one of the federal Constitution's most potent doctrines: "The Equal Protection Clause enforces this principle [of neutrality] and today requires us to hold invalid a provision of Colorado's Constitution."<sup>183</sup> Again, while this conclusion may seem (at least to a lay reader) overly deferential to the authority of the U.S. Constitution, not to mention self-evident, it is precisely such a direct appeal to established textual authority that enables lawyers and judges to fashion the practically manageable questions and socially determinate solutions that are the essence of legal argumentation and discourse – legal narrative in the broadest sense. Indeed, the narrative progress of conventional legal discourse depends upon an almost maddeningly compact and painstaking kind of argumentation, in which the author (whether judge or advocate) seeks to validate her assertions by tightly weaving precedent and analogy as she carefully moves up and down the scale of abstract rules and concrete possibilities.

Kennedy's use of analogy is a crafty, and thus more likely to be persuasive, deployment of narrative. This is because analogy, essentially a narrative metaphor, operates by invoking something *known* or *familiar* – an experience, event, situation, concept, argument, or (more likely) some combination of these and other tropes – in order to make accessible

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<sup>182</sup> *Romer*, *supra* note 14, at 623.

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

something *unknown* or *unfamiliar*.<sup>184</sup> Thus when Kennedy invokes *Plessy*, he brings to mind a well established, layered narrative of slavery, discrimination, lack of equality, ignorance, bias, collective guilt, Jim Crow, segregated lunch counters, and so on. Whatever else he is attempting in his opening, Kennedy uses that familiar narrative to morally engage the reader.

This is quite distinct from Justice White's use of analogy in *Bowers*. There, White distinguished private, consensual, gay sex from several other private behaviors – among them procreation, interracial marriage, contraception, and abortion – to which the Court had previously granted constitutional protection.<sup>185</sup> But White's analogical reasoning, like his framing and application of the premises of his moral syllogism – asking and answering narrowly tailored yet broadly manipulable questions<sup>186</sup> – has the dismissive, conclusory feel of analysis-by-fiat:

[W]e think it is evident that none of the rights announced in those cases *bears any resemblance* to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . .

<sup>187</sup>

White makes no attempt to reason about *how* or *why* sexual activity<sup>188</sup> between two men is different from the intimate matters of marriage and procreation between a man and a woman – let alone to explain how the one bears *no* “resemblance” to the other. Leaving aside the ultimate disposition of the case, White seems not to have wanted to engage the *merits* – namely, the complex issue of how we define, or should define, what is private or intimate between individuals for purposes of legal protection. To impose such a narrow, closed reading on such a broad, open issue is a fundamentalist narrative choice indeed.

By contrast, Kennedy's reading of the homosexuality in *Romer* is engaged with history and context, open and attentive to the evolution of

<sup>184</sup> See LAKOFF AND JOHNSON, *supra* note 40.

<sup>185</sup> *Bowers* 478 U.S. at 190 -91. *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942) (procreation); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); and *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

<sup>186</sup> *Id.* At 192; *supra* note 162 and accompanying text, at 55-56.

<sup>187</sup> *Id.* (emphasis added).

<sup>188</sup> By White's analysis, it would have made no difference whether Michael Hardwick and his partner considered this sexual experience an act of lust, lovemaking, or both; we can infer only that what mattered was simply that the two were of the same sex.

moral sensibility over time.<sup>189</sup> This is clear from the effect of the opening paragraph alone. Having experienced the narrative resonance of *Plessy*, the reader is predisposed to see the more novel or unfamiliar situation presented in *Romer* in a similar light: “*Plessy* meant unfair treatment of a certain class of people for unacceptable reasons; perhaps *Romer* will mean the same thing if it is not decided differently.” At core, Kennedy’s narrative here is a simple and persuasive moral allegory, engaging us, at the level of American cultural identity, toward what Rorty calls “[t]he process of coming to know oneself, confronting one’s contingency, tracking one’s causes home,” – which we achieve, however provisionally, by “inventing a new language – that is, of thinking up some new metaphors.”<sup>190</sup>

The opening of Chief Justice Marshall’s majority opinion in *Goodridge* is similarly crafty:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.<sup>191</sup>

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<sup>189</sup> *Romer*, 517 U.S. 620, 626-37. Kennedy’s discussion of the legal and social ramifications of Amendment 2 is significantly more thorough and nuanced in its reasoning than is White’s discussion in *Bowers*. Interestingly, part of Kennedy’s justification for finding Amendment 2 unconstitutional involves the Court’s treatment of Mormon polygamists in *Davis v. Beason*, 133 U.S. 333 (1890) at roughly the same time that *Plessy* was decided:

In *Davis*, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it “simply excludes from the privilege of voting, or of holding any office of honor, trust, or profit, those who have been convicted of certain offences. . . .

*Romer* at 634. The *Beason* court’s benign characterization of the categorical scope of the territorial statute is strikingly similar to White’s implicit, tradition-based justification of the Georgia anti-sodomy statute in *Bowers*. See *Bowers* at 192-93.

That Kennedy’s legal narrative in *Romer* is exemplary of crafty reading (“acknowledg[ing] the seriousness of fundamentalist readings, while resisting and criticizing the zeal that often results in interpretive leaps to an unearned certainty of meaning“ and remaining attentive to “the complexity of the texts themselves, their histories, and their present situations,“ SCHOLLES, *supra* note 36, at 219) is supported, albeit unwittingly, by Justice Scalia in the famous opening line of his dissent: “The Court has mistaken a *Kulturkampf* for a fit of spite.” *Romer* at 636 (emphasis added).

<sup>190</sup> See RORTY, *supra* note 45, at 27-28.

<sup>191</sup> *Goodridge*, *supra* note 44, at 312.

Marshall engages us by articulating *the* primary American marriage narrative, a narrative whose moral logic extends straight back to *Reynolds*<sup>192</sup> and affirms the ideological community of traditional marriage advocates. As with Kennedy's opening in *Romer*, which effectively creates an ideological community centered on the value of anti-racism, this rhetorical framing makes of most readers (particularly opponents of same-sex marriage) a coherent ideological community centered on the social value of marriage. And, as in *Romer*, this leaves only the question of the degree to which that community will remain intact through the next step of the court's narrative-argument.

That step takes a decidedly literary form, characterizing carefully and respectfully the two ideological communities in conflict over this issue and punctuating that pair of community narratives with a succinct statement of judicial purpose:

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. . . . Our obligation is to define the liberty of all, not to mandate our own moral code.<sup>193</sup>

This last sentence offers a kind of moderating (if not re-unifying) judicial narrative, a reminder that courts must work to transcend, insofar as that is possible, the concrete disputes before them, and to resolve those disputes from a position of principle. Here, that principle – that narrative of “liberty of all” – echoes Kennedy's invocation of the “law's neutrality where the rights of persons are at stake.”<sup>194</sup>

Just as Kennedy did in both *Romer* and *Lawrence*,<sup>195</sup> here Marshall creates, by rhetorical appeal to a widely revered value, an ideological community of readers. The court's next step, into a copious discussion declaring unconstitutional the “Commonwealth[s'] . . . use [of] its formidable regulatory authority to bar same-sex couples from civil marriage,”<sup>196</sup> is where this ideological community – one unified by a belief

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<sup>192</sup> *Supra* text at 37-42.

<sup>193</sup> *Goodridge*, *supra* note 44, at 312 (quoting *Lawrence*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

<sup>194</sup> *Romer* at 623.

<sup>195</sup> *Supra* note 193.

<sup>196</sup> *Goodridge* at 312-13.



in “the liberty of all” – divides into distinct interpretive communities along lines of religious and cultural values. Just *what* values the ideological community of “the liberty of all” should include is, of course, where the bulk of the debate over same-sex marriage resides. Nevertheless, Marshall’s rhetorical strategies in legally framing that debate are admirably literary in their open, principled attempt to fairly characterize and evaluate the values and complexities of each side. This, like Kennedy’s approach in *Romer*, stands in contrast to the preemptive, fundamentalist framing choices that White deploys in *Bowers*.

### Conclusion

In a pluralistic liberal democracy, the importance of “crafty” narrative habits cannot be overestimated. Such “literary” discursive methods and attitudes enable genuinely meaningful public discourse and the consequent, ongoing revision of the boundaries of ideological communities. These conditions, in turn, make more possible for all the pursuit of legitimate individual and communal autonomy, because such a self-conscious, self-revising narrative ethos leads us to negotiate, if not resolve, our complex differences openly, such that we know where we stand with each other when fresh controversy invites our baser impulses.

The alternative, fundamentalism of thought and speech, is inherently violent, imposing on ourselves and others reductive narratives of self and community that narrow our ethical vision and distort our mutual understanding – “mediation” of the most destructive kind. Michael Bronski puts this narrative violence in the context of the same-sex marriage debate:

[Y]ou don’t win the right to marry by telling the world that queer people’s lives are as confusing, messy, tattered, and complicated as heterosexual lives. You win the right to marry, it seems, by presenting to the world, and to the courts, the most acceptable, most homogeneous, most lovable, most traditional couples (with kids if possible) you can find. Given that marriage is, for everyone, a form of sexual regulation, it is also important to present to the world the most conventional images of gay behavior.<sup>197</sup>

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<sup>197</sup> Bronski, *supra* note 151. Of course, given the universal desire for cultural legitimacy, it is not difficult to understand the appeal of marriage to homosexuals:

So why would gay people want to get married? Part of the answer is that in a world wracked by homophobia, getting an official okay on your relationship feels great. It is validating and it mutes some of the hurt and pain inflicted on so many queers by their families, neighbors, co-workers, and society at large.”

Without question, Bronski believes in the rightness of granting homosexuals equality in the marriage context. Nevertheless, he suggests that the cost to homosexuals of winning the right to marry is perhaps too dear. The cultural assimilation required for such “narrative“ equality would compel gays to become truly fundamentalist self-narrators, borrowing and living out an oppressive narrative provided by someone else.<sup>198</sup> This kind of derivative cultural legitimacy would come at the expense of whatever hard-earned sense of autonomy homosexuals, as individuals and as a community, have achieved.

The consequences of our fundamentalist habits of mind are all about us, in our political campaigns, our culture wars, our shrill internet blogging. The world we inhabit reminds us daily that such habits of mind, when indulged to the extreme, pose serious danger to intellectual freedom, to cultural tolerance, and to social peace. This need not be the path we take, though it is surely the easiest one.

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*Id.*

<sup>198</sup> See RORTY, *supra* note 45, at 27-28.