

# ARTICLES

## **(Still) Not Fit To Be Named: Moving Beyond Race To Explain Why ‘Separate’ Nomenclature for Gay and Straight Relationships Will Never Be ‘Equal’**

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#### INTRODUCTION

Last May in *In re Marriage Cases*, the California Supreme Court considered whether same-sex couples were constitutionally entitled to the name “marriage,” in addition to the benefits and obligations that flow from that legal status.<sup>1</sup> Prior to that landmark case, the state of California had extended most of the substance of marriage to same-sex couples under the label of “domestic partnership.”<sup>2</sup> The *Marriage Cases* plaintiffs, however, wanted more: they wanted, in short, for the state to recognize their relationships in the traditional and conventional lexicon of marriage.<sup>3</sup>

As is widely known by now, the court in that case ruled that California was required to recognize same-sex “marriage” under its constitution, finding that the state violates state constitutional liberty and equality guarantees when it

1. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

2. See CAL. FAM. CODE § 297 (Deering 2007) (defining and providing the requirements for establishing a domestic partnership in California). As the California Supreme Court pointed out in *Marriage Cases*, California’s Domestic Partner Act was a near mirror image of marriage. Because the differences between those two statuses were relatively inconsequential, Judge Corrigan noted that the issue in that case was a question of “whether domestic partners have a constitutional right to the name of ‘marriage.’” *Marriage Cases*, 183 P.3d at 468 (Corrigan, J., concurring and dissenting). For a list of the minor differences between marriage and domestic partnership status, see *id.* at 416 n.24. The same holds true for the distinction between marriage and civil union status in Vermont, New Jersey, and New Hampshire, and for the distinction between marriage and domestic partnership status in Oregon—all states in which those two statuses are nearly identical. See *infra* note 36.

3. The New Jersey Supreme Court characterized the name issue as “whether committed same-sex partners have a constitutional right to define their relationship by the name of marriage, the word that historically has characterized the union of a man and a woman.” *Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006). Nearly ten years ago, when the push for same-sex marriage was not yet at its height, Michael Warner, a vocal critic of the same-sex marriage movement, noted that the campaign for gay marriage has always been more about the language of marriage, or what he calls the “ancient ritual vocabulary of recognition and status,” than about the substantive benefits that flow from that legal status. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 130, 143 (1999).

“reserv[es] the historic designation of ‘marriage’ exclusively for opposite-sex couples.”<sup>4</sup> As is also widely known by now, California’s electorate in the 2008 election voted effectively to overturn that decision by amending its constitution to define “marriage” in opposite-sex terms.<sup>5</sup> That amendment, formerly known as Proposition 8, provides that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>6</sup> Post-election data indicate that supporters and opponents of Proposition 8 collectively spent \$75,000,000 on this ballot initiative, making it “one of the most expensive ballot measures ever waged”<sup>7</sup>—a \$75,000,000 struggle, it turns out, over a name. At least for now,<sup>8</sup> then, a same-sex couple in California must legally refer to itself as “domestically partnered” rather than as “married.”

The name issue, which one jurist has described as a “pitched battle over who gets to use the ‘m’ word,”<sup>9</sup> has assumed center stage in marriage equality litigation. In addition to being the focus of the California Supreme Court’s marriage equality decision and the subject of one of the most costly state ballot initiatives in history,<sup>10</sup> it is an issue that the high courts of Massachusetts and New Jersey considered in 2004 and 2006,<sup>11</sup> respectively, and that the high court

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4. *Marriage Cases*, 183 P.3d at 400.

5. I say “effectively” because the *Marriage Cases* court also ruled that gays and lesbians were considered a suspect class under the equality guarantees of California’s constitution. *See id.* at 443 (“[W]e conclude that statutes imposing differential treatment on the basis of sexual orientation should be viewed as constitutionally suspect under the California Constitution’s equal protection clause.”). Proposition 8 did not, of course, explicitly overrule that part of the California Supreme Court’s opinion. Thus, California is in the odd position of allowing the state openly to discriminate against a suspect class without having to satisfy the stringent demands of heightened judicial review.

6. *See* CALIFORNIA SECRETARY OF STATE, CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE 128 (2008).

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

8. The American Civil Liberties Union (ACLU), Lambda Legal Defense and Education Fund, and the National Center for Lesbian Rights have collectively filed “a writ petition before the California Supreme Court . . . urging the court to invalidate Proposition 8” on the bases that “the initiative process was improperly used in an attempt to undo the constitution’s core commitment to equality for everyone by eliminating a fundamental right from just one group—lesbian and gay Californians” and that Proposition 8 prevents “the courts from exercising their essential constitutional role of protecting the equal protection rights of minorities.” *See* Press Release, ACLU, Legal Groups File Lawsuit Challenging Proposition 8, Should it Pass (Nov. 7, 2008), available at <http://www.aclu.org/lgbt/relationships/37706prs20081105.html>. The California Supreme Court heard oral argument in that case, *Strauss v. Horton*, on March 5, 2009.

9. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004). During oral argument in *Marriage Cases*, Justice Chin deployed that same locution when he asked counsel for the City of San Francisco whether or not the entire issue in that case didn’t “just boil down to the use of the ‘m’ word,” to which counsel responded, “You’re right.” Audio Recording of Oral Argument, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), [www.courtinfo.ca.gov/courts/supreme/audio-arch.htm](http://www.courtinfo.ca.gov/courts/supreme/audio-arch.htm).

10. McKinley & Goodstein, *supra* note 7, at A1.

11. *Opinions of the Justices*, 802 N.E.2d at 565, 571 n.5 (finding that the name “marriage” must be extended to same-sex couples under Massachusetts’ constitution and stating that “discrimination . . . flows from separate nomenclature”); *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006) (finding that the substantive benefits of marriage must be extended to same-sex couples under New Jersey’s constitution but that those couples did not have a constitutional right to the name “marriage”).

of Connecticut ruled on in another landmark marriage equality decision that issued just one week before the 2008 election.<sup>12</sup> It is also an issue that will undoubtedly be before several courts in the near future as more and more states decide to offer same-sex couples the substance of marriage but only under a different name, such as “civil union” or “domestic partnership”—a “compromise” approach to the same-sex marriage question that appeals to politicians and to the public alike.<sup>13</sup> While most states, according to a recent Pew Research Center survey, are not ready to extend the right to “marry” to same-sex couples,<sup>14</sup> they are more likely prepared to offer same-sex couples a parallel institution that affords them the same protections and benefits, and imposes on them the same obligations and responsibilities, as those afforded to and imposed on their married opposite-sex counterparts.<sup>15</sup>

In analyzing the issue of nominal difference, legal actors have offered several reasons why “names matter,”<sup>16</sup> and why it is unconstitutional for states like Vermont, New Hampshire, and New Jersey (and Connecticut until just recently) to extend same-sex couples the substantive benefits and responsibilities of marriage, but to call that relationship by another name. They have argued, for instance, that “[t]he words ‘marriage’ and ‘marry’” are an integral part of the

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12. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (finding that gays and lesbians are a quasi-suspect class under the Connecticut constitution and that Connecticut’s opposite-sex marriage definition violates the equal protection clause of that constitution). The Connecticut Supreme Court reversed the Connecticut Superior Court’s 2006 decision finding that it was not unconstitutional for the state to extend a separate nominal status to legally-recognized same-sex couples. *See Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006). For media coverage of the marriage versus civil union issue in New Jersey and Connecticut (prior to the Connecticut Supreme Court’s decision in *Kerrigan*), see Alison Leigh Cowan, *Gay Couples Say Civil Unions Aren’t Enough*, N.Y. TIMES, Mar. 17, 2008, at B1; Laura Mansnerus, *Civil Union or Marriage? A Long Wait in New Jersey*, N.Y. TIMES, Oct. 28, 2006, at B5; *All Things Considered: For Some, Civil Unions Gain Second-Class Stigma* (NPR radio broadcast May 17, 2007) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=10239467>).

13. *See* William N. Eskridge, Jr., *How Government Unintentionally Influences Culture (The Case of Same-Sex Marriage)*, 102 N.W. U. L. REV. 495, 496 (2008) (referring to civil unions and other nominally separate statutory schemes as a “compromise” approach to the same-sex marriage question); *see also infra* notes 38–39 and accompanying text.

14. Indeed, quite the contrary, given that thirty-eight states currently have mini-defense of marriage acts (or mini-DOMAs) that define marriage for state purposes as a union between a man and a woman, and that twenty-seven states have constitutional amendments banning same-sex marriage. For an overview of these laws and amendments, see ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006).

15. DAVID MASCI, SENIOR RESEARCH FELLOW, PEW FORUM ON RELIGION AND PUBLIC LIFE, *A STABLE MAJORITY: MOST AMERICANS STILL OPPOSE SAME-SEX MARRIAGE* (Apr. 1, 2008), available at <http://pewforum.org/docs/?DocID=290> (stating that thirty-six percent of Americans favor allowing marriage for same-sex couples, whereas fifty-four percent of Americans favor allowing civil unions for the same).

16. During oral argument in *Marriage Cases*, the plaintiffs’ advocates repeatedly stated to the California Supreme Court that “names matter” and that “words matter.” *See* Audio Recording of Oral Argument, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), available at <http://www.courtinfo.ca.gov/courts/supreme/audio-arch.htm>. *See also* *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (Poritz, J., dissenting) (asserting that “[w]hat we ‘name’ things matters, language matters”).

fundamental right to marry.<sup>17</sup> Similarly, they have contended that “[p]rohibiting same-sex couples from using the word ‘marriage’ to describe their relationships sends a message ‘that what same-sex couples have is not as important or as significant as “real” marriage.’”<sup>18</sup> Most often, though, advocates, courts, and commentators have invoked the discredited legal doctrine of separate-but-equal in support of the proposition that the nominal distinction between “marriage” and “civil union” (or “domestic partnership”) “bestow[s] a separate status on people (whatever its tangible ‘equality’),” one that “fundamentally, and impermissibly, diminish[es] their humanity.”<sup>19</sup> This “separate status,” they argue, is no more constitutionally permissible today than it was in 1954, when the Supreme Court ruled in *Brown v. Board of Education* that the doctrine of separate-but-equal violated the United States Constitution’s Equal Protection Clause.<sup>20</sup>

This Article provides a novel way to consider why the use of separate nomenclature to describe gay and straight relationships will never be equal, even if those relationships are substantively identical, as well as why something that looks like a stepping stone to equality (civil unions/domestic partnerships) is, in fact, discriminatory and harmful. While advocates routinely turn to the repudiated legal doctrine of separate-but-equal to support their contention that nominal separation is unconstitutional, they have overlooked the history that best explains why that is so. That is, they have overlooked the most compelling reason why the nominal separation between “marriage” and “civil union” (or “domestic partnership”) will never satisfy genuine equality: because it hearkens back in any number of ways to homosexuality’s criminal past, and, in particular, to a time when same-sex intimacy was known simply, and derogatorily, as “a crime not fit to be named.”<sup>21</sup>

More specifically, the separate-but-equal analogy to nominal separation is woefully incomplete without an understanding of the issues of naming, language, and representation that have historically plagued same-sex intimacy in the law. This Article submits that the problem with the state’s creation of a separate nominal status for same-sex couples is not just the fact that separation connotes second-class status and therefore inflicts dignitary harm on gays and lesbians, and not just the fact that nominal substitutes like “domestic partnership” and “civil union” lack the intangible qualities of the name “marriage,” as many advocates have suggested.<sup>22</sup> Rather, or in addition, nominal separation is

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17. See Respondents’ Supplemental Brief at 32, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

18. *Id.* at 37 (citation omitted).

19. *Id.* at 36. For a more complete survey and discussion of the comparison between the nominal separation of gay and straight relationships (or what some advocates have referred to as “nominal segregation”) and the physical separation of individuals on the basis of race, see *infra* notes 94–105 and accompanying text.

20. See *id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)).

21. 4 WILLIAM BLACKSTONE, COMMENTARIES \*215.

22. See, e.g., Brief of the Plaintiffs-Appellants at 16–17, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. 17716) (citing *Brown*, 347 U.S. at 493–94, for the proposition that

problematic, constitutionally as well as morally, because it points back to a time when homosexuality was not only criminalized, but also linguistically marginalized—to a time when it was marked by an “economy of silence” or a “practice of silence,” in the words of one commentator.<sup>23</sup> That is, for centuries, homosexuality was “structured by its unnameable quality,”<sup>24</sup> because same-sex intimacy was either not discussed at all or simply referred to as “that which should remain unnamed.”<sup>25</sup> Indeed, at most, legal and non-legal discourse together relegated same-sex intimacy to a mere “quasi-nominative” status in law and culture, something sort of named but not entirely, and certainly not in affirmative terms.<sup>26</sup>

This Article argues that it is that history that best explains why “names matter” to gays and lesbians and why the nominal separation between legally-recognized gay relationships and legally-recognized straight relationships will never represent true equality, even if the substance of those relationships is identical. It contends that nominal separation will always be a sign not just of sexual minorities’ criminal past, but also of their unnameable past—as well as of the repugnance that inspired it and the harms that flowed from it. It ultimately suggests that the separation between “marriage” and its nominal substitutes will never be equal because it both reflects and perpetuates something that has applied to same-sex intimacy for centuries: A speech—or, more appropriately, a *name*—taboo. Indeed, when the state refuses to extend “the ‘m’ word” to same-sex couples, as more than one court has tellingly framed the name issue,<sup>27</sup> it reminds gays and lesbians that they have always been excluded from names in the law and that they have suffered, and continue to suffer, a variety of harms on account of that exclusion. It reminds them, in short, that the “gay closet”—or, more specifically, the gay *linguistic* closet—remains “a shaping presence” in

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“separation itself ‘generates a feeling of inferiority as to . . . status in the community that may affect . . . hearts and minds’” and *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), for the proposition that civil unions are unequal to marriage on an intangible level even if they are equal to it in all tangible or substantive respects). For a more complete discussion of the deployment of the *Sweatt* and *Brown* analogies in this context, see *infra* Part II.

23. LESLIE J. MORAN, *THE HOMOSEXUAL(ITY) OF LAW* 34 (1996) (referring to the “economy of silence” that was “generated” by the law’s injunction to silence with respect to sodomy).

24. H.G. COCKS, *NAMELESS OFFENCES: HOMOSEXUAL DESIRE IN THE NINETEENTH CENTURY* 160 (2003).

25. See *infra* section III.A for a more thorough survey of the way in which same-sex sex was either, or both, elided from speech entirely or named only by a disgust-driven language of negation (an ‘unnameable’ crime or an ‘unspeakable’ offense, for example). Professor Janet Halley has argued that the law’s deployment of the “unnameability trope,” the rhetorical practice of naming sodomy/homosexuality only by unnameable it, both helped to create a “tradition of reticence” and “silence” around homosexuality and led to “definitions of homosexuality that [were] not definitions at all.” Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 954–55 (1989).

26. See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 203 (1990) [hereinafter SEDGWICK, *EPISTEMOLOGY*] (stating that the rhetorical practice of explicitly *not* naming same-sex sex/homosexuality had a “quasi-nominative, quasi-oblitative structure” because it both elided same-sex sex/homosexuality from speech *and* acknowledged it as an erotic possibility).

27. See *supra* note 9 and accompanying text.

their lives.<sup>28</sup>

This Article will proceed as follows. Part I will provide an overview of the name issue, including additional information with respect to how and why that issue has arisen and a short summary of its treatment by those courts that have considered it. Part II will then look more closely at the separate-but-equal analogy to nominal separation, the principal doctrinal lens through which advocates, commentators, and courts have analyzed the name issue, and briefly consider what is largely missing from the deployment of that analogy in this context: a sense of history, and, specifically, of the history that will prove exactly why a separate nominal status for same-sex relationships will never be equal, but rather always “viewed by both [lesbian and gay people] and by others as a badge of inferiority.”<sup>29</sup>

To that end, Parts III and IV will provide a fuller account of why officially-recognized gay and straight relationships will never be equal if they are named differently. Part III will survey the “economy of silence” that marked homosexuality’s rhetorical past, which includes the practices of (1) not talking about same-sex intimacy at all and/or (2) referring to it in a language of negation—that is, as something so abhorrent and distasteful that it could not, or should not, be named. Moreover, this Part will suggest the principal reason for, or motivation behind, that rhetorical tradition as well as the harmful effects that it produced. Part IV will then draw from that history, and from Part III’s analysis thereof, to argue that the nominal separation between “marriage” and its so-called linguistic equivalents will never be equal, even if the substance of those relationships is identical, because that separation both reflects and perpetuates homosexuality’s disgust-driven rhetorical past and the harms that flowed from it, a past that should no longer play even a residual role in our legal order for reasons discussed below.

This Article has two objectives. Its first and more narrow objective is to supplement the primary doctrinal argument on which advocates have relied when challenging the constitutionality of nominal separation—the separate-but-equal argument—with a history that is unique to homosexuality. It contends that the separate-but-equal analogy not only is incomplete, but also fails to do the work that it must do to explain why nominal difference is uniquely injurious to gays and lesbians. By moving beyond a raced-based civil rights paradigm to challenge contemporary forms of sexual orientation discrimination, this Article reminds readers—including judges who will be considering the name issue for years to come—that nominal discrimination against gays and lesbians is immoral and unconstitutional not just because it evokes a time when systemic

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28. SEDGWICK, *EPISTEMOLOGY*, *supra* note 26, at 68 (“[F]or many gay people [the gay closet] is still the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.”).

29. Respondents’ Opening Brief on the Merits at 23, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

racial and ethnic discrimination was tolerated and encouraged, but also, and more important, because it evokes a time when homosexuality was so contemptible that it could not be named at all. Moreover, viewing the increasingly litigated “‘m’ word” issue through an historical lens that is unique to sexual minorities offers advocates for marriage equality an opportunity to avoid the charge that they have used race analogies in ineffective and even inappropriate ways in the marriage equality context, a criticism that has become more widespread and more vocal over the past few years and that I will also address in the Parts that follow.

Its second and more expansive objective is to remind the legal community that past forms of discrimination and their resultant harms can manifest themselves in the present in ways that might seem innocuous or insignificant, and that deserve our close attention for that very reason. Legal historians have long observed the extent to which the ghosts of our disinherited and disavowed past persevere in contemporary law in such quiet and understated ways that we are likely to miss them altogether—the extent to which past forms of legal discrimination, prejudice, and subordination persist in “these enlightened times” despite, or perhaps because of, our belief that we have moved past them.<sup>30</sup> The name issue, which has been described by some courts as “new,”<sup>31</sup> “neutral,”<sup>32</sup> “inconsequential,”<sup>33</sup> and merely “nominal,”<sup>34</sup> exemplifies just this phenomenon, as the history that underlies that issue suggests that it is far from any of those things. Quite the contrary, viewing that issue through the lens of history throws into relief just how very old, consequential, and substantive the issue of names is for those who are currently demanding to be legally denominated in the language of “marriage.” More important, viewing the name issue in this way reveals just how very much we continue “to drag our disinherited selves behind us”<sup>35</sup> in the law’s regulation of that which it has always been reluctant to name.

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30. See, e.g., Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 397 (2007) (identifying and explaining the historical antecedents of the contemporary claim that same-sex marriage warrants prohibition because it is a “counterfeit” of real marriage); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Edward L. Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 TEX. L. REV. 1587, 1587 (2006) (“Current legal treatment of homosexuals is best understood as a new episode of discrimination, in which old paradigms combine and coalesce in novel ways.”).

31. *Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006) (characterizing the application of alternative nominal schemes to legally-recognized gay relationships as “new”); see also *Kerrigan v. State*, 909 A.2d 89, 98 (Conn. Super. Ct. 2006) (noting that the term civil union is “of relatively recent origin”).

32. *Kerrigan*, 909 A.2d at 98.

33. *Id.* at 95.

34. *Id.*

35. This wonderfully rich quotation comes from Professor Martha Ertman of the University of Maryland School of Law, who used it in a talk before the Roger Williams law faculty in October 2007.

## I. THE NAME ISSUE: AN OVERVIEW

Part I provides an overview of the name issue. Section A clarifies what that issue is and distinguishes it from the definitional issue that same-sex-couple plaintiffs routinely faced during the early years of marriage equality litigation. Section B then briefly surveys the judicial response to the name issue in those jurisdictions where it has arisen. The purpose of Section B is merely to provide some concrete examples of the way in which courts have so far approached the name issue. In so doing, it offers a few models of the way in which courts are likely to approach it in the future as well.

### A. THE NAME ISSUE

The name issue, in a nutshell, is this: Is it constitutionally permissible to give same-sex couples all the benefits and responsibilities of marriage—from property and inheritance rights to the obligations, financial and otherwise, imposed on married couples when they divorce—but to officially call that status by another name, such as “civil union” or “domestic partnership”?<sup>36</sup> Assuming that it is unconstitutional to withhold the right to marry from same-sex couples, would a “civil union” or “domestic partnership” status cure or remedy that constitutional violation? Or, does a nominally separate status for legally-

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36. Currently, New Hampshire, New Jersey, and Vermont have “civil union” status for same-sex couples, and Oregon has “domestic partnership” status for the same. In these states, civil unions and domestic partnerships are the mirror image of marriage for purposes of state law. *See* N.H. REV. STAT. ANN. § 5-C:41 (2008); N.J. STAT. ANN. § 37:1-1 (West 2007); VT. STAT. ANN. tit. 15, §§ 1201–07 (2008); 2007 Oregon Family Fairness Act, Or. Laws page nos. 425–27. Only same-sex couples may enter into a civil union/domestic partnership status in these states. Moreover, the District of Columbia, Hawaii, Maine, and Washington have domestic partner laws that provide a range of health care benefits and other protections to same-sex couples, but that are not the mirror image of marriage. *See* D.C. CODE § 32-701(3) (2006) (defining domestic partner); HAW. REV. STAT. § 572C-3 to -4 (2006) (defining and providing the requirements for reciprocal beneficiary status); ME. REV. STAT. ANN. tit. 18-A, § 1-201 (2006) (extending inheritance rights to domestic partners); WASH. REV. CODE ANN. § 26.60.010 (West Supp. 2009). With few exceptions, only same-sex couples may enter into a domestic partnership in these states. The two exceptions are Hawaii and Washington. In Hawaii, any two adults who cannot marry under state law can enter into a reciprocal beneficiary status, and in Washington, any two individuals over the age of sixty-two, of the same or opposite sex, can enter into a domestic partnership. The name issue has been litigated only in California, Connecticut, New Jersey, and Massachusetts, those states that offer (or, in the case of California, Connecticut, and Massachusetts, that did offer or proposed offering) a status to same-sex couples that is substantively equal to marriage but nominally different from it. No court in New Hampshire, Oregon, or Vermont has considered the constitutionality of nominal distinctions between the status of “marriage” and that of “civil union/domestic partnership.” Vermont was the first state to pass civil union legislation in 2000, following the Vermont Supreme Court’s holding in *Baker v. State* that same-sex couples must be extended the same benefits and responsibilities afforded to and imposed on married opposite-sex couples under that state’s constitution. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). While the *Baker* court directly considered the issue of substantive equality for same-sex couples under the law, it never squarely considered whether the name “marriage” was also required under Vermont’s constitution, explicitly refusing to rule on whether “the denial of a marriage license operates per se to deny constitutionally-protected rights.” *Id.* at 886. Instead, it reserved that question for “some future case,” *id.*, thereby limiting its decision to the more narrow—and, in its view, more critical—question of whether substantive equality, as opposed to substantive *and* nominal equality, was constitutionally required.

recognized gay relationships not only fail to remedy the unconstitutionality of barring same-sex couples from the tangible benefits of marriage, but itself constitute an independent constitutional violation?<sup>37</sup>

The name issue is an enormously relevant one for the entire country for more than a few reasons. First, as mentioned in the Introduction, it is likely that states contemplating the now proverbial same-sex marriage question will increasingly opt for a compromise approach that extends same-sex couples substantive equality but only under a different name, as did New Hampshire earlier last year.<sup>38</sup> Second, President Barack Obama publicly supports civil unions for same-sex couples rather than marriage for the same, thus suggesting that at the very most our country's national leadership will work toward substantive, but not nominal, equality over the next four years.<sup>39</sup> Third, the issue of equality has become the focal point for same-sex marriage advocates, whose marriage equality efforts have recently centered on getting the name "marriage" in states like California, Connecticut, and New Jersey, each of which already gives, or gave, same-sex couples the substantive benefits and responsibilities of marriage—but only under a different name. Fourth and last, the issue of names, and of sexual minorities' exclusion from them, is one that has very deep roots in American law; indeed, the issue of nominal separation is but the most recent chapter in a much longer and much older narrative about homosexuality, naming practices, and the law. For these reasons, sustained attention to what this "perplexing"<sup>40</sup> name issue is all about is both warranted and wise.

Deceptively simple, the name issue has confounded courts, which have recently described it as "challenging,"<sup>41</sup> "philosophical,"<sup>42</sup> and, as mentioned

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37. The Supreme Judicial Court of Massachusetts suggested as much in *Opinions of the Justices to the Senate* when it stated that "[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue." *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 571 (Mass. 2004).

38. As mentioned above, *supra* note 15, recent Pew Research Center surveys suggest that significantly more Americans support civil unions (or domestic partnerships) for same-sex couples than they do marriage for the same. See also Joshua Lynsen, *Lawmakers Debating Civil Unions, Marriage Across U.S.*, WASH. BLADE, Mar. 9, 2007, at 21; Todd Simmons, *Civil Compromise*, THE ADVOCATE, May 24, 2005, at 17; Jennifer Parker, *Jersey Revives Same-Sex Marriage Debate*, ABC NEWS, Feb. 19, 2007, <http://abcnews.go.com/Politics/Story?id+28873429page=1> (stating that while Americans might not be ready for same-sex marriage, they do "believe that same-sex couples should be granted rights and benefits").

39. See, e.g., Michael Falcone, *McCain and Obama Differ on Same-Sex Marriage Initiative*, N.Y. TIMES, July 3, 2008, at A18 (stating that while President Barack Obama opposed Proposition 8 in California, he does not support marriage for same-sex couples but rather civil unions and domestic partnerships for the same).

40. *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006) ("Raised here is the perplexing question—'what's in a name?'").

41. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 727 (Ct. App. 2006) (Parilli, J., concurring), *rev'd*, 183 P.3d 384 (Cal. 2008).

42. *Id.*; see also *Kerrigan v. State*, 909 A.2d 89, 97 (Conn. Super. Ct. 2006), *rev'd*, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (stating that plaintiffs' argument that same-sex couples' nominally separate institution, civil union, was "nonnormative and, thus, less privileged under

above, “perplexing.”<sup>43</sup> Moreover, and likely for those reasons, the name issue has not lent itself to a quick and easy disposition or resolution. For instance, that issue was before the Connecticut Supreme Court for over one year before that court issued its decision in favor of nominal equality.<sup>44</sup> Similarly, the California Supreme Court, which recently found that “the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution,”<sup>45</sup> needed 121 pages to justify why that was so—in an opinion that never definitively resolves “[w]hether . . . the name ‘marriage,’ in the abstract, is considered a core element of the state constitutional right to marry.”<sup>46</sup> Finally, the New Jersey Supreme Court, which considered the name issue in 2006, at once refused to presume that names were an issue of “constitutional magnitude”<sup>47</sup> and asserted that names were so important that something close to chaos would ensue were the court to mandate that gays and lesbians be given the name “marriage” as the official designation of their relationships.<sup>48</sup>

In one sense, the fact that courts appear to be struggling with the name issue is surprising, particularly given its similarities to the old definitional issue that confronted courts during the first wave of marriage equality litigation in the 1970s and 1980s. In those cases, courts were called upon to consider the constitutionality of opposite-sex marriage definitions, which, at the time, withheld all of the substance of marriage, as well as its name, from same-sex couples. Courts reviewing those definitions often held that they were constitutional because same-sex marriage was a definitional impossibility: Lacking a foundation in language, same-sex marriage could not exist in law.<sup>49</sup> As one court put it in 1980, marriage between two persons of the same sex was “impossible” because that relationship was, by definition, the union of a man and a woman.<sup>50</sup> This sort of reasoning came to be known as the “definitional”

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the law” was “an interesting philosophical point”—although one with which the court ultimately disagreed).

43. *Lewis*, 908 A.2d at 221.

44. In February 2007, plaintiffs in Connecticut’s marriage equality case appealed the Connecticut Superior Court’s decision, finding that nominal difference was not unconstitutional, to the Connecticut Supreme Court. It was not until October 28, 2008, that Connecticut’s high court rendered a decision in that case.

45. *In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008).

46. *Id.* at 434.

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

48. *See id.* (stating that to extend the name marriage to same-sex couples “would render a profound change in the public consciousness of a social institution of ancient origin”).

49. *See, e.g., Adams v. Howerton*, 486 F. Supp. 1119, 1122 n.2 (C.D. Cal. 1980) (stating that “[t]he dictionary definition of the term ‘spouse’ is ‘a husband or wife’”), *aff’d*, 673 F.2d 1036 (9th Cir. 1982); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (citing various dictionary definitions of marriage as a union between a man and a woman); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (“Black’s Law Dictionary furnishes three definitions of marriage, all of which recognize that it is a union or contract between a man and a woman.”).

50. *Adams*, 486 F. Supp. at 1123.

rationale<sup>51</sup> and was one on which courts routinely relied when finding that opposite-sex marriage definitions did not offend state and federal constitutional guarantees.<sup>52</sup>

In another sense, however, it is not a complete surprise that the contemporary name issue does not sit so comfortably with those courts which have considered, or are considering, it. That issue, unlike the old definitional one, is *just* about names, nomenclature, language, and pure nominal difference. Whereas the old definitional issue arose in the context of laws that withheld all the rights of marriage—including, but surely not limited to, its lexicon—from same-sex couples, the new name issue is more narrow, more rarified, and, for those reasons, more “philosophical” than its definitional ancestor. In fact, the new name issue harkens back not so much to the old definitional issue but to an even older philosophical question taken up by Plato in the *Cratylus* dialogue: What is the relationship between names and the essences that they are meant to represent?<sup>53</sup>

In that foundational text on names and naming, Plato considers, although never fully resolves, whether language is a system of largely arbitrary signs or whether names are naturally related to an essence that they signify.<sup>54</sup> While what takes place in the dialogue that ensues is well beyond the scope of this Article, suffice it to say that the recent name issue has challenged and confounded courts precisely because it relates to a philosophical tradition which itself is indeterminate. If names are nothing more than conventional and largely arbitrary signs, one side of the *Cratylus* dialogue, then presumably Shake-

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51. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 89 (1996) (stating that, as of 1996, “the most popular argument to deny a right of same-sex marriage [was] definitional”).

52. Most courts no longer rely on the definitional rationale in support of same-sex marriage prohibitions; indeed, the Chief Justice of the Maryland Supreme Court, which recently upheld that state’s opposite-sex marriage definition, referred to that rationale as impermissibly “circular” in his dissent. *Conaway v. Deane*, 932 A.2d 571, 697 (Md. 2007) (Bell, C.J., dissenting) (quoting *Hernandez v. Robles*, 855 N.E.2d 1, 27 (N.Y. 2006) (Kaye, C.J., dissenting)). That said, some state courts have still adverted to the traditional definition of marriage in closely related contexts. For instance, in *Chambers v. Ormiston*, the Rhode Island Supreme Court held that Rhode Island’s family court could not grant a divorce to two women who were married in Massachusetts but who were residents of Rhode Island because that state’s definition of “marriage” was an opposite-sex one in 1961, the year that Rhode Island’s statute authorizing the family court to hear and determine all petitions for divorce was written. *Chambers v. Ormiston*, 935 A.2d 956, 961 (R.I. 2007).

53. 4 PLATO, *CRATYLUS* 7–9 (H.N. Fowler trans., Loeb Classical Library 1970). It also harkens back, as this Article will later show, to the name taboo that surrounded homosexuality for centuries in Western society. See *infra* Parts III and IV.

54. Whereas *Cratylus* maintains that names follow naturally from the essences that they signify, Hermogenes contends that names are nothing more than a product of social convention. As one commentator has pointed out, “Socrates destabilizes both positions.” Gabrielle Vom Bruck & Barbara Bodenhorn, “*Entangled in Histories*”: *An Introduction to the Anthropology of Names and Naming*, in *THE ANTHROPOLOGY OF NAMES AND NAMING* 1, 5 (Gabrielle Vom Bruck & Barbara Bodenhorn eds., 2006).

spere's Juliet is correct—a relationship by any other name is just as sweet<sup>55</sup>—and it would not matter if the state used different names to describe the same thing. However, if names convey the essence or substance of that which they signify, the other side of the *Cratylus* dialogue, and the essence or substance of marriage and its nominal equivalents is the same, then presumably the same name should—indeed, must—be given to each. Put more simply, if names naturally follow from the essences that they describe, and the essences are the same, then shouldn't the names also be the same?

Of those courts that have considered *that* more “challenging” and “philosophical” question, two have answered it in the negative and two in the affirmative. Section B will now briefly summarize those courts' dispositions of the name issue. Part IV will return to some of the reasoning and rhetoric from the opinions just touched on here to illuminate the extent to which nominal separation not only reflects, but also perpetuates homosexuality's centuries-old speech or *name* taboo and the harms that flowed from it, a taboo that should no longer play even a residual role in the law for reasons discussed in greater depth below.

#### B. JUDICIAL RESPONSE

The two courts that have not found that nominal difference violates state constitutional guarantees include the New Jersey Supreme Court, which considered the name issue in 2006, and a trial court in Connecticut, whose ruling was reversed by the Connecticut Supreme Court in October 2008. I here consider the opinions of both Connecticut courts (among the other state courts discussed herein) because the lower court's treatment of nominal difference in Connecticut's marriage equality case, while superseded by that state's high court, provides an example of the way in which courts might approach this issue in the future. In addition, given that courts have only recently started to consider the question of nominal difference, it is useful to survey in brief all possible responses to it.

In *Lewis v. Harris*,<sup>56</sup> the New Jersey Supreme Court framed the name issue in the following way: “Raised here is the perplexing question—‘what's in a name?’—and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples?”<sup>57</sup> While the court in that case held that it was unconstitutional to withhold all the

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55. I am referring, of course, to Juliet's soliloquy from Shakespeare's *Romeo and Juliet*, where the heroine muses: “What's in a name? That which we call a rose/By any other name would smell as sweet.” 2 WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. ii., ll. 43–44, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* (Bantam Books 1980). A dissenting justice in *Opinions of the Justices to the Senate* invoked this famous soliloquy in support of the proposition that “[t]he insignificance of according a different name to the same thing has long been recognized.” *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 n.1 (Mass. 2004) (Sosman, J., dissenting).

56. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

57. *Id.* at 221.

benefits and responsibilities of marriage from same-sex couples,<sup>58</sup> it refused to find that the lexicon of marriage was required under New Jersey's constitution.<sup>59</sup> Rather, *Lewis* strongly suggested that it would be entirely permissible for the New Jersey legislature to cure the constitutional violation that the court found in that case by extending a status to same-sex couples that was nominally different from marriage, as long as that status was substantively identical to it. And this is exactly what the state legislature did in December 2006 when it passed New Jersey's civil union bill, which names legally-recognized same-sex relationships "civil unions" (instead of "marriage") and legally-recognized same-sex partners "partner[s]" in a civil union (instead of "spouses").<sup>60</sup>

In the *Lewis* court's estimation, the New Jersey constitution required substantive, but not nominal, equality; as the court there stated: "We will not presume that a difference in name alone [between 'marriage' and 'civil union'] is of constitutional magnitude."<sup>61</sup> Indeed, because same-sex relationships were ostensibly "new," the court continued, it would be better for it to "exercise forbearance" and allow a "[n]ew language" to develop around them rather than to "overthrow" the meaning of marriage by "judicial fiat," an act that "would render a profound change in the public consciousness of a social institution of ancient origin."<sup>62</sup> How the New Jersey Supreme Court could possibly conceptualize same-sex relationships, which have existed for millennia,<sup>63</sup> as "new," and therefore as undeserving of the language of "marriage," is something that Part IV will take up in greater detail.<sup>64</sup>

Similarly, in *Kerrigan v. State*,<sup>65</sup> a Connecticut trial court refused to find that the state's civil union legislation for same-sex couples violated state constitutional equality, liberty, and free association guarantees.<sup>66</sup> Much like the *Lewis*

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58. *Id.* at 220–21 (finding that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples" under "the equal protection guarantee" of New Jersey's constitution).

59. *Id.* at 221 ("Under our equal protection jurisprudence . . . plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples").

60. N.J. STAT. ANN. § 37:1-28 (West 2007). In this respect, New Jersey's civil union law is unlike Vermont's civil union law, which explicitly provides that "[a] party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' or other terms that denote the spousal relationship." VT. STAT. ANN. tit. 15, § 1204 (2002).

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

62. *Id.* at 222–23.

63. One need not look far to find evidence pointing to the long history of same-sex relationships throughout the world, social and familial structures that are by no means new—even if, as this Article later suggests, the silence that long surrounded them makes them appear so. *See, e.g.*, ESKRIDGE, *supra* note 51, at 15–51 (providing a detailed history of same-sex marriages both in and beyond the United States). *See generally* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY (1980) [hereinafter BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY]; JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) [hereinafter BOSWELL, SAME-SEX UNIONS].

64. *See infra* Part IV.

65. *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006).

66. *Id.* at 96.

court, the lower court in *Kerrigan* found that nominally separate statutory schemes for legally-recognized gay and straight relationships did not even trigger Connecticut's constitutional protections, and therefore a constitutional analysis by the court, because the "effects of the classification" by the state "were, quite literally, nominal" and thus "inconsequential" from a legal perspective.<sup>67</sup> Among other arguments, the plaintiffs contended that Connecticut's nominally separate statutory scheme was "a form of 'separate but equal' segregation"<sup>68</sup> and that "the use of two different terms—marriage and civil union—is a form of separation or segregation that is unconstitutional regardless of whether the state treats the two unions differently."<sup>69</sup>

The *Kerrigan* trial court sharply disagreed. Specifically, the court drew a clear distinction between "separate facilities or actual *physical* separation,"<sup>70</sup> of the kind at issue in *Brown v. Board of Education*,<sup>71</sup> and separate names or "the *rhetorical* separation of marriage vs. civil union."<sup>72</sup> The latter form of separation, the court emphasized, represented a "mere difference in nomenclature," one that was by no means "worthy of a comprehensive constitutional analysis" under Connecticut's constitution.<sup>73</sup>

The three courts that have agreed with plaintiffs who maintain that "names matter" and that nominal difference is unconstitutional include the Supreme Judicial Court of Massachusetts, the California Supreme Court, and the Connecticut Supreme Court.<sup>74</sup> In 2004, the Massachusetts legislature sought the Supreme Judicial Court's advice with respect to the following question: Would it be constitutionally permissible, under that state's constitution and in light of *Goodridge v. Department of Public Health*,<sup>75</sup> to extend same-sex couples the same benefits as married opposite-sex couples but only under the name "civil union?"<sup>76</sup> In *Opinions of the Justices to the Senate*, a majority of the high court answered that question in the negative.<sup>77</sup> Specifically, it found that the creation of a nominally separate statutory scheme for same-sex couples not only failed to cure the constitutional violation that the court found to exist in *Goodridge*, but also represented an independent constitutional violation in itself.<sup>78</sup>

Contrary to the dissent, for which the name issue represented a silly "squabble

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67. *Id.* at 95.

68. *Id.* at 96.

69. *Id.* at 98.

70. *Id.* at 99.

71. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

72. *Kerrigan*, 909 A.2d at 100.

73. *Id.* at 98.

74. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

75. 798 N.E.2d 941 (Mass. 2003).

76. *Opinions of the Justices*, 802 N.E.2d at 566.

77. See *id.* at 571.

78. See *id.* ("Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.")

over the name to be used”<sup>79</sup> and certainly not “a dispute of any constitutional dimension whatsoever,”<sup>80</sup> the majority in *Opinions of the Justices* reasoned that “discrimination . . . flows from separate nomenclature.”<sup>81</sup> Noting that “[t]he history of our nation has demonstrated that separate is seldom, if ever, equal,”<sup>82</sup> the majority invoked *Brown* for the proposition that “[t]he dissimilitude between the names ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”<sup>83</sup> Much like the trial court in *Kerrigan*, the dissent balked at this idea that nominal separation was tantamount to the sort of invidious discrimination at issue in *Brown* and to the separate-but-equal doctrine that the Supreme Court declared unconstitutional in that landmark case.<sup>84</sup>

More recently, in *Marriage Cases*, the California Supreme Court found that same-sex couples were entitled to the name “marriage” under that state’s constitution, in addition to the substantive benefits that ordinarily flow from that legal status.<sup>85</sup> The court reasoned that “retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may have the effect of perpetuating a more general premise—now emphatically rejected by this state—that gay individuals and same-sex couples are in some respects ‘second-class citizens.’”<sup>86</sup> Noting that California’s statutes drew “a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples,” the court concluded that such nominal difference violated the state’s constitution.<sup>87</sup> “The new and unfamiliar designation of domestic partnership,” it observed, may not only be viewed as “a mark of second-class citizenship”<sup>88</sup> for same-sex couples specifically and for gays and lesbians generally, but it also poses a “serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.”<sup>89</sup>

Finally, and most recently, the Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health* rejected the trial court’s conclusion “that mar-

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79. *Id.* at 572 (Sosman, J., dissenting).

80. *Id.*

81. *Id.* at 571 n.5 (majority opinion).

82. *Id.* at 569.

83. *Id.* at 570.

84. *See id.* at 580 n.6 (Sosman, J., dissenting) (stating that the majority’s invocation of *Brown* was misplaced because “that landmark case involved a classification (and resulting separation) based on race, . . . [one that] has long been recognized as a ‘suspect’ classification,” whereas the nominal separation between “marriage” and “civil union” involves a non-suspect classification, sexual orientation, one that warrants minimal judicial scrutiny).

85. *In re Marriage Cases*, 183 P.3d 384, 400–02 (Cal. 2008).

86. *Id.* at 402.

87. *Id.* at 434.

88. *Id.* at 445.

89. *Id.* at 434–35.

riage and civil unions are ‘separate’ but ‘equal legal entities,’ stating instead that marriage and civil unions “are by no means ‘equal.’”<sup>90</sup> Indeed, the high court in that case condemned the state’s implementation of a separate nominal status for gays and lesbians on two grounds. First, the court noted, the state was attempting to invoke ‘separate but equal’ as a shield against otherwise discriminatory legislation that targeted “politically unpopular or historically disfavored minorities.”<sup>91</sup> Second, the court later averred, the state’s creation of a separate nominal status for gay and lesbians would always be viewed as inferior to marriage in light of the longstanding discrimination against that class. In its words, “because of the long history of discrimination that gay persons have faced, there is a high likelihood that the creation of a second, separate legal entity for same sex couples will be viewed as reflecting an official state policy that that entity is inferior to marriage.”<sup>92</sup>

## II. TOWARD A MORE PERSUASIVE ‘SEPARATE-AND-UNEQUAL’ ARGUMENT

As with the high courts of Massachusetts, California, and Connecticut, advocates for marriage equality have largely framed the issue of nominal separation as an unconstitutional case of separate-and-unequal.<sup>93</sup> In so doing, they have consistently turned to Supreme Court precedent concerning the constitutionality of physical segregation on the basis of race to argue that nominal segregation on the basis of sexual orientation, or the establishment of a separate nominal status for officially-recognized gay relationships, will never be equal. To date, however, advocates and courts have overlooked the most persuasive and compelling reason why a separate nominal status for officially-recognized same-sex relationships will never be equal, even if the substance of those relationships is exactly the same.

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90. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008).

91. *Id.* at 418.

92. *Id.* at 475.

93. For instance, David Buckel, Senior Counsel and Marriage Project Director at Lambda Legal in New York, and the attorney who argued *Lewis v. Harris* before the New Jersey Supreme Court in 2006, has widely argued that civil unions are a flagrant example of the doctrine of “separate but equal” redux. A nominally separate institution for same-sex couples, he has contended, has the same stigmatizing effect for those excluded from “marriage” as officially separate schools had for racial minorities prior to *Brown*. In both instances, he has noted, “the separation ‘generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.’” David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When it Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73, 78 (2005) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954)); see also David S. Buckel, *Lewis v. Harris: Essay on a Settled Question and an Open Question*, 59 RUTGERS L. REV. 221, 226–32 (2007) (invoking the separate-but-equal analogy to describe the constitutional infirmities with civil unions); John Cloud, *Viewpoint: A Separate But Equal Ruling for Gay Marriage*, TIME, Oct. 25, 2006, available at <http://www.time.com/time/nation/article/0,8599,1550838,00.html>; Evan Wolfson, *Just Say No to Civil Union*, THE STRANGER, Oct. 26, 2005, available at <http://www.thestranger.com/seattle/Content?oid=23780> (stating that civil union and domestic partnership status would “take our nation, again, down the path of separate and unequal treatment for some” and “say to some couples and their kids . . . , ‘You come in the front,’ while telling others to go around back”).

For instance, advocates and courts have argued and reasoned, respectively, that a separate nominal status for same-sex couples who seek the imprimatur of the state will never be equal because *no* name—be it “civil union,” “domestic partnership,” or anything else—will ever measure up to the lexicon of “marriage,” particularly in light of the latter’s “longevity, tradition and prestige.”<sup>94</sup> In support of that proposition, they have adverted to *Sweatt v. Painter*,<sup>95</sup> where the United States Supreme Court held that the state of Texas’s separate law school for blacks violated the federal Constitution’s equality guarantees because it lacked not only “substantial equality” to the University of Texas Law School,<sup>96</sup> which categorically denied admittance to black students, but also “those [intangible] qualities which are incapable of objective measurement but which make for greatness in a law school,” qualities such as “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”<sup>97</sup> Under this view, a separate name for officially-recognized same-sex relationships will never be equal because it will never approximate the intangible qualities of the name “marriage” in much the same way that a separate law school for black students in Texas would never be equal because it would never approximate the intangible qualities of the University of Texas Law School.<sup>98</sup> Even if “marriage” and “civil unions” or “domestic partnerships” were substantively identical or substantively equal, which they are in a few jurisdictions,<sup>99</sup> they would still remain unequal simply by virtue of the fact that the former has a certain currency that the latter undeniably lack. As Professor Ronald Dworkin has recently argued in a statement that has widely appeared in marriage equality briefs and decisions: “We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning [to marriage] than we can now create a substitute for poetry or for love. The status of marriage is . . . a social resource of irreplaceable value to those to whom it is offered.”<sup>100</sup>

Similarly, advocates and courts have argued and reasoned, respectively, that a

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94. See Respondents’ Opening Brief on the Merits at 21, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

95. *Sweatt v. Painter*, 339 U.S. 629 (1950).

96. *Id.* at 633–34 (“In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.”).

97. *Id.* at 634.

98. See, e.g., Respondents’ Opening Brief on the Merits at 21, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Brief of the Plaintiffs-Appellants at 16, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (S.C. 17716) (citing *Sweatt* for the proposition that “[o]ur courts have fully recognized the manifest advantage that comes from an institution’s longevity, tradition and prestige as compared to a new institution created solely for a minority group”).

99. See *supra* note 36.

100. Ronald Dworkin, *Three Questions For America*, 53 N.Y. REV. OF BOOKS, Sept. 21, 2006, at 24, 30. For a court that has cited this statement, see, for example, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 n.15 (Conn. 2008). See also Dworkin, *supra* (“Civil union status may provide many of the legal and material benefits of marriage, but it does not provide the social and personal meaning of that institution because marriage has a spiritual dimension that civil union does not.”).

separate nominal status for same-sex couples who seek the imprimatur of the state will never be equal because discrimination necessarily “flows from separate nomenclature,” in the words of the Massachusetts Supreme Judicial Court<sup>101</sup>—that is, because the mere fact of nominal *separation* between “marriage” and “civil union” (or “domestic partnership”) signifies that the latter is somehow less than, or inferior to, the former. In support of that proposition, advocates and jurists have widely adverted to *Brown v. Board of Education*, where the Supreme Court of course held that the physical separation of black and white schoolchildren in public schools was “*inherently unequal*.”<sup>102</sup> As the plaintiffs in *Marriage Cases* argued to the California Supreme Court, “the [*Brown*] Court found that the *essence* of a ‘separate’ status was its *implicit declaration* that those relegated to it were, in some fundamental sense, lesser citizens—lesser human beings.”<sup>103</sup> Under this view, a separate name for officially-recognized same-sex relationships will never be equal simply because *separation itself* “generates a feeling of inferiority as to . . . status in the community that may affect . . . hearts and minds.”<sup>104</sup> In the words of one plaintiff: “‘Separate but equal’ is never equal; we all know that.”<sup>105</sup>

While sound, advocates’ and jurists’ deployment of the *Sweatt* and the *Brown* analogies alone fail to capture the full range of reasons why a separate nominal status for officially-recognized same-sex relationships will never satisfy true equality. Whereas the deployment of the *Sweatt* analogy ends up placing exclusive emphasis on the prestige of the lexicon of “marriage” (to explain why no other name will ever be equal to it), the deployment of the *Brown* analogy ends up placing exclusive emphasis on the idea of separation itself (to explain why nominal separation will always signify inequality). Thus, the deployment of neither analogy focuses all that much, if at all, on the *history* that underlies separate nomenclature, the same history that throws into stark relief precisely why even substantively identical institutions will never be equal if they are named differently.

Admittedly, advocates have at times argued, and courts have at times recognized, that a nominally separate status for legally-recognized gay and straight relationships will never be equal because of the *history* of discrimination that nominal separation reflects. For instance, the plaintiffs in *Marriage Cases* not only made a separate-but-equal argument, but also supported that argument with history—and, specifically, with the same history of legal discrimination against gays and lesbians that would guarantee that separate names would never be

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101. Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 n.5 (Mass. 2004).

102. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (emphasis added).

103. Respondents’ Supplemental Brief at 27, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (emphasis added).

104. Brief of the Plaintiffs-Appellants at 16–17, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. S.C. 17716) (quoting *Brown*, 347 U.S. at 493–94).

105. Respondents’ Opening Brief on the Merits at 23, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

equal:

Where a group has suffered a long history of legal discrimination and social stigma, the State's decision to create a separate legal status for that group inevitably will be viewed both by the group and by others as a badge of inferiority. Lesbian and gay people have been labeled as mentally ill, deviants, and sexual perverts; they have been fired from jobs, barred from employment in the federal government, excluded from entry into the country under our immigration laws, banned from service in our nation's armed forces, and subjected to violence and harassment. Their intimacy has been criminalized and, until very recently, their relationships completely unrecognized.

*The State's decision to require same-sex couples to enter "domestic partnerships" rather than marriage must be seen in this historical context. Because gay people have been subjected to a long history of discrimination, excluding them from marriage and assigning them to a separate class created just for them is stigmatizing and injurious. It is both a remnant and a reaffirmation of the unequal, outsider status that lesbian and gay people have experienced as a historically disfavored minority.*<sup>106</sup>

In much the same way, at least two courts have looked to the history of discrimination against sexual minorities in support of the proposition that a separate name for gay relationships is unconstitutional. In *Marriage Cases*, the California Supreme Court remarked that,

*particularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term "marriage" is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship.*<sup>107</sup>

Similarly, in *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court observed that "[e]specially in light of the long and undisputed history of invidious discrimination that gay persons have suffered we cannot discount the plaintiffs' assertion that the legislature, in establishing a statutory scheme consigning same sex couples to civil unions, has relegated them to an

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106. *Id.* (emphasis added).

107. *In re Marriage Cases*, 183 P.3d 384, 445 (Cal. 2008) (emphasis added). The *Marriage Cases* court then favorably cited the Canada Supreme Court, which, it noted, declared in a similar context that "[o]ne factor which may demonstrate that legislation that treats a claimant differently has the effect of demeaning the claimant's dignity is the existence of pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue." *Id.* at 445 (citing *M. v. H.*, [1999] 2 S.C.R. 3, 54-55 (Can.)).

inferior status.”<sup>108</sup>

These few notable exceptions aside, most actors who have compared nominal separation to Jim Crow have failed to use the history of discrimination that lay behind a distinction in nomenclature between gay and straight relationships to support the proposition that nominal separation is injurious and will therefore never be equal. More important, no one to date has made the connection between nominal separation, or the current name issue, and the nominal issues that have long confronted gays and lesbians. That is, no one has argued that *giving* gays and lesbians substantive equality under a different name *injures* them because that separate nominal status points back in a variety of ways to a speech, or a name, taboo that historically surrounded sodomy (and, through it, homosexuality), a variety of ways that collectively indicate that nominal separation is “both a remnant and a reaffirmation”<sup>109</sup> of the following: (1) homosexuality’s rhetorical tradition, (2) the sentiment of disgust that gave rise to that tradition, and (3) the harms that flowed or resulted from it. No one, in short, has looked to the history that best supports the doctrinal argument that separate names will never satisfy the demands of genuine equality.

To that end, the following two Parts will view the recent name issue through the lens of history and, specifically, homosexuality’s rhetorical history. Their purpose in so doing is (1) to demonstrate why “discrimination . . . flows from separate nomenclature”;<sup>110</sup> (2) to explain just what it is about nominal separation that so many gays and lesbians find to be objectionable—and even “putrid,” in the words of one advocate fighting for nominal equality;<sup>111</sup> (3) to persuade jurists that a relationship by any other name is *not* just as sweet<sup>112</sup> and that it does *not* place “rhetoric over reality” to say that “[t]he name ‘marriage’ matters”;<sup>113</sup> and (4) to capture not simply the dignitary harms, but the even more significant expressive, ontic, and epistemic harms that gays and lesbians suffer from a separate nominal status, harms which will be defined and discussed below.

Furthermore, this approach also has the normative advantage of using a history that is unique to homosexuality in order to develop a coherent legal argument as to why nominal difference is morally and constitutionally problem-

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108. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) (emphasis added) (internal citation omitted).

109. Respondents’ Opening Brief on the Merits at 23, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

110. Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 n.5 (Mass. 2004).

111. Ann Rostow, *Crab State Crawls Towards Equality*, S.F. BAY TIMES, Dec. 7, 2006 (referring to the statement of Steven Goldstein, executive director of the New Jersey advocacy group, Garden State Equality).

112. *But see Opinions of the Justices*, 802 N.E.2d at 572 n.1, 573 (Sosman, J., dissenting) (citing to Juliet’s “What’s in a Name?” soliloquy in support of the proposition that names are “insignificant”).

113. Audio Recording of Oral Argument, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), available at [www.courtinfo.ca.gov/courts/supreme/audio-arch.htm](http://www.courtinfo.ca.gov/courts/supreme/audio-arch.htm) (statement of Justice Chin, California Supreme Court).

atic. That is, it offers a way to supplement a doctrinal argument that is historically grounded in race discrimination, or the separate-but-equal analogy, with a historical narrative that resonates specifically with those who claim to be most adversely affected by nominal difference. This, in turn, has the benefit of convincing those who have looked upon the deployment of the separate-but-equal analogy in this context with skepticism, and even with disdain, that names do matter to gays and lesbians in particular and that not naming them in the officially-recognized language of law *is* damaging or harmful to that class, as it has been for a very long time.

For instance, some courts and commentators have criticized the notion that withholding the name “marriage” from same-sex couples is anything like Jim Crow and the systemic discrimination that was legally in place at the time that the Supreme Court decided *Brown*. When considering the name issue, for example, California’s appeals court remarked that “the facile comparison of California’s marriage statutes to racial segregation is inappropriate.”<sup>114</sup> “Quite the opposite of the Jim Crow laws,” it continued, “the Domestic Partner Act was enacted not to perpetuate discrimination but to *remedy* it.”<sup>115</sup> One of the dissenting justices from the California Supreme Court echoed these sentiments, stating that “[t]he analogy” between racial discrimination and nominal separation simply “does not hold.”<sup>116</sup>

Similarly, criticism of gay rights advocates’ invocation of the separate-but-equal analogy—and of the civil rights paradigm more generally—has grown more pronounced and more forceful over the past few years. For instance, in responding to the claim that the New Jersey Supreme Court allowed a separate-and-unequal regime to stand in *Lewis v. Harris*<sup>117</sup> by not requiring that the state extend the lexicon of marriage to same-sex couples, one commentator remarked that “[i]t’s time for pundits to stop picking up this simplistic (though emotionally powerful) analogy and think about what the New Jersey decision really means—and what an important step toward equality it really is.”<sup>118</sup> More recently, in response to the observation that opponents of Proposition 8 “failed to win black support” in California, one commentator argued that “[p]roponents of gay marriage fling [the term ‘civil rights’] around as if it is a one-size-fits-all

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114. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 721 (Ct. App. 2006), *rev’d*, 183 P.3d 384 (Cal. 2008).

115. *Id.*

116. *In re Marriage Cases*, 183 P.3d 384, 469 (Cal. 2008) (Corrigan, J., concurring and dissenting); *see also id.* at 469 (“The civil rights cases banning racial discrimination were based on duly enacted amendments to the United States Constitution, proposed by Congress and ratified by the people through the states. To our nation’s great shame, many individuals and governmental entities obdurately refused to follow these constitutional imperatives for nearly a century. By overturning Jim Crow and other segregation laws, the courts properly and courageously held the people accountable to their own constitutional mandates. Here the situation is quite different.”).

117. *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006).

118. The Flawed “Separate but Equal” Analogy, [http://blogs.chron.com/bluebayou/2006/10/the\\_flawed\\_separate\\_but\\_equal.html](http://blogs.chron.com/bluebayou/2006/10/the_flawed_separate_but_equal.html) (Oct. 26, 2006).

catchphrase for issues of fairness.”<sup>119</sup> In her view, analogizing the marriage equality movement to the civil rights movement obscures, distorts, and does a profound disservice to the latter.<sup>120</sup>

By using a history that is unique to homosexuality to argue that separate names for gay and straight relationships will never be equal, this Article provides a way for skeptics of the separate-but-equal analogy to see more clearly how not naming same-sex relationships in the same way as their opposite-sex counterparts might be viewed by sexual minorities as harmful, injurious, discriminatory, and unequal. In addition, and equally important, it provides a way for same-sex marriage advocates to avoid the charge that they deploy race analogies in unsuitable ways—or inaptly “dress gay marriage in a suit of civil rights,”<sup>121</sup> in the words of one commentator—when they analogize marriage discrimination against sexual minorities to past forms of discrimination against racial minorities, a view espoused by some of those who have taken issue with the deployment of race/sexual orientation analogies both in the marriage context and outside of it.<sup>122</sup>

Indeed, this Article offers a way for marriage equality advocates to move beyond race/sexual orientation analogies when framing legal arguments, or at least to supplement, and thereby enhance, one of those analogies with a history that is unique to sexual minorities and that has so far been overlooked in marriage (or nominal) equality jurisprudence. While this Article largely disagrees with those who have criticized the deployment of race analogies in general, and the separate-but-equal analogy in particular, in the marriage equality context, it does view their criticisms as an opportunity to look beyond race discrimination alone when considering why certain governmental action vis-à-vis sexual minorities is unconstitutional and why separate names will never be equal. In turn, looking beyond race analogies serves as a potent reminder that nominal discrimination against gays and lesbians is morally and constitutionally problematic not simply because it evokes a time, not too long ago, when blacks

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119. Jasmyne A. Cannick, Editorial, *The Gay/Black Divide*, L.A. TIMES, Nov. 8, 2008, at A23.

120. *Id.*

121. Shelby Steele, Editorial, *Selma to San Francisco?*, WALL ST. J., Mar. 18, 2004, at A16.

122. Indeed, race/sexual orientation analogies have invited critique for any number of reasons, either because they treat the categories that they analogize—racial minorities and sexual minorities—in monolithic ways that fail to capture intra-group convergences or because they group together historical moments that, at least under one view, share little in common. See, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 U.C.L.A. L. REV. 1467, 1484–85 & n.118 (2000) (arguing that race/sexual orientation analogies often render black sexual minorities invisible); Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 879–82 (2006) (noting that the comparison between same-sex marriage prohibitions and anti-miscegenation laws “has generated a number of legal and non-legal responses in the black community that challenge” that analogy and providing some examples of such responses); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 430–36 (2001) (discussing the race/sexual orientation analogy and its criticisms); Steele, *supra* note 121 (arguing that the deployment of the race/sexual orientation analogy in the marriage context is misplaced because civil rights for African Americans and the battle for marriage for same-sex partners do not share common ground).

were separated from whites in classrooms and in myriad other public settings across the nation. Rather, or in addition, nominal discrimination is morally and constitutionally problematic because it hearkens back to a time *very* long ago when gays and lesbians were so contemptible as to evade naming altogether.

### III. HOMOSEXUALITY'S RHETORICAL PAST

Although most societies have sexual taboos, . . . few, if any, other major cultures have made homosexuality—either as a general classification of acts according to gender or as an “orientation”—the primary and singular moral taboo it has long been in Western society: the sin that cannot be named, the unmentionable vice, the love that dare not speak its name. . . . Murder, matricide, child molesting, incest, cannibalism, genocide, even deicide are *mentionable* . . . [.]

—John Boswell, *Same-Sex Unions in Premodern Europe*<sup>123</sup>

Parts III and IV will view the recent name issue through the lens of homosexuality's rhetorical history in order to illuminate why names matter to gays and lesbians, and, more important, in order to show why separate nomenclature for officially-recognized gay relationships will never cure or remedy the constitutional violation of excluding same-sex couples from the institution of marriage. Part III, which is divided into three sections, surveys the economy of silence that marked homosexuality's rhetorical past, a past in which the practices of (1) not talking about same-sex intimacy at all, or (2) simply referring to it as something so abhorrent and distasteful that it could not, or should not, be named, flourished. Moreover, this Part considers the motivation behind that rhetorical tradition as well as the harmful effects that it produced.

The objective of this Part is not to posit that such a rhetorical tradition in fact existed; indeed, legal scholars have already observed the reticence that historically surrounded sodomy and homosexuality in the law.<sup>124</sup> Rather, its objective is to set forth that tradition in such a way that it can be used to develop a strategic legal argument with respect to why nominal difference is unconstitutional. Whereas legal scholars have in the past alluded to homosexuality's rhetorical tradition, none has used that tradition in deeper ways to challenge contemporary forms of sexual orientation discrimination. Moreover, this Part demonstrates just how far back that rhetorical tradition can be traced, something that scholars have overlooked by locating it almost exclusively in the English

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123. BOSWELL, *SAME-SEX UNIONS*, *supra* note 63, at xxiii (internal quotation marks omitted).

124. *See, e.g.*, Katherine Franke, *Cunning Stunts: From Hegemony to Desire: A Review of Madonna's Sex*, 20 N.Y.U. REV. L. & SOC. CHANGE 549, 564 (1994) (“The unspeakability of the crime of homosexuality, that is, the crime of deviance from compulsory heterosexual norms, is evident in such bastions of legal tradition as Blackstone and the United States Supreme Court.”); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 98 COLUM. L. REV. 1753, 1789–90 (1996) [hereinafter Yoshino, *Suspect Symbols*] (detailing the ways in which “homosexuality . . . is framed through preterition: that is, the mention of a term only to dismiss it”).

common law, as well as clarifies what drove that tradition and sets forth what its harmful effects were. In so doing, this Part lays the necessary groundwork for making the argument that sits at the heart of this Article and with which it will conclude in section IV.B.

#### A. HOMOSEXUALITY'S RHETORICAL PAST: A SURVEY

This section provides a general overview of homosexuality's rhetorical tradition, from the early-Christian period in Europe (300–500 A.D.) through twentieth-century American law.<sup>125</sup> For purposes of convenience, this section is divided into two subsections. Subsection 1 broadly surveys sodomy/homosexuality's representation in the Christian theological tradition. Subsection 2 then broadly surveys sodomy/homosexuality's representation in the English/American legal tradition.

##### 1. Christian Theological Tradition

In 1170, Alan of Lille, a twelfth-century French theologian and poet whose “philosophical support for popular hostility [against homosexuality] provided effective ammunition against gay people for later theologians,”<sup>126</sup> wrote a poem called *The Complaint of Nature*, a vehement attack on homosexuality that was both widely read and enormously influential.<sup>127</sup> In it, Alan wrote that when a man has sex with another man, he not only “blackens the honor of his sex” and is “made woman,” but also “pushes the laws of grammar too far.”<sup>128</sup> He maintained that sex between “members of the same-sex” constituted an “inexcusable and monstrous solecism,”<sup>129</sup> the latter of which (solecism) was defined then, as it is now, as a grammatical blunder or error. In other words, according to Alan, sex between men violated the laws of nature and gender as well as the

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125. Following Boswell, this Article identifies the early-Christian period as including the years 300–500 A.D. In addition, and also following Boswell, it identifies the early Middle Ages as extending 500–1050 A.D., the high Middle Ages as extending 1050–1150 A.D., and the later Middle Ages as extending 1150–1350 A.D. See generally BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY, *supra* note 63.

126. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY, *supra* note 63, at 310.

127. *Id.* (calling *The Complaint of Nature* an “influential poem” and referring to Alan as “a celebrated and influential teacher” who “wrote treatises against heretics, Jews, infidels, and Muslims” and who “took part in the Third Lateran Council of 1179, which condemned or restricted the freedom of these and other nonconformist groups,” including those who engaged in “homosexual behavior”). Boswell further notes that Alan’s writings were relied on “heavily” by thirteenth-century writers and theologians interested in “rationaliz[ing] the Christian faith in accordance with principles of Greek philosophy.” *Id.* at 311. For another account of Alan of Lille and his influence on the anti-homosexual discourse of the later medieval period, see *Alan of Lille*, in ENCYCLOPEDIA OF HOMOSEXUALITY 32 (Wayne R. Dynes et al. eds., 1990).

128. Alain de Lille, *The Complaint of Nature*, in 36 YALE STUDIES IN ENGLISH 3 (Albert S. Cook ed., Douglas M. Moffat trans., 1908).

129. *Id.* at 51.

law of language. Non-procreative and therefore unnatural,<sup>130</sup> same-sex sodomy was a grammatical mistake that produced “meaningless discourse, the lack or absence of verbal meaning.”<sup>131</sup> It was, in short, a linguistic failure.

Long before there was such a thing as a “homosexual” identity, a medical term invented by a Swiss doctor in 1869,<sup>132</sup> writers referred to the conduct by which those with a homosexual orientation in time came to be known in linguistic terms—in terms, that is, that made clear that sodomy was thought of as something that both resisted representation in language and was itself a linguistic violation of sorts.<sup>133</sup> While Alan’s peculiar conflation of natural, moral, and grammatical categories has been described by at least one reader of his work as “puzzling,”<sup>134</sup> it nonetheless reflected a much larger theological and literary tradition that conceptualized deviant sexuality as that which should not, and even could not, be named. As early as the time of St. Paul and continuing well beyond him, sodomy earned its “status” in society as the “unspeakable or unnameable vice.”<sup>135</sup> In the provocative formulation of one scholar, sodomy in time became the “obscene counterpart to the Tetragrammaton, or the unspeakable name of God.”<sup>136</sup>

Early-Christian<sup>137</sup> theological writings established the conditions that allowed the later-medieval period’s more virulent anti-homosexual rhetoric to thrive. Admittedly, unlike their late-medieval counterparts, the early-Christian and early-medieval church fathers did not explicitly target same-sex sodomy.<sup>138</sup> Rather, for early European Christians, sodomy largely referred either to exces-

130. See BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY, *supra* note 63, at 148 (“[A]ny use of human sexuality, potential or actual, which did not produce legitimate offspring violated ‘nature’; all moral issues were subordinate to the primary duty of males to procreate.”).

131. Susan Schibanoff, *Sodomy’s Mark: Alan of Lille, Jean de Meun, and the Medieval Theory of Authorship*, in QUEERING THE MIDDLE AGES 28, 30 (Glen Burger & Steven F. Kruger eds., 2001).

132. See JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 36 (1999).

133. See 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 43 (Robert Hurley trans., Vintage Books 1990) (1976) (“The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology.”). *But see* MARK D. JORDAN, THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY 163–64 (1997) [hereinafter JORDAN, INVENTION] (arguing that the idea that those who engage in same-sex sodomy might be perceived as having a separate “identity” as such might be traced back to Peter Damian, an eleventh-century Church reformer who not only coined the term *sodomia* but also built an incipient identity around those who engaged in that conduct, persons known at that time as “Sodomites”).

134. JORDAN, INVENTION, *supra* note 133, at 79 (stating that “the most obvious and puzzling feature of Alan’s work” is “his choice of grammatical metaphors for describing deviations of human copulation”).

135. See RICHARD HALPERN, SHAKESPEARE’S PERFUME: SODOMY AND SUBLIMITY IN THE SONNETS, WILDE, FREUD, AND LACAN 23–24 (2002).

136. *Id.* at 24.

137. See *supra* note 125 for a description of this and other temporal terms.

138. See, e.g., BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY, *supra* note 63, at 202 (stating that during the early Middle Ages “[s]odomy” came to refer to any emission of semen not directed exclusively toward the procreation of a legitimate child within matrimony, and the term included much—if not most—heterosexual activity”).

sive sexual appetite generally or to any non-procreative conduct, regardless of the way in which, and between whom, it occurred.<sup>139</sup> Nevertheless, early-Christian theologians periodically deployed a rhetoric of unnameability and unspeakability with respect to sodomy that would in time become synonymous with same-sex sodomy—and, in due course, with homosexuality.

For instance, St. Jerome, the fourth-century church father who is best known for translating the Bible from Greek and Hebrew into the Latin Vulgate, maintained that the place-name “Sodom” from Genesis 18–19, which recounts the fall of Sodom, means “mute” or “silent beast.”<sup>140</sup> The sin that in time would become an unnameable crime, then, eponymously derived from a place which Jerome, that “master of the scriptural text and its renowned translator,”<sup>141</sup> understood to denote silence and speechlessness. This Article will return to St. Jerome’s peculiar etymology of Sodom as “mute” or “silent” below and will suggest an intriguing connection between that etymology and the expressive harm that some gays and lesbians are said to feel upon being denied the universally recognizable, and inherently communicative, language of marriage.<sup>142</sup>

In associating Sodom with muteness or silence, St. Jerome laid the foundations for subsequent theologians and political actors from the early-Christian period and the early Middle Ages to place a speech taboo around sodomy—a taboo that underscored the importance of remaining silent about that which could, under St. Jerome’s interpretation, render one silent. For instance, quoting St. Paul, St. Augustine referred to the kind of sex that we would today understand to mean sodomy, “unnatural” or non-procreative sex, in terms of the unspeakable, or “those things, which, as the Apostle saith, *it is a shame even to speak of.*”<sup>143</sup> John Chrysostom, archbishop of Constantinople and a late-fourth-, early-fifth-century Church father whose sermons on the Bible were widely circulated among early-medieval audiences and readers, echoed these sentiments in his *Homilies on Titus*, a set of sermons centered on the New Testament’s book of Titus.<sup>144</sup> There, Chrysostom referred to the pagans’ “passion for boys” as a subject on which he would rather not speak, as it was, after all, something “not fit to be named.”<sup>145</sup>

Similarly, Emperor Justinian’s *Institutes*, Roman civil law that went into

139. *See id.*

140. MARK D. JORDAN, *THE SILENCE OF SODOM: HOMOSEXUALITY IN MODERN CATHOLICISM* 16 (2002) [hereinafter JORDAN, *SILENCE*].

141. JORDAN, *INVENTION*, *supra* note 133, at 33.

142. *See infra* section III.C.

143. ST. AUGUSTINE, *On the Good of Marriage*, in *SEVENTEEN SHORT TREATISES OF ST. AUGUSTINE, BISHOP OF HIPPO* 274, 283 (Oxford, John Henry Parker 1847) (emphasis added).

144. For additional bibliographic information on Chrysostom, see Robert Wilken, *John Chrysostom*, in *1 ENCYCLOPEDIA OF EARLY CHRISTIANITY* 622, 622–24 (Everett Ferguson et al. eds., 2d ed. 1998).

145. ST. JOHN CHRYSOSTOM, *Homily XX*, in *THE HOMILIES OF ST. JOHN CHRYSOSTOM, ARCHBISHOP OF CONSTANTINOPLE, ON THE EPISTLES OF ST. PAUL THE APOSTLE TO TIMOTHY, TITUS, AND PHILEMON* 306, 318 (Oxford, John Henry Parker 1843).

effect throughout the Eastern Roman Empire in 533, defined sodomy as “*nefandam libidinem*,” or “vile acts of lust,” that took place between men.<sup>146</sup> While the Latin adjective *nefandam* is colloquially translated as “vile” or “abominable,” it actually denotes a condition of unspeakability, as the words *ne* and *fari* mean “not” and “to speak,” respectively.<sup>147</sup> Justinian thus used an adjective that quite literally means “that which should not be spoken about” to qualify the sexual crime that rendered one eligible for death starting in the sixth century.<sup>148</sup> Soon thereafter, Pope Gregory the Great wrote in his *Moralia* that “the air itself is corrupted by [sodomy’s] mention, and the Devil himself is embarrassed.”<sup>149</sup>

The early-Christian and early-medieval eras’ periodic tendency to conceptualize non-procreative sex as an unspeakable sexual sin and crime became, during the later Middle Ages, something significantly more explicit and more persistent. What was a tendency, in short, became a tradition—and not just a tradition, but one that applied to sex between men almost exclusively.<sup>150</sup> As already mentioned, for Alan of Lille sodomy was not only an act that took place between two men, but also one that quite literally violated language.<sup>151</sup> To be sure, if same-sex sex violated the norms of grammar, as Alan contended that it did, then how could one put that act into words without also doing the same?

Similarly, in the thirteenth century, St. Thomas Aquinas wrote that he would not speak about the “vice against nature” in his theological expositions because that vice itself was “unnameable.”<sup>152</sup> In so doing, Thomas was merely appropriating what by that time had become a well-established rhetorical tradition of “pushing [the vice of sex between men] outside the boundaries of the discourse of ethics” and of placing it “beyond the realm of rational inquiry,”<sup>153</sup> a tradition

146. THOMAS COOPER, *THE INSTITUTES OF JUSTINIAN* 387 (New York, John S. Voorhies 1852) (entry for “*De adulteriis*”).

147. D.P. SIMPSON, *CASELL’S LATIN DICTIONARY* 241, 252 (5th ed. 1968) (entry for “*for*,” “*fari*”).

148. See BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY*, *supra* note 63, at 171 (“Not until 533 did any part of the Empire see legislation flatly outlawing homosexual behavior . . . . In that year, . . . the emperor Justinian placed all homosexual relations under the same category as adultery and subjected them for the first time to civil sanctions (adultery was at that time punishable by death).”).

149. MICHAEL GOODICH, *THE UNMENTIONABLE VICE: HOMOSEXUALITY IN THE LATER MEDIEVAL PERIOD* 62 (1979).

150. BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY*, *supra* note 63, at 277 (stating that “[a] few social critics . . . did single gay people out for special attack” during the later Medieval period and began “[u]sing the word ‘sodomy’ to refer solely to homosexual acts (. . . against theological precedent)”; see also *id.* at 293 (“Between 1250 and 1300, homosexual activity passed from being completely legal in most of Europe to incurring the death penalty in all but a few contemporary legal compilations.”); *id.* at 295 (“During the 200 years from 1150 to 1350, homosexual behavior appears to have changed, in the eyes of the public, from the personal preference of a prosperous minority, satirized and celebrated in popular verse, to a dangerous, antisocial, and severely sinful aberration.”)).

151. See *infra* notes 126–33 and accompanying text.

152. JORDAN, *INVENTION*, *supra* note 133, at 150 (commenting on Thomas’s appropriation of “the tradition according to which vice against nature is a vice that cannot be named”); see also *id.* at 151 (arguing that the “vagueness of [Thomas’s] *Summa* and its emphasis on the rare conditions under which the vice [against nature] is generated would seem to indicate something of the traditional reserve”).

153. *Id.* at 150.

that reflected theologians' collective "desire to exclude [sodomy] from speech altogether."<sup>154</sup> For Albert the Great, the thirteenth-century theologian and bishop, this meant that same-sex sex was something about which one should remain utterly "silent," even to the point of "confusion about which acts the word [sodomy] names."<sup>155</sup> For priests, this meant that the sin against nature was, in the words of William Peraldus, "'to be spoken of with great caution, both in preaching and in hearing confessions, so that nothing be revealed to men that might give them occasion to sin.'"<sup>156</sup>

In fact, confessors' manuals during this time routinely invoked Jerome's traditional etymology of the sin of Sodom as "mute" or a "silent beast" when warning priests that "[t]hose guilty of the sin that cannot be named . . . are rendered mute as animals before God."<sup>157</sup> Speech and speechlessness thus existed in a feedback loop: to name homosexual sex would have been "to tell the penitent that the act occur[red] frequently enough to have been named,"<sup>158</sup> which might thus encourage the penitent to commit it. In turn, committing that act could ultimately render the penitent without speech, or "mute before God at the last judgment."<sup>159</sup> It was therefore critical that priests talk about that sin sparingly, if at all—critical that *they* become mute with respect to the sin that could render one mute.<sup>160</sup>

154. *Id.* at 133.

155. *Id.* Jordan writes:

There is in Albert the Great's texts on Sodomy a series of dissociations by which he refuses to engage the analyses of same-sex copulation in his own scientific or medical authorities, and this despite his regular appropriation of their teaching on other topics. At the same time, Albert fails to correct the medical or scientific analyses of same-sex copulation—even though he is eager to correct errors elsewhere. His refusal to discuss even to the point of refusing to correct shows quite plainly a new familiar feature of the theological artifact that is the conception of "Sodomy": the desire to exclude it from speech altogether. Albert here enacts that desire with regard to medicine and natural philosophy. Where he will not engage, he keeps silence.

*Id.* (emphasis added).

156. *Id.* at 111 (internal citation omitted).

157. *Id.* at 106.

158. *Id.* at 93.

159. *Id.* at 112.

160. On this subtle connection, Jordan writes:

Confessors are not to mention any of the forms of Sodomy for fear of encouraging them in those who might not know about them. . . . The fear of Sodomy ends up by undoing the pretense of spiritual care for Sodomites. Their sin cannot be spoken plainly. It cannot be preached against. It cannot be broached even within the confession except with utmost indirection. The fanciful etymology recalled by Robert of Sorbonne and William Peraldus claims that "Sodom" means mute. *In fact, it is Robert and William who have been made mute on the subject of Sodomy.* Incoherent fear of sin has taken away the voice of confessors and preachers. Their silence is an ironic, an unintended testimony to the power of Sodom over the clergy.

*Id.* at 113 (emphasis added).

## 2. English and American Legal Tradition

The late-medieval theological tradition of either not talking about same-sex sex at all, or of naming it only as *the* unnameable act,<sup>161</sup> directly influenced the English common law—and through it, American law. The theme of sodomy's unnameability in the English common law is most often associated with Sir Edward Coke and Sir William Blackstone, the two English jurists whose writings on sodomy were enormously influential in shaping the discursive terrain that surrounded that conduct and its criminal prohibition in the United States well into the twentieth century. For Coke, writing in the early seventeenth century, and for Blackstone, writing in the eighteenth, sodomy was, respectively, “a crime not fit to be named”<sup>162</sup> and “a detestable, and abominable sin, amongst christians not to be named.”<sup>163</sup> In the *Commentaries*, Blackstone in particular observed that Roman law approached sodomy with a significant degree of “taciturnity” or reticence.<sup>164</sup> He assures his readers that he will do the same, promising not to “dwell” too long “upon a subject, the very mention of which is a disgrace to human nature.”<sup>165</sup>

Starting in the late nineteenth century, and continuing well into the twentieth, American courts routinely adverted to Coke and Blackstone's formulation of sodomy as an unnameable crime when considering constitutional challenges to criminal sodomy statutes, statutes that failed to name with any particularity the precise conduct that was subject to criminal prohibition. In 1897, a state appeals court upheld a sodomy conviction in the face of a vagueness challenge by the defendant, a male who was charged with committing ““the infamous crime against nature upon and with”” another man.<sup>166</sup> In response to the defendant's claim that the indictment's language was “uncertain and insufficient” and therefore failed to inform him “of the nature of the offense charged,” the *Honselman v. People* court wrote:

The statute gives no definition of the crime, which the law, with due regard to the sentiments of decent humanity, *has always treated as one not fit to be named*. It was never the practice to describe the particular manner or the details of the commission of the act, but the offense was treated in the indictment as the abominable crime not fit to be named among Christians. The existence of such an offense is a disgrace to human nature. . . . [T]he records of the courts need not be defiled with the details of different acts which may go to constitute it.<sup>167</sup>

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161. See JORDAN, INVENTION, *supra* note 133, at 150 (commenting on Thomas's appropriation of “the tradition according to which vice against nature is a vice that cannot be named”).

162. BLACKSTONE, *supra* note 21.

163. EDUARDO COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 58 (London, E. & R. Brooke 1797).

164. BLACKSTONE, *supra* note 21, at \*216.

165. *Id.* at \*215.

166. *Honselman v. People*, 48 N.E. 304, 304 (Ill. 1897) (emphasis added).

167. *Id.* (emphasis added) (internal citation omitted).

In naming sodomy only by unnamng it, the *Honselman* court was merely following a well-established theological and common law tradition of speaking about the act that in time came to be intimately, and almost exclusively, associated with homosexuality in American law<sup>168</sup> in tropes relating to speech or to the lack thereof. Because “everyone knows what a crime against nature is” when they see it, one court later remarked, the crime itself need not be “spell[ed] out”<sup>169</sup>—need not, quite literally, be put into words. In any event, even if that were not the case, criminal sodomy statutes that used vague terms like “the abominable and detestable crime against nature” were perfectly legitimate in most cases because, as a Texas court averred in 1909, “the charge was too horrible to contemplate and too revolting to discuss.”<sup>170</sup> Indeed, as another court declared not long thereafter, “by reason of the vile and degrading nature of [sodomy], it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading.”<sup>171</sup>

By the late twentieth century, it was altogether common practice for courts to uphold convictions for sodomy by relying on what Professor Janet Halley has referred to as the “unnameability trope,” the rhetorical strategy of talking about (or naming) homosexual conduct by not talking about (or not naming) it.<sup>172</sup> In 1966, for instance, a state supreme court remarked that it was unnecessary to recount what the state’s evidence in a same-sex sodomy prosecution was for the sole reason that “[i]t would serve no useful purpose to soil the pages of our Reports with [sodomy’s] sordid details.”<sup>173</sup> Here, the court transposed the dirtiness (or “sordidness”) that it imaginatively associated with the criminalized sexual act at issue in that case onto the scriptural act of recounting it, the latter of which would “soil the pages” of the judicial reports. Under this view, deviant

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168. On sodomy as a “metonym” for homosexuality, see *infra* note 179. Prior to *Lawrence v. Texas*, 539 U.S. 558 (2003), courts routinely conflated conduct (sodomy) and status (homosexuality). See, e.g., *Shahar v. Bowers*, 114 F.3d 1097, 1105–06, 1110 (11th Cir. 1997) (en banc) (upholding an openly gay attorney’s termination from the state attorney general’s office on the ground that her participation in a same-sex commitment ceremony indicated that she was homosexual and therefore presumptively violating Georgia’s criminal sodomy statute). Even after *Lawrence*, the law continues to conflate homosexuality and sodomy. For instance, the military’s exclusionary policy, popularly known as “don’t ask, don’t tell,” subjects members of the armed forces to discharge if they engage in “homosexual acts,” and provides that admission of one’s homosexual status creates a presumption that he or she engages in that prohibited conduct. See 10 U.S.C. § 654 (2000) (requiring that any individual admitting to homosexuality or bisexuality must be discharged unless there is a further finding that the member has demonstrated that he or she is not a person who engages in homosexual acts).

169. *Locke v. State*, 501 S.W.2d 826, 830 (Tenn. Crim. App. 1973) (Galbreath, J., dissenting).

170. *Harvey v. State*, 115 S.W. 1193, 1193 (Tex. Crim. App. 1909).

171. *Glover v. State*, 101 N.E. 629, 630 (Ind. 1913) (upholding male defendant’s conviction for committing sodomy with another male); see also *id.* (“It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required.”).

172. Halley, *supra* note 25, at 955; see also Lawrence Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: “Queer Baiting” From the Bench*, 3 POL. BEHAV. 31, 36 (1981).

173. *State v. Stubbs*, 145 S.E.2d 899, 902 (N.C. 1966); see also *State v. White*, 217 A.2d 212, 215 (Me. 1966) (describing sodomy as “a dirty business”).

sexual acts perverted language in much the same way that same-sex sex, for Alan of Lille in twelfth-century France, perverted grammar.

Similarly, in 1972, an appeals court asserted that it did not need to “describe in detail” what fell under one state’s prohibition of oral or genital contact, or “any other unnatural or perverted sexual practice.”<sup>174</sup> Because such things were matters “of common knowledge,” the court opined, they need not be given definitional clarity—indeed, need not be given any definition at all.<sup>175</sup> One year later, another court went so far as to say that “[i]t [would] be unnecessary for us to set out the sordid testimony about the [homosexual] act, which appeared so revolting to one of the two deputies sheriff . . . that he vomited thrice during the evening.”<sup>176</sup> Finally, in 1986, then-Chief Justice Burger “placed his *imprimatur* on such definitions”<sup>177</sup> when, in his *Bowers v. Hardwick*<sup>178</sup> concurrence, he approvingly cited Blackstone for the proposition that sodomy, which emerges from that case as a metonym for homosexuality,<sup>179</sup> could surely be criminalized if it could not even be put into words: a “heinous act ‘the very mention of which is a disgrace to human nature’” and “‘a crime not fit to be named,’” in Burger’s summary of Blackstone’s renowned formulation.<sup>180</sup>

#### B. HOMOSEXUALITY’S RHETORICAL PAST: CAUSE OR MOTIVATION

Whether it was early-Christian Europe or late-twentieth-century America, sodomy or homosexuality’s economy of silence was largely the result of one thing: disgust for same-sex sex and for those who engaged in it.<sup>181</sup> That is, it was repugnance for sodomy that best explains both its categorical elision from speech (for example, the refusal to talk about it at all in the Christian tradition) and its long-standing association with locutions such as “abominable crime not fit to be named” and conduct “too horrible to contemplate and too revolting to discuss.” An object of revulsion that was unlike any other, sodomy was “a very pariah of crimes, and the acts constituting it but seldom specifically defined,” in

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174. *Hughes v. State*, 287 A.2d 299, 302 n.3 (Md. Ct. Spec. App. 1972).

175. *Id.*

176. *Carter v. State*, 500 S.W.2d 368, 370 (Ark. 1973).

177. Halley, *supra* note 25, at 955.

178. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of Georgia’s criminal sodomy law and finding that no “right to homosexual conduct” existed under the federal Constitution).

179. For sodomy as a “metonym” for homosexuality, see Janet E. Halley, *Reasoning About Sodomy: Acts and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1737 (1993) (“Sodomy . . . is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym.”). For the conflation of sodomy and homosexuality in *Bowers*, see Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 288 (1996) (“From the beginning of the opinion, in which Justice White first described the question on which the Court granted *certiorari*, the conflation between ‘engaging in sodomy’ and ‘being a homosexual’ is apparent.”).

180. *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 BLACKSTONE, COMMENTARIES \*215).

181. Whereas historically those people were called Sodomites, today they are called gays and lesbians. See, e.g., JORDAN, SILENCE, *supra* note 140, at 9.

the words of an early-nineteenth-century court.<sup>182</sup>

In his examination of same-sex unions in pre-modern Europe, John Boswell notes that homosexuality was *uniquely unmentionable* in a way that distinguished it from other taboos, child molesting, incest, and murder among them.<sup>183</sup> He attributes that rhetorical tradition, or the failure to “name[] or discuss[]”<sup>184</sup> homosexuality until only just recently, to the fact that homosexuality was perceived as being *uniquely disgusting* in a way that the other moral and sexual taboos were not. Observing the “extraordinary prejudice” and “remarkable . . . degree of revulsion” that traditionally surrounded homosexuality in Western society,<sup>185</sup> Boswell concludes that “[i]t is actually the affective, taboo aspect of the subject that has rendered it unmentionable until recently.”<sup>186</sup>

If it was disgust for sodomy that rendered that conduct uniquely unspeakable or unnameable in the Christian theological tradition as well as in modern American law, then the rhetorical tradition of not talking about sodomy, or of talking about it only as something too heinous to discuss, merely amplified and augmented others’ disgust for it. In other words, disgust and homosexuality’s rhetorical tradition existed in a feedback loop, with the former fueling the latter and vice versa. Part IV will return to this interrelationship between disgust and homosexuality’s rhetorical past when arguing that the nominal separation between “marriage” and “civil union” hearkens back to both of them. While a number of commentators have observed the role that disgust has played in shoring up contemporary laws that discriminate against sexual minorities,<sup>187</sup> no one to date has argued that laws that create a separate nominal status for officially-recognized gay relationships are also linked to disgust, albeit indirectly.

### C. HOMOSEXUALITY’S RHETORICAL PAST: HARMFUL EFFECTS OF

Sodomy’s economy of silence had negative consequences for those whose status was long defined by that unnameable criminal act. To be sure, one might argue, as some commentators have, that the silence that surrounded sodomy and homosexuality was a source of power for gays and lesbians, for whom definitional elusiveness and linguistic invisibility might have constituted a protective

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182. *Glover v. State*, 101 N.E. 629, 631 (Ind. 1913).

183. BOSWELL, *SAME-SEX UNIONS*, *supra* note 63, at xxiii.

184. *Id.* at xxiv.

185. *Id.* at xxiii.

186. *Id.* at xxiii–xxiv.

187. *See, e.g.*, Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *Nw. U. L. REV.* 1543 (2005); William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 *FLA. L. REV.* 1011 (2005); Martha Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW* 19, 45 (Susan A. Bandes ed., 1999).

cover,<sup>188</sup> a form of freedom,<sup>189</sup> and even an aesthetically sublime experience.<sup>190</sup> Moreover, one might also argue, as some have, that the rhetoric of unnameability that was part and parcel of the law's approach to sodomy and homosexuality, at least until *Lawrence v. Texas*<sup>191</sup> was decided, did not necessarily mean that either of those things lacked a name and the legal recognition that ordinarily flows from one's nominal status. Quite the contrary, what that rhetoric of unnameability simply meant was that sodomy and homosexuality would be named, and therefore recognized, in negative terms—something which, of course, is not quite the same thing as saying that sodomy and homosexuality had no name, or no legal identity, whatsoever.<sup>192</sup>

At the same time, however, homosexuality's rhetorical past not only linguistically marginalized sexual minorities, but inflicted certain harms upon them—harms that continue to be felt today in same-sex couples' contemporary struggle to be named in officially-recognized terms. As already mentioned, "rhetorical past" references a time when same-sex intimacy was either, or both, (1) pushed outside the boundaries of discourse entirely (that is, not discussed at all), or (2) referred to simply as that which was so horrible and repugnant that it could not, or should not, be named (that is, named only by a disgust-driven language of negation). Those rhetorical practices together worked four interrelated harms on sexual minorities: a dignitary harm, an expressive harm, an epistemic harm, and an ontic harm, each of which is reproduced and perpetuated by the state's reluctance to "name" officially-recognized gay relationships in the same way as their opposite-sex counterparts, as the next Part will show.

Homosexuality's rhetorical past inflicted dignitary harm on gays and lesbians because it conceptualized the conduct that would become synonymous with homosexuality in demeaning, offensive, and disgust-driven ways.<sup>193</sup> Indeed, and as suggested above, while it was disgust for same-sex sex that motivated or underlay the persistent refusal to discuss or name it, the persistent refusal to discuss or name it merely *increased* others' disgust for it. In addition, homosexu-

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188. See, e.g., COCKS, *supra* note 24, at 160 (stating that "the unnameable quality of homosexual desire was one of [gay men's] principal resources" because it "enabled them to develop intimacies which at a later date would have seemed suspicious, if not pathological").

189. *Id.*

190. See HALPERN, *supra* note 135, at 22; ELAINE SHOWALTER, *SEXUAL ANARCHY: GENDER AND CULTURE AT THE FIN DE SIÈCLE* 176 (1990) (referring to Oscar Wilde's "rationalization of homosexual desire as aesthetic experience").

191. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas' criminal sodomy prohibition and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

192. See, e.g., MORAN, *supra* note 23, at 45 ("[T]he silence of the law does not in the first instance produce an absolute prohibition but gives rise to a certain proliferation of speech . . . by way of a multiplicity of euphemisms."); SEDGWICK, *EPISTEMOLOGY*, *supra* note 26, at 203 (stating that preterition, or the rhetorical practice of naming something by dismissing it, performed the dual function of both negating/obliterating same-sex intimacy and affirming/reifying it); Lawrence Danson, *Oscar Wilde, W. H., and the Unspoken Name of Love*, 58 ENG. LIT. HIST. 979, 981 (1991) (stating that in Oscar Wilde's *The Picture of Dorian Gray*, "negatives of direct statement can be subverted into sexual affirmations").

193. On sodomy as a metonym for homosexuality, see *supra* note 179.

ality's rhetorical past inflicted expressive harm on gays and lesbians because it both established and maintained a wall of silence around the conduct that came to define their very identity. How could sexual minorities express their intimacy, or have that intimacy expressed, in words when it was not only criminalized, but negated in language as well? One thinks here of St. Jerome's curious etymology of the place-name "Sodom" from Genesis as "mute" or a "silent beast," and wonders whether it was the speech taboo that surrounded sodomy, rather than anything intrinsic to sodomy (as Jerome's etymology appears to suggest), that rendered one mute.

The latter two harms, epistemic and ontic, warrant some explanation. Elsewhere, Professor Kenji Yoshino has explained that an epistemic harm "relate[s] to . . . how one is known," and that an ontic harm "relate[s] to one's being, or to how one is constituted."<sup>194</sup> Thus, whereas an epistemic harm results from action that renders one less known or less recognized, an ontic harm results from action that renders one less real. In this context, one might say that it was the economy of silence that traditionally surrounded homosexuality that contributed to sexual minorities' epistemic harm, and that it was their epistemic harm that led naturally to their ontic harm.

More specifically, not talking about sodomy and homosexuality inflicted epistemic harm on gays and lesbians because silence made it difficult to "know" what either sodomy or homosexuality was all about—or, indeed, whether either even existed at all. For instance, Sir John Wolfenden, the primary author of the 1957 report that recommended that homosexuality be decriminalized in Great Britain,<sup>195</sup> once remarked that homosexuality was "not mentioned in polite society [in Britain]" and that "[m]ost ordinary people had never heard of [it]."<sup>196</sup> In other words, it was in large part because an economy of silence long surrounded homosexuality that "most ordinary people" did not really know all that much, if anything, about it. To be sure, if, as John Boswell wrote in 1994, homosexuality "could not, until the last few decades, be named or discussed," then one can hardly be surprised that same-sex intimacy for a very long time existed as something "vague" and "necessarily unexamined," in his words.<sup>197</sup> Or, as nicely put by the plaintiffs in *Marriage Cases*, "until very recently,

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194. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and The Case of "Don't Ask, Don't Tell,"* 108 *YALE L.J.* 485, 527 (1998) [hereinafter Yoshino, *Assimilationist Bias*]. Yoshino notes that "[t]he lines between these two harms [are] not always . . . clear." *Id.* at 527 n.180.

195. The Wolfenden Report, short for The Report of the Departmental Committee on Homosexual Offences and Prostitution, was published in Britain in 1957. It is named after the chairman of that committee, Sir John Wolfenden. The Report recommended that Parliament decriminalize homosexuality in Britain, which it finally did in 1967 with the passage of the Sexual Offences Act of 1967. See MORAN, *supra* note 23, at 21–27.

196. SIR JOHN WOLFENDEN, *TURNING POINTS: THE MEMOIRS OF LORD WOLFENDEN* 132 (1976). Wolfenden also points out that more people "knew about prostitution" than about homosexuality. *Id.*

197. BOSWELL, *SAME-SEX UNIONS*, *supra* note 63, at xxiv.

[sexual minorities'] *relationships [were] completely unrecognized.*"<sup>198</sup>

To offer another example of this phenomenon, take, for instance, certain statements of "rap cultural icon Professor Griff of Public Enemy."<sup>199</sup> Professor Griff, as recently observed by Professor Devon Carbado, has remarked that "[i]n knowing and understanding black history, African history, *there's not a word in any African language which describes homosexual . . . .* You would like to make them part of the community, *but that's something brand-new to black people.*"<sup>200</sup> Professor Carbado observes that "[t]he notion that homosexuality is 'brand new' to black people is intended to convey the idea that precolonial black people were exclusively heterosexual."<sup>201</sup> In the above statement, Professor Griff makes the mistake of assuming that homosexuality is "brand-new" to the black community because it did not historically exist in language, specifically, in "any African language."<sup>202</sup> Quite the contrary, it was the erasure of homosexuality *from* "African language" that made it *appear* as if something that has existed for centuries did not exist until only just recently. In other words, once again, it was the elision of homosexuality from speech that helped set the conditions for rendering it less known and less recognized—an epistemological problem—as either a set of acts or an orientation.

In turn, the lack of recognition of homosexuality inflicted ontic harm on gays and lesbians because it helped create a situation where their intimacy did not seem to exist. That is, as Professor Yoshino has argued, because we "are" to some extent the sum of our expressions, it follows that when our expression is burdened (an expressive harm), we are not only less recognized (an epistemic harm), but also less real (an ontic harm).<sup>203</sup> Applying that idea here, if what we name our intimacy in some sense creates it,<sup>204</sup> then when that name is a language of negation, or no name at all, that intimacy is not only less recognizable to the world but also, and for that very reason, less real. If same-sex intimacy was linguistically closeted in such a way that rendered it "completely unrecognized," and if "[m]ost ordinary people had never heard of homosexuality" because it was a topic that was "not mentioned in polite society," then on what level could that intimacy really be said to "exist" or to "be"?

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198. Respondents' Opening Brief on the Merits at 23, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (emphasis added).

199. Carbado, *supra* note 122, at 1476.

200. *Id.* (citing Marlon T. Riggs, *Black Macho Revisited: Reflections of a SNAP! Queen*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* 306, 310 (quoting Professor Griff of Public Enemy)) (emphasis added).

201. *Id.*

202. At least, of course, according to Griff.

203. Yoshino, *Assimilationist Bias*, *supra* note 194, at 530 (stating that "if one suspends the assumption that essences exist" and assumes instead that "expression is not just an effect of an underlying identity but potentially a cause of it as well," then "when that expression is burdened, the burden is not only an epistemic harm but also an ontic one").

204. For instance, Judith Butler has argued that "the name wields a *linguistic power of constitution*" and that "to utter is to create the effect uttered." JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 31, 32 (1997) (emphasis added).

In fact, one might even argue that it was the speech taboo that long surrounded same-sex intimacy that led, at least in part, the New Jersey Supreme Court to declare in *Lewis v. Harris* that same-sex relationships were “new” and therefore needed a “new language” to describe them<sup>205</sup>—to declare, that is, that relationships that have been around for centuries did not really exist until only just recently. Part IV will return to that language and reasoning from the *Lewis* opinion and examine it at some length. Suffice it to say here, though, that had same-sex relationships not been subject to a linguistic taboo for such a long time, then perhaps the *Lewis* court would not have been able to characterize their existence as “new” with quite so much ease and, in the process, to continue to inflict ontic harm on gays and lesbians by making it appear as if their unions did not “exist” until only just recently.<sup>206</sup>

This section has identified four interrelated harms that flowed from homosexuality’s rhetorical past, specifically a dignitary harm, an expressive harm, an epistemic harm, and an ontic harm. Part IV will establish a connection between the harm of unnamings, and of not talking about, same-sex intimacy (sexual minorities’ old nominal struggle) and the harm of not giving same-sex couples the specific name “marriage” (sexual minorities’ new nominal struggle).

#### IV. THE INEQUALITY OF SEPARATE NOMENCLATURE: A “REMNANT AND A REAFFIRMATION” OF HOMOSEXUALITY’S RHETORICAL PAST

Separate nomenclature for officially-recognized gay and straight relationships will never be equal because it points back in a variety of ways to a time when homosexuality was subject to a speech, or a name, taboo, and because it reproduces and perpetuates the harms that followed from that taboo. Section A will consider several ways that we might read or interpret the new name issue in light of that past. In particular, this section will discuss the myriad ways in which nominal separation reflects, recalls, evokes, bears the traces of, leads us back to, and even derives from a time when same-sex intimacy was elided from speech entirely, or viewed as something so repugnant that it could not, or should not, be named.

Section B will then establish that separate nomenclature for gay and straight relationships will never be equal because it reflects homosexuality’s disgust-driven rhetorical past and its harmful effects, a past that should no longer play

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205. *Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006).

206. The same, of course, goes for Professor Griff’s statement that black homosexuality is a “brand-new” phenomenon. See Carbado, *supra* note 122, at 1476. When the *Lewis* court, and Professor Griff, characterize same-sex relationships/homosexuality as a “new” phenomenon, they exercise what Sedgwick has referred to as the “epistemological privilege of unknowing.” EVE KOSOFKY SEDGWICK, *TENDENCIES* 24 (1993) [hereinafter *SEDGWICK, TENDENCIES*] (internal citations omitted). Professor Yoshino has recently argued that “the privilege of unknowing is still powerfully deployed by straights” in American law and culture. Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 824 (2002) [hereinafter *Yoshino, Covering*]. See also Yoshino, *Suspect Symbols*, *supra* note 124, at 1790 (commenting on the *Bowers* majority’s exercise of the “epistemological privilege of unknowing”).

even a residual role in our legal order. Separate nomenclature is, quite simply, both “a remnant and a reaffirmation”<sup>207</sup> not just of homosexuality’s criminal past, but of its nameless, unspeakable, and unspoken past. For that reason, it is unequal.

#### A. NOMINAL SEPARATION POINTS BACK TO HOMOSEXUALITY’S RHETORICAL PAST

Nominal separation points back to homosexuality’s rhetorical past in a number of ways. It should be noted that it is not the aim of this section to make conventional legal arguments or to establish strict one-to-one correspondences between the current name issue and homosexuality’s rhetorical tradition. Rather, its goal is to identify in more general ways the residues of the past in the present, and to locate the connective tissue and thematic continuities that exist between giving a different name to same-sex relationships and either (1) not discussing same-sex intimacy at all or (2) naming it only through a disgust-motivated language of negation.

##### 1. Nominal Separation Evokes or Is Reminiscent of Homosexuality’s Rhetorical Past

Nominal separation points back to homosexuality’s rhetorical past because it deals not just with names, but also with the law’s reluctance to name same-sex intimacy in a certain way. As such, it evokes a time when the law withheld names and language from same-sex relationships entirely—withheld names and language, moreover, out of a belief that same-sex intimacy was disgust-provoking in a way that no other moral or sexual taboo was. When the state tells gays and lesbians that they may have the substance of marriage but only under a different name, it takes them back to a time when the law was reluctant to name their intimacy at all or when it could only name it in a lexicon that exhibited a “remarkable . . . degree of revulsion.”<sup>208</sup> Nominal separation, in other words, reminds the class most negatively affected by it that it has always been relegated to a non-nominative or quasi-nominative status in the law (and well beyond it); that the law has always used language, or the lack thereof, to marginalize it; and that it has suffered, and continues to suffer, the harmful effects of a rhetorical tradition that was both the product of, and itself produced, repugnance for same-sex conduct.

Admittedly, some differences exist between present and past—that is, between the current name issue and its nominal antecedent. Today, same-sex intimacy is denied a name, albeit the name that apparently will validate it most, as subsection 3 will demonstrate. Historically, and as Part III has shown, same-sex intimacy was denied any name whatsoever, or was named only as that which could not be named. In other words, today officially-recognized same-sex

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207. Respondents’ Opening Brief on the Merits at 23, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

208. BOSWELL, SAME-SEX UNIONS, *supra* note 63, at xxiii.

intimacy at least has a name (“civil union,” “domestic partnership”), whereas historically it did not.

The relevant (and larger) point here, however, is that it is still just all about names and sexual minorities’ exclusion from them, and that the recent legal issue *over* names merely reminds gays and lesbians of their perennial struggles *with* names and with the resultant harms of nominal exclusion. That is, telling same-sex couples that they may be denied the officially-recognized lexicon of marriage simply reminds them that homosexuality has always been a site of nominal struggle in law and culture, even if the tenor of that struggle has changed over time. One of the plaintiffs’ briefs in *Marriage Cases* puts it best: Giving a different name to officially-recognized same-sex relationships places gays and lesbians “outside of the common . . . vocabulary of . . . civic life”<sup>209</sup>—to be sure, it places them in a quasi-nominal space that they know only too well. Indeed, the very way in which some courts have framed the issue of nominal difference, whether same-sex couples must be given “the ‘m’ word,”<sup>210</sup> evokes the language of taboo that was once applied to sodomy, as “the ‘m’ word” locution curiously suggests that it is taboo to use the word “marriage” for same-sex couples, just as it was once taboo to name same-sex intimacy at all.

## 2. Nominal Separation is a Result, By-Product, or Consequence of Homosexuality’s Rhetorical Past

Nominal separation points back to homosexuality’s rhetorical past in the sense that it is, in many ways, a result, by-product, or consequence of it. To better understand how this is so, it is helpful to consider some of the reasons that have been offered by courts and by states in support of a separate nominal status for gay relationships. In particular, it is helpful to return to *Lewis v. Harris*, where the New Jersey Supreme Court offered two reasons in support of its finding that nominal difference was not an issue of constitutional magnitude. Each of those reasons not only points back to the economy of silence that marked homosexuality’s rhetorical past, but does so in such a way that suggests that nominal separation is a result, by-product, or consequence of that silence.

First, the *Lewis* court declared that separate names for gay and straight relationships were constitutional because the name “marriage” referred to the traditional definition of marriage, and the traditional definition of marriage was an opposite-sex one. Specifically, it stated that the definition of marriage as the legally-recognized union of a man and a woman was one “that has reigned for centuries” and that has been “accepted in forty-nine states and in the vast majority of countries in the world.”<sup>211</sup> Moreover, the court continued, it was not “prepared immediately to overthrow the long established definition of marriage”

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209. Respondents’ Supplemental Brief at 25, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

210. See *supra* note 9 and accompanying text.

211. *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006).

and to alter “a social institution of ancient origin,” one whose meaning had been “passed down through the common law into our statutory law”<sup>212</sup>—which is precisely what it thought it would be doing were it to mandate, “by judicial fiat,”<sup>213</sup> that same-sex couples be given the name “marriage” as the official designation of their relationship.

The *Lewis* majority is not alone in advertent to the traditional definition of marriage in support of separate names for officially-recognized gay and straight relationships. The state of California, for instance, made a similar argument to the California Supreme Court in *Marriage Cases*. There, in arguing why reserving a different name for officially-recognized same-sex relationships was constitutionally permissible, the state adverted to the “traditional definition of marriage” as a “union between a man and a woman,” one that has operated “in the overwhelming majority of jurisdictions in the United States and around the world.”<sup>214</sup> Given “the historic and well-established nature” of this definition, the state continued, it was entirely reasonable for the state of California “to reserve the designation of marriage solely for opposite-sex couples.”<sup>215</sup> In other words, in the state’s view, a different *designation* or name for same-sex relationships followed naturally from the traditional, and nearly universal, opposite-sex *definition* of marriage.

Second, the *Lewis* court declared that reserving a separate name, or different language, for officially-recognized same-sex relationships was well within constitutional limits because those relationships were, in its estimation, new. In the court’s words:

New language is developing to describe *new social and familial relationships*, and in time will find its place in our common vocabulary. Through a better understanding of *those new relationships* and acceptance forged in the democratic process, rather than by judicial fiat, the proper labels will take hold. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose . . . .<sup>216</sup>

This second reason offered by the *Lewis* court in support of the constitutionality of a separate nominal status for gay relationships works together with the first reason that it offered, the definitional one, in the following way: Because same-sex relationships were “new,” at least according to *Lewis*, they could not possibly satisfy the “ancient” definition of marriage. Consequently, using a new name, or a new language, to describe them was entirely justified.

The reasons offered by the *Lewis* court and by the state of California to justify why a separate nominal status for officially-recognized gay relationships

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212. *Id.*

213. *Id.* at 223.

214. *In re Marriage Cases*, 183 P.3d 384, 450 (Cal. 2008) (summarizing these arguments).

215. *Id.* at 399, 450.

216. *Lewis*, 908 A.2d at 223 (emphasis added).

is not unconstitutional lead back in many ways to homosexuality's rhetorical past as a nameless crime; indeed, they lead back to that past in such a way that suggests that the former (a separate nominal status) is in some sense a result or by-product of the latter (not being named at all). Looking first at the definitional rationale for nominal separation, if, as *Lewis* and the state of California assert, different names for officially-recognized gay and straight relationships are somehow a consequence of marriage's opposite-sex definition, then they are no less a consequence of homosexuality's rhetorical past as a nameless crime for that very reason. To better understand this causal connection between a separate nominal status for gay relationships and not naming same-sex intimacy at all, consider the following.

Part III provided a survey of the centuries-old theological and legal tradition of not naming, and of not talking about, same-sex intimacy. In light of that tradition, one might argue that it is not at all surprising that the definition of marriage is an opposite-sex one. To be sure, if same-sex intimacy could not be named at all, then how could it possibly make its way *into* language, and, specifically, into a dictionary definition of "marriage"?

The California Supreme Court recognized as much in *Marriage Cases*. There, the court responded to the state's contention that a separate name for same-sex relationships reasonably followed from the opposite-sex definition of marriage by observing that "it is hardly surprising" that the definition of marriage has always been an opposite-sex one, given that homosexuality has long been subject to "disparagement . . . in many cultures."<sup>217</sup> This Article would merely add to that court's observation that it is "hardly surprising" that the definition of marriage has always been an opposite-sex one, given that homosexuality has been not only disparaged, but also negated in language for centuries.

If homosexuality's exclusion from speech, in addition to its criminalization, ensured that the definition of marriage would remain an opposite-sex one, and if marriage's opposite-sex definition is the reason why gay and straight relationships should have separate names, then separate names for those relationships are in some sense a result, by-product, or consequence of homosexuality's nameless rhetorical past. In other words, to justify separate names for gay and straight relationships on the basis of marriage's opposite-sex definition, which both *Lewis* and the state of California did, is to establish a causal connection between separate nomenclature for gays and straights and a history of not naming same-sex intimacy at all.

Turning now to *Lewis*'s second rationale for nominal separation, if, as that court asserts, nominal separation is somehow a consequence of the novelty or 'newness' of same-sex relationships, then it is no less a consequence of homosexuality's rhetorical past for that very reason. The logic behind this causal chain is similar to that of the first: Because same-sex intimacy was negated in

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217. *Marriage Cases*, 183 P.3d at 451.

language for such a long time, same-sex relationships appear to be new. In turn, their apparent newness or novelty justifies why same-sex couples cannot have the name “marriage.” When viewed in this light, separate names for gay and straight relationships are a result or consequence of not naming, and of not talking about, homosexuality at all. That is, if same-sex relationships are “new,” as the *Lewis* court claims, then that is only because, or largely because, an economy of silence surrounded them for centuries. To then justify nominal separation based on the so-called newness of same-sex relationships, as *Lewis* does, is in effect once again to establish a causal connection between separate names for gay and straight relationships and a history of not naming, and of not talking about, same-sex intimacy at all.

That separate names for officially-recognized gay and straight relationships might in some sense be viewed as a result or by-product of homosexuality’s rhetorical past was completely lost on the *Lewis* court. As mentioned above, in finding that a difference in name was not an issue of constitutional magnitude, that court placed significant emphasis on the fact that the opposite-sex definition of marriage was an “ancient” one, a definition “that has reigned for centuries” and that has been “accepted in forty-nine states and in the vast majority of countries in the world.” What that court overlooked, however, was the equally “ancient” tradition of negating same-sex intimacy in language, a tradition that has also “reigned for centuries,” as Part III has shown; a tradition that helps to explain why marriage has long been defined in opposite-sex terms and why same-sex relationships might seem so “new”; and, most important, a tradition *that has in many ways resulted in the state’s refusal to name officially-recognized gay relationships as “marriage.”* Indeed, what *Lewis* overlooks is the fact that a difference in name does matter, or at least should matter, if that difference is somehow the result, by-product, or consequence of a time when same-sex intimacy was subject to a name taboo.

### 3. Nominal Separation Reproduces and Perpetuates the Harmful Effects of Homosexuality’s Rhetorical Past

Nominal separation points back to homosexuality’s rhetorical past because it reproduces, and therefore perpetuates, the four varieties of harm that followed from it, that is, from either (1) not discussing same-sex intimacy at all or (2) referring to it as something so disgusting that it could not, or should not, be named. Those harms, as noted above, are dignitary harm, expressive harm, epistemic harm, and ontic harm. Where section III.C already discussed the way in which homosexuality’s economy of silence either caused or contributed to each of those harms, this subsection will now consider how not extending the lexicon of marriage to same-sex couples curiously reproduces and perpetuates all of them.

#### *a. Dignitary Harm*

First, the creation of a separate nominal status for officially-recognized gay

relationships inflicts dignitary harm on sexual minorities because it conceptualizes officially recognized same-sex relationships in ways that gays and lesbians find to be insulting, demeaning, and humiliating. The plaintiffs in *Lewis*, for instance, argued to the state trial court in that case that “having to use a different language to describe our commitment and our family . . . chips away at our self-esteem and makes us feel like second-class citizens.”<sup>218</sup> This “different language,” they continued, not only “discounts and cheapens”<sup>219</sup> their families, but also constitutes an “assault on [their] dignity”<sup>220</sup> because their partnership is not taken as seriously as it would be if it were called a “marriage.”

Similarly, the plaintiffs in *Kerrigan v. State* argued to the state trial court in that case “that the term civil union” was unconstitutional because it was “offensive and demeaning to them.”<sup>221</sup> The trial court disagreed. In particular, it reasoned that the term “civil union” is “[n]eutral and of relatively recent origin, has no history as an insult or slur, and is properly descriptive of the type of legal institution to which it applies.”<sup>222</sup>

The *Kerrigan* court neglected to realize the following: Whereas the name, “civil union,” might be a new one, the idea that sexual minorities can experience dignitary harm by being excluded from names—whether from any name or from a particular name, like marriage—has a very long history indeed. Homosexuality’s rhetorical tradition inflicted dignitary harm on gays and lesbians because it conceptualized the conduct that would become synonymous with sexual minority status in demeaning, offensive, and disgust-driven ways.<sup>223</sup> Same-sex conduct was something so abhorrent, according to many courts, that it could not even be named, let alone discussed at any length. Today, the law’s use of a separate nominal status inflicts dignitary harm on gays and lesbians because that status is itself perceived as “demeaning” and “offensive.” Language and naming—or the exclusion of same-sex intimacy from both—continue to give offense and demean. Indeed, viewing the recent name issue through the lens of homosexuality’s rhetorical history throws into stark relief precisely why nominal separation is perceived as injurious and even “putrid” by many sexual minorities,<sup>224</sup> namely, because it mimics homosexuality’s old name taboo and reproduces the same sort of dignitary harm that followed from it.

#### *b. Expressive Harm*

Second, the creation of a separate nominal status for officially-recognized gay

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218. Affidavit of Karen Nicholson-McFadden at ¶ 11, *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law Div. Nov. 5, 2003), *aff’d*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005), *aff’d*, 908 A.2d 196 (N.J. 2006).

219. *Id.* ¶ 13.

220. *Id.* ¶ 15.

221. *Kerrigan v. State*, 909 A.2d 89, 98 (Conn. Super. Ct. 2006), *rev’d*, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (summarizing these arguments).

222. *Id.* at 98.

223. *See infra* Part III.

224. *See supra* note 111 and accompanying text.

relationships reproduces the expressive harm that resulted from, or was in one way or another associated with, homosexuality's rhetorical past. More specifically, according to the testimony of several same-sex couple plaintiffs in litigation over the name, a separate nominal status for officially recognized same-sex relationships can inhibit any expression whatsoever about that status. For instance, one plaintiff testified that her mother "*almost never talked . . . about [her daughter's same-sex relationship] because [she] did not know how to describe it*" and because she "*didn't have the right words to explain*" what it meant—that is, because she could not officially refer to her daughter as "married" and to her daughter's partner as a "spouse."<sup>225</sup> Another plaintiff testified that her son neglected to talk with others about her relationship with her same-sex partner "in part because *he had no words to describe*" that partner's status, and specifically because he was unable to say that his mother and her partner were officially "married."<sup>226</sup> To be sure, without the "common vocabulary" of "marriage," advocates have argued, same-sex couples are sometimes at a loss for words when describing to others just what kind of relationship they are in because "[t]here are no civil union analogues to the verb 'to marry' or the adjective 'married.'"<sup>227</sup> As one plaintiff put it, "How can you explain domestic partnership or civil union to a child or even to an older person?"<sup>228</sup>

These plaintiffs' statements call to mind the ancient correlation between "sodomy" and "muteness" or "silence." Now, however, it is no longer an issue of whether one will become "silent" upon committing that conduct, but rather whether one is rendered "silent"—quite literally, at a total loss for words—when trying to express the relationship of two people of the same sex that does not bear the label "marriage." Indeed, now as then, gays and lesbians struggle with, or are confronted by, a language that silences them, or that is linked to silence, in some way. Historically, it was a word that was interpreted to mean mute or silent (Sodom), a language replete with disgust-driven metaphors of silence (unspeakable, unnameable), and/or a language that was itself silent about same-sex intimacy. Today, it is a language that quite literally renders sexual minorities silent and that leaves them at a loss for words (civil union/domestic partnership).

### c. *Epistemic Harm*

Third, the creation of a separate nominal status for officially recognized gay relationships reproduces the same sort of epistemic harm that followed from homosexuality's economy of silence. More specifically, one of the most consis-

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225. See *In re Marriage Cases*, 49 Cal. Rptr. 3d, 675, 760 n.23 (Ct. App. 2006) (Kline, J., concurring and dissenting) (emphasis added) (summarizing these statements), *rev'd*, 183 P.3d 384 (Cal. 2008).

226. See Respondents' Opening Brief on the Merits at 15, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

227. Brief of the Plaintiffs-Appellants at 18, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. 17716).

228. See *Marriage Cases*, 49 Cal. Rptr. 3d at 761 n.23 (Klein, J., concurring and dissenting).

tent themes that runs throughout plaintiffs' and advocates' arguments in favor of extending the name "marriage" to same-sex couples is that of acknowledgement and recognition, and, in particular, of the extent to which the language of marriage, unlike any other language, provides both of those things. For instance, plaintiffs in California testified that their respective families refused "to *acknowledge*" their relationship as legally registered "domestic partners" precisely because that relationship was not called "marriage," and that they desired the name marriage "so that others [would] *recognize*" their relationship.<sup>229</sup>

Similarly, the New Jersey Civil Union Review Commission, which was established in 2007 to evaluate the effectiveness of that state's civil union status for same-sex couples, issued a report earlier last year that stated that "civil unions" were a "second-class status," in its view, because they lack the "universal recognition" that the word "marriage" provides.<sup>230</sup> The report highlighted the statements of one woman, who testified before the Commission that "[w]hen you tell your employer or union you are married, *there's something about that word that makes them recognize your relationship* in a way they don't recognize it when you tell them you are [sic] civil union."<sup>231</sup> Employers and unions, she continued, have "respect for the word marriage" because it is "something they understand."<sup>232</sup>

Thus, the exclusion of same-sex intimacy from speech, or from a certain kind of speech, can cause epistemic harm. In the past, not naming, and not talking about, homosexuality inflicted epistemic harm on gays and lesbians because it rendered same-sex intimacy less recognized and less understood (recall Wolfenden's statement that "[m]ost ordinary people had never heard of homosexuality" because it was so rarely "mentioned,"<sup>233</sup> as well as Boswell's remarks that homosexuality was "vague" and "unexamined" because it "could not, until the last few decades, be named or discussed"<sup>234</sup>). Today, not naming same-sex relationships *in a particular way* does much the same. That is, when the state refuses to extend the lexicon of marriage to same-sex couples, it inflicts epistemic harm on gays and lesbians because it fails to give their relationships the one name that, in their view, others will recognize, acknowledge, and understand.<sup>235</sup>

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229. Respondents' Opening Brief on the Merits at 15, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (emphasis added).

230. See NEW JERSEY CIVIL UNION REVIEW COMMISSION, FIRST INTERIM REPORT 10 (2008), available at <http://www.NJCivilRights.org/curc>.

231. *Id.* at 8 (emphasis added).

232. *Id.*

233. See WOLFENDEN, *supra* note 196, at 132.

234. BOSWELL, SAME-SEX UNIONS, *supra* note 63, at xxiv.

235. Judith Butler has described this epistemic problem as one of "intelligibility." In particular, she has noted that "marriage" is "the current episteme of intelligibility" among all other family forms. JUDITH BUTLER, *Is Kinship Always Already Heterosexual?*, in UNDOING GENDER 102, 113–14 (2004).

*d. Ontic Harm*

Fourth and last, the creation of a separate nominal status for officially recognized same-sex relationships reproduces and perpetuates the ontic harm associated with homosexuality's rhetorical past because that status makes same-sex relationships seem less real, both to same-sex couples and to their families, than they would otherwise be with the name "marriage."<sup>236</sup> For instance, several plaintiffs in litigation over the name have testified that, in their view, their same-sex relationships are "not real" in both "the eyes of the law and of much of society" without the name of "marriage."<sup>237</sup> The official language of marriage, they argue, transforms a "pretend" marriage into a real marriage.<sup>238</sup> Their families, it seems, feel much the same way. The son of one plaintiff, for example, testified that his mother's domestic partnership would not be "the real thing until" it became a marriage.<sup>239</sup> The mother of another plaintiff testified that she would not feel that her daughter's same-sex partner was "truly" her daughter-in-law until she and her daughter were "married."<sup>240</sup>

In the wake of receiving the right "to marry" (and not just the substance of marriage) six years ago in Massachusetts, many gays and lesbians from that state have echoed these sentiments. A participant in one study on the effects of same-sex marriage on the understanding of same-sex relationships, for instance, stated:

I've considered myself to be in a committed relationship for a long time. But, *there is something to the word marriage that makes it feel more real . . . even to me.* That word, marriage, makes it mean something different because it makes it a more concrete thing to be in this relationship.<sup>241</sup>

Other participants stated that "[g]etting 'married' . . . . *makes our love seem more real, even to us,*"<sup>242</sup> and that "marriage" turned what was "parody" or

236. On the power of "marriage" to make relationships more "real," see *id.* at 114 (stating that excluding same-sex couples from legitimate familial forms like marriage can cultivate a "sense of delegitimation [that] can make it harder to sustain a bond, a bond that *is not real* anyway, a bond *that does not 'exist,' that never had a chance to exist, that was never meant to exist.* If you're not real, it can be hard to sustain yourselves over time." (emphasis added)). However, Butler also questions whether "there [are] not other ways of feeling possible, intelligible, *even real*, apart from the sphere of state recognition." *Id.* (emphasis added).

237. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 761 n.23 (Cal. Ct. App. 2006) (Kline, J., concurring and dissenting) (summarizing these statements), *rev'd*, 183 P.3d 384 (Cal. 2008).

238. Affidavit of Karen Nicholson-McFadden at ¶ 14, *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law Div. Nov. 5, 2003), *aff'd*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 908 A.2d 196 (N.J. 2006).

239. *Marriage Cases*, 49 Cal. Rptr. 3d at 961 n.23.

240. *Id.*

241. Pamela J. Lannutti, *The Influence of Same-Sex Marriage on the Understanding of Same-Sex Relationships*, 53 J. HOMOSEXUALITY 135, 142 (2007) (emphasis added) (internal quotation marks omitted).

242. *Id.* (emphasis added).

“pretend” into something “real.”<sup>243</sup> Based on these remarks and others like them, the author of the above-mentioned study concluded that one of the principal benefits of “marriage” for same-sex couples, as opposed to differently named relational forms, is its ability to make “existing [same-sex] relationships seem more real” both to the world and to those in them.<sup>244</sup>

If it is the word “marriage” rather than the benefits that flow from that relationship that makes same-sex relationships feel “more real,” both to those in them and to the world at large, then it follows that gays and lesbians suffer ontic harm when their relationships are denied that language. Now as then, same-sex intimacy’s exclusion from speech, or from a certain kind of speech, throws into doubt not only the legitimacy of that intimacy, but also its very existence. If same-sex intimacy was rendered unreal by the economy of silence and by the tradition of unnamings that long surrounded it, then it only continues to remain so today by the state’s refusal to extend the language of “marriage” to it.

#### B. NOMINAL SEPARATION IS UNEQUAL

As mentioned in Part II, some advocates in litigation over the constitutionality of nominal difference have argued that a separate nominal status for officially recognized gay relationships will never be equal, even if that status is equal in all substantive respects to marriage, because it will always be “both a remnant and a reaffirmation of the unequal, outsider status that lesbians and gay people have experienced as a historically disfavored minority.”<sup>245</sup> More specifically, these advocates have contended that a separate nominal status will always be a “badge of inferiority” for gays and lesbians because it will not only reflect, but also reaffirm the legal discrimination to which that class has been subjected for decades under United States law, in areas as varied as immigration, the military, and employment.

What these advocates have so far overlooked is the best reason why a separate nomenclature for officially recognized same-sex relationships will never be equal, namely, because it will always reflect (1) the speech or name taboo that has surrounded homosexuality for centuries, both in the law and far beyond it; (2) the disgust or repugnance that gave rise to that taboo; and (3) the harmful effects that followed from it. Or, to echo advocates’ framing of the argument, separate nomenclature is “both a remnant and a reaffirmation” of the non-nominative, or quasi-nominative, “status that lesbians and gay people have experienced” since at least the later Christian period, a time when “lesbians and gay people” were known not as “lesbians and gay people” at all, but rather

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243. *Id.*

244. *Id.* at 140; see also Pamela J. Lannutti, *For Better or Worse: Exploring the Meanings of Same-Sex Marriage Within the Lesbian, Gay, Bisexual and Transgendered Community*, 22 J. OF SOC. & PERS. RELATIONSHIPS 5, 10 (2005) (summarizing a study that found that same-sex marriage was viewed by the gay community “as a means for same-sex partnerships to become more serious,” but also “more fanciful”).

245. *Supra* note 106 and accompanying text.

merely by reference to a set of acts—acts that were uniquely unmentionable because they were perceived as being uniquely repulsive.

Separate nomenclature points back in any number of ways to the speech or name taboo that has long been an integral feature of sodomy and homosexuality's theological and legal representation. Separate nomenclature is, in the most general sense, *reminiscent of* homosexuality's rhetorical past because it deals with names and with sexual minorities' exclusion from them, and therefore evokes a time when sodomy, the conduct by which gays and lesbians have traditionally been identified, was viewed as so repugnant and unnatural that it (1) could not be talked about at all, (2) was cast in tropes of silence and negation, and/or (3) was even regarded as a grammatical defect or "solecism." Moreover, separate nomenclature is, in a more specific sense, the *result* or consequence of homosexuality's rhetorical past because it was the disgust-driven exclusion of same-sex intimacy/homosexuality from language that has arguably led, at least in part, to a separate nominal status for same-sex relationships. If same-sex intimacy had not been negated for such a long time in language, and viewed at most as an "abominable sin . . . not to be named,"<sup>246</sup> then perhaps same-sex relationships would not seem so "new" and so undeserving of the "ancient" lexicon of "marriage." Finally, separate nomenclature *reproduces and therefore perpetuates the harms* that followed from homosexuality's rhetorical past because it injures gays and lesbians on a dignitary, expressive, epistemic, and ontic level, all of which recall (1) the harms that flowed from homosexuality's rhetorical tradition and (2) the disgust that gave rise to that tradition in the first place.

In all of these ways, and for all of these reasons, separate nomenclature is "both a remnant and a reaffirmation" of homosexuality's outsider status vis-à-vis language and naming. As such, it will never be equal, and will therefore never cure or remedy the constitutional violation of excluding same-sex couples from the institution of marriage, as some states have argued. Indeed, when a state, like New Jersey, maintains separate names for same-sex relationships that seek the imprimatur of the state, it places that same imprimatur on a centuries-old speech taboo that most people would agree should play no role whatsoever, not even a residual one, in American law.

If this last point warrants clarification, or if some people would argue that it is perfectly appropriate to exclude sexual minorities from *a* name given that they have been subjected to *a name taboo* for such a long time, consider the following. In a narrow sense, *Lawrence v. Texas*,<sup>247</sup> which overruled *Bowers v. Hardwick*,<sup>248</sup> stands for the proposition that the state may no longer criminalize same-sex relations that take place between two adults in private. In a more

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246. COKE, *supra* note 163.

247. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas' criminal sodomy prohibition and overruling *Bowers v. Hardwick*).

248. 478 U.S. 186 (1986).

general sense, however, that case also stands for the proposition that the state may no longer use the law to treat gays and lesbians in demeaning ways because of the conduct in which they actually or presumptively engage. Under this more general reading of that landmark case, the *Lawrence* Court rejected not only criminal sodomy laws, but also the demeaning rhetoric that was once deployed to justify them—deployed as late as 1986, when then Chief Justice Burger used such rhetoric in a not-just-rhetorical-sense in his *Bowers* concurrence to argue that criminal sodomy laws were by no means unconstitutional if sodomy had always been a “crime not fit to be named.”<sup>249</sup>

Under this more expansive reading of *Lawrence*, the demeaning rhetoric that once supported criminal sodomy statutes should play no more a role in the law than do those statutes themselves. Given that laws that maintain a separate nominal status for officially-recognized same-sex relationships point back in any number of ways to that demeaning rhetoric, such laws fail to cure the constitutional violation of excluding same-sex couples from marriage. They are not only the remnant of a harmful and disgust-driven way of talking about homosexuality, but also a reproduction and reaffirmation of it.

#### CONCLUSION

In their brief to the California Supreme Court, the *Marriage Cases* plaintiffs argued that “domestic partnership” status “does not cure the constitutional violations caused by barring same-sex couples from marriage” in part because the name, “domestic partnership,” is a separate nominal status that is inherently unequal.<sup>250</sup> “It is no more acceptable for the State of California to assign a separate family status to lesbian and gay people,” they contended, “than it would be for the State to do so for any other minority group.”<sup>251</sup> To illustrate the problems with the state’s desired approach, the plaintiffs went on to argue that “if the State were to determine that Catholics, or those of Chinese descent, or left-handed people were eligible only for domestic partnership, while everyone else remained eligible to marry, the constitutional defect would be unmistakable. It is no less obvious here.”<sup>252</sup>

The separate-but-equal argument is compelling and carries a certain rhetorical force. Nevertheless, the plaintiffs overlooked an invaluable opportunity to argue why names and nominal difference were issues of especial importance to

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249. While one might argue that when *Lawrence* overruled *Bowers* it also “overruled” the tradition of reticence and unnameability reflected in the case, some commentators have suggested to the contrary that *Lawrence* is itself marked by reticence. See, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 29 (2003) (calling *Lawrence* a “remarkably opaque” decision). See generally Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75 (2003); Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

250. Respondents’ Opening Brief on the Merits at 18, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

251. *Id.* at 22.

252. *Id.*

gays and lesbians specifically when they adverted to “other minority groups”—Catholics, the Chinese, left-handed people—in order to throw into relief the “unmistakable” problems with nominal difference. Plaintiffs and their advocates need not look beyond the class that is most immediately affected by nominal separation, sexual minorities, to argue why that separation is problematic, constitutionally as well as morally.

Sexual minorities have long struggled with issues pertaining to names and to naming. This Article has brought into focus just one of those struggles, albeit a significant one, in order to show more precisely why separate nomenclature will never be equal. Indeed, there are any number of name-related issues that gays and lesbians have had to face throughout history, some more recent and others less so. One need only think here of the naming of homosexuality in the nineteenth century, and of the disease or pathology that that name connoted until just recently;<sup>253</sup> or of sexual minorities’ struggles with other derogatory names; or of the question of what to name the class at issue itself.<sup>254</sup> It goes without saying that issues of names, language, words, and vocabulary—in short, issues of representation—have always confronted gays and lesbians, and that the new name issue is but the most recent iteration of this phenomenon.<sup>255</sup> When Alan of Lille compared same-sex sex to a grammatical mistake or defect in the twelfth century, he was merely putting a unique spin on a tradition that far preceded him—and, if the recent name issue is any indication, one that would long outlive him as well.

Among those many name-related issues, the focus here is on the speech or name taboo that long surrounded same-sex conduct in legal and non-legal discourse alike because the historic name taboo best explains (1) how or why the new name issue even arose in the first place and (2) how or why nominal separation harms or injures gays and lesbians, something which has eluded those jurists and commentators who have found it difficult to understand how *giving* gays and lesbians substantive equality in the form of “civil union” or “domestic partnership” status constitutes a form of harm or discrimination. To be sure, the old name taboo that surrounded sodomy is replaying itself or resurfacing in any number of fascinating ways today, in the form of what is effectively becoming a new name taboo surrounding same-sex marriage—or “the ‘m’ word,” according to some jurists’ rather telling locution. Where historically it was sodomy/same-sex intimacy that eluded naming, today it is

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253. See, e.g., Jami Weinstein & Toby DeMarco, *Challenging Dissent: The Ontology and Logic of Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 423, 443 (2004) (“[T]he very word homosexual became linked to the pathologization of it insofar as the term was invented and the species was born under the guise of essentializing a class of people thought to be deviant.”). It was not until 1973 that the American Psychiatric Association removed “homosexuality” as a listed medical condition from the Diagnostic and Statistical Manual II. See Yoshino, *Covering*, *supra* note 206, at 805.

254. The issue, that is, of whether the class should be “named” LGBT, GLBT, LGB, etc.

255. See, e.g., DEBORAH CAMERON & DON KULICK, LANGUAGE AND SEXUALITY 12 (2003) (“Language, arguably the most powerful definitional/representational medium available to humans, shapes our understanding of what we are doing (and of what we *should* be doing) when we do sex or sexuality.”).

same-sex “marriage.” While the character of that taboo has changed over time, the salient point here is that being excluded from names and from speech, and being harmed by that exclusion, has been an integral part of gays’ and lesbians’ lived experience both in the law and outside of it for quite some time. Which is why, then, it is odd that advocates for nominal equality have neglected to place the new name issue in the historical context that seems most naturally suited to it, focused as they are instead on viewing it exclusively through a race-based civil rights lens.

To closely examine the connection between these two name taboos and their harmful effect is to lay the groundwork for developing a more persuasive argument for why separate nomenclature will never be equal, an argument that takes an analogy grounded in race and race discrimination and supplements it with a history that is unique to homosexuality—and, therefore, to the class for whom nominal difference is most injurious. Beyond its strategic usefulness, however, this Article has provided an occasion to witness the power that the past has on the present, the former of which continues to influence the latter in both direct and indirect ways despite our belief that we have moved well past it. As C.S. Lewis once said, “Humanity does not pass through phases as a train passes through stations: being alive, it has the privilege of always moving yet never leaving anything behind.”<sup>256</sup> Here, that thing that has been “left behind” is a very old way of talking about homosexuality (or not, as it were), one that the legal community has so far overlooked because of its deceptively new dress.

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256. C.S. LEWIS, *ALLEGORY OF LOVE: A STUDY IN MEDIEVAL TRADITION* 1 (1936).