

# THE RHETORIC OF SAME-SEX RELATIONSHIPS

By Carrie Sperling\*

So far, my legal career has spanned just over two decades. But those two decades have been perhaps the most exciting decades in the development of legal rights for gay and lesbian citizens. In reflecting on these past two decades, I will turn my focus to language – how it shapes our struggles and enshrines our victories. The stories we craft as civil rights lawyers and activists have changed the legal landscape. Hopefully, my essay will convince other lawyers that advocacy centers on language, story, and metaphor – that through our language, we move people to see another way, to look beyond the stereotypes and consider homosexuals as human beings who share common ancestry and who often share common values. My story begins with *Bowers v. Hardwick* and ends with *Diaz v. Brewer* – a case in which I am currently a plaintiff.

Along the way, I hope to offer a different perspective – one seated in the work I do, as well as the life I live. My legal career has been tied, in one way or another, to bringing justice to groups often ignored or mistreated by our legal system. I began by working with the ACLU, then representing inmates on death row, and finally representing wrongly convicted prisoners. I also teach legal writing to law students. I focus on telling stories, using words to convey difficult principles, and using what we know about human psychology to craft language that persuades. Finally, I am a lesbian. Although I do not consider myself an expert in the field often described as sexual orientation and the law, I am certainly an interested, and self-interested, observer.

In this essay, I don't attempt to convey an exhaustive analysis of the case law regarding sexual orientation and claims of discrimination. Instead, I have selected a few cases to illustrate a narrow point – that the way we frame our lives and our relationships, the language we use to litigate our cases and to advance our cause in the public sphere, changes the legal rights we enjoy. A lawyer's craft is language, and his or her words can transform issues and change the way we perceive legal concepts and claimants.

We see the power of words to reframe issues in our everyday lives. A change in words recasts the rich as “job creators,” so that raising taxes on top earners would logically destroy jobs.<sup>1</sup> People residing in this country without proper documents are labeled “illegals” – creating an illusion that they are engaging in criminal activities just by their very being.<sup>2</sup> Of

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<sup>1</sup> Robert Frank, *Tech Millionaire: 'The Rich Aren't Job Creators,'* WALL ST. J. BLOG (Dec. 1, 2011, 2:52 PM), <http://blogs.wsj.com/wealth/2011/12/01/tech-millionaire-the-rich-arent-job-creators/>.

<sup>2</sup> E.J. Montini, *Arpaio's Toughest Opponent: Himself,* ARIZ. REPUBLIC, Jan. 20, 2012, at B1 (quoting Maricopa County Sheriff Joe Arpaio, “President Obama and a band of his merry men might as well erect their own pink neon sign at the Arizona-Mexico border saying welcome all illegals to the U.S., our home is your home”).

course, this relabeling provides justification to round them up and confine them to prison. It also justifies endless detention of people who have committed a mere civil offense. We have not labeled people who commit other, more politically correct transgressions of the law – like speeding or littering – as “illegals.” In those circumstances we don’t define the entire person by the transgression, and, therefore, we tend to treat these people in a more humane way. A simple change in words can transform our outlook and can change our behaviors, often in ways we don’t notice and might never consciously choose to endorse.<sup>3</sup>

In the civil rights context, our words heal, normalize, shift the debate, frame issues anew, and sometimes even cause disgust. Much of this happens outside our intentions and without our planning it, but it has profound effects on the legal rights we enjoy.

This Essay will focus on a few cases that lend insight to the way language framed the issues or predicted the outcomes. I hope to convince you that equal rights are gained not simply through carefully crafted legal arguments, but also through effective use of language. Language plays a powerful role in lifting us up, humanizing us, motivating us toward greater aspirations, and creating a context that transforms our lives. More specifically, this essay explores two of the most powerful tools of persuasion – metaphors and stories<sup>4</sup> – and their use in cases that have affected the rights of gays and lesbians for nearly three decades.

### **I. *Bowers v. Hardwick*: Did a sodomy metaphor impede gay rights for almost two decades?**

Writers use metaphors to describe difficult or unfamiliar concepts. A metaphor transfers characteristics from objects that are familiar to those that are not, and in so doing, creates a comparison or analogy that might not have been apparent before. Therefore, a metaphor is not merely a way to see or to say, it is a way to think and to know.<sup>5</sup> In this way, metaphors are persuasive because they can frame our conception of an abstract concept by superimposing the properties of a dissimilar concept that is easier to comprehend.<sup>6</sup> Metaphors are effective because they often operate outside our conscious awareness.<sup>7</sup>

History has given us proof of metaphor’s power, and courts have grappled with persistent metaphors that arguably subvert legal reasoning. For example, the Supreme Court’s use of Thomas Jefferson’s metaphor – that the First Amendment erected a *wall of*

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<sup>3</sup> See, e.g., Carrie Sperling, Priming Legal Negotiations through Written Demands, 60 CATH. U. L. REV. 107, 131 (2010) (citing a priming study by John A. Bargh et al., Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996)) (“When a person’s recent perceptions incidentally and unknowingly influence his behavior, his behavior has been “primed.” For instance, when people play a word game that contains terms “relevant to the elderly,” like grey, old, wrinkle, and Florida, they walk more slowly after finishing the word game than people who played a word game with “age non-specific words” like birds, tree, and book. Unbeknownst to the players with the first set of words, they were primed to conjure the “elderly” stereotype. By unconsciously priming this stereotype, the players behaved more like their perception of the stereotype, that is, they walked more slowly.”).

<sup>4</sup> See Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey, 29 SEATTLE U. L. REV. 767, 769 (2006).

<sup>5</sup> Linda L. Berger, What Is the Sound of a Corporation Thinking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law, 2 J. ASS’N LEGAL WRITING DIRECTORS 169, 170 (2004).

<sup>6</sup> Id. at 169.

<sup>7</sup> Id. at 176 (citing George Lakoff and Mark Johnson, Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought 47 (1999)).

*separation* between church and state – long went unquestioned.<sup>8</sup> Only in recent First Amendment jurisprudence<sup>9</sup> have the Justices begun to argue that the Framers may not have intended to separate the two entities in such an absolute way. Justice Harlan crafted the metaphor in *Plessy v. Ferguson* that “our Constitution is color-blind.”<sup>10</sup> This principle, that the Constitution cannot see differences in color and that the color of one’s skin must be irrelevant to any constitutional claim, was indeed seen as dangerous by Justice Brennan in *University of California Regents v. Bakke*, despite its frequent use in court opinions.<sup>11</sup> More recently, the Supreme Court used metaphors of corporations as people and money as speech to overturn more than a century of campaign finance law in *Citizens United v. Federal Elections Commission*.<sup>12</sup>

Social cognitive psychologists have confirmed the power of metaphor. Although metaphors are perhaps seen as an ornamental figure of speech, social cognitive theory has demonstrated that metaphors are a cognitive tool or mechanism that people use to understand abstract concepts.<sup>13</sup> More than simply a linguistic device that compares dissimilar things, metaphor’s power to shape our thoughts and feelings stays with us even when the metaphor is not expressly stated.<sup>14</sup>

Humans seem powerless to ignore the imprint of the metaphor. For example, we often describe generous and caring people metaphorically without even realizing we are doing so. They are warm instead of cold. Researchers have demonstrated that simply invoking a sense of warmth affects people’s perceptions of others.<sup>15</sup> One study showed that when participants simply hold a warm beverage (as opposed to a cold beverage), they rate themselves as being emotionally closer to their friends and family.<sup>16</sup> Building on the personal warmth metaphor, another study asked participants to recall a time when they were socially excluded and then asked them to guess the room temperature. Participants who recalled social exclusion guessed the temperature at an average of five degrees colder than a control group even though the room temperature was the same for both groups.<sup>17</sup>

These findings from social cognitive theory demonstrate that metaphors actually shape how people conceptualize the world. And the power of the metaphor to shape our perceptions extends beyond the written or spoken word. We actually *feel* colder when we

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<sup>8</sup> See Marci A. Hamilton, “Separation”: From Epithet to Constitutional Norm, 88 VA. L. REV. 1433, 1433-34 (2002).

<sup>9</sup> See generally, *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>10</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>11</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (“Against this background [of slavery and segregation], claims that law must be “color-blind” or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities.”).

<sup>12</sup> 130 S. Ct. 876 (2010). Unlike other metaphors courts have used to frame legal principles, this metaphor has been uncovered and attacked as inappropriate by the media, academics, and the general public. See, e.g., *The Word – Let Freedom Ka-Ching*, COLBERTNATION.COM (Sept. 15, 2009), <http://www.colbertnation.com/the-colbert-report-videos/249055/september-15-2009/the-word---let-freedom-ka-ching> (Stephen Colbert satirized the metaphors in the case on his show *The Colbert Report*.); Hayley Benham- Archdeacon, *People Speak Out Against Citizens United*, SANJOSEINSIDE.COM (Jan. 20, 2012), [http://www.sanjoseinside.com/news/entries/1\\_20\\_12\\_citizens\\_united\\_supreme\\_court\\_protest\\_san\\_jose/](http://www.sanjoseinside.com/news/entries/1_20_12_citizens_united_supreme_court_protest_san_jose/).

<sup>13</sup> Mark J. Landau, *A Metaphor-Enriched Social Cognition*, 136 PSYCHOL. BULL. 1045, 1046 (2010).

<sup>14</sup> *Id.* at 1049.

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

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

<sup>17</sup> *Id.* at 1050.

think of social exclusion. We view people as more caring when we can *feel* warmth. We attribute more piety to people whose photographs are *exalted* into a higher versus a lower vertical presentation.<sup>18</sup>

Metaphors also figure prominently in our language of morality, and those metaphors are closely tied with concepts of physical cleanliness.<sup>19</sup> A *disgusting* act can *soil* one's reputation. One can have a *dirty* mind. We *wash* our hands of morally reprehensible acts. Our acts may be *cleansed* through a particular act of contrition. Researchers have shown that, like other metaphors, exposure to concepts related to cleanliness influences people's moral attitudes and the strength of their judgments.<sup>20</sup> For example, when exposed to bad smells, people judge others' behaviors to be more morally repugnant.<sup>21</sup> On the other hand, participants who washed their hands before making a moral judgment delivered a less severe judgment of the person in the moral dilemma.<sup>22</sup>

People have long used metaphors to describe the act of sodomy, or "the heinous act not fit to be named."<sup>23</sup> These metaphors often draw attention to the perceived unnaturalness or uncleanness of the act.<sup>24</sup> The word sodomy, itself, comes from scripture – a biblical story in which God punishes the people of Sodom and Gomorrah after the men of the city threatened to rape Lot's male visitors.<sup>25</sup> As in the story of Sodom and Gomorrah, sodomy metaphors frequently pit one person or group of people as the aggressor against another person or group, the victim.<sup>26</sup> Sodomy metaphors also frame the act as one of aggression – as if only one party to the act could have consented to it.

Curiously, Laurence Tribe and others used that metaphor when they argued before the Supreme Court on behalf of Michael Hardwick in *Bowers v. Hardwick*.<sup>27</sup> Hardwick had been arrested under Georgia's sodomy statute for committing sodomy with another man in his own bedroom.<sup>28</sup> He and the other man were discovered when police entered his home to serve a warrant.<sup>29</sup> Georgia's sodomy statute prohibited sodomy practiced between

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<sup>18</sup> *Id.* at 1048-49.

<sup>19</sup> *Id.* at 1051.

<sup>20</sup> Simone Schnall, et al., *Disgust as Embodied Moral Judgment*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1096, 1101 (2008).

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

<sup>22</sup> Landau, *supra* note 13, at 1051.

<sup>23</sup> Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1894 (2004) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring)).

<sup>24</sup> For example, sodomy is often referred to as a "crime against nature." See, e.g., Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1469 (2004) (citing a Texas statute prohibiting sodomy).

<sup>25</sup> Genesis 19.

<sup>26</sup> For example, you can purchase a bumper sticker from a conservative website that reads, "Bend Over. Here It Comes." The "O" in the "Over" is the trademark "O" from Obama's 2008 campaign. The message seems to be that Obama's policies are metaphorically raping the citizens of the United States. CONSERVATIVEBUYS.COM, <http://conservativebuys.com/cgi-bin/shop/shop/bumperstickers.tshirtcrusade-336788647+bend-over-sticker-bumper-10-pk.html>.

<sup>27</sup> See generally Brief for Respondent, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) 1986 WL 720442. In law school, I remember the constant jokes about the plaintiff's name and its unfortunate relationship to his constitutional claim. Of course, having a hard wick metaphorically expresses the physical condition of a male being ready for or engaging in the act of sex with an erect penis. Just the mention of the case name would elicit subdued laughter from a class of first-year constitutional law students.

<sup>28</sup> DAVID A.J. RICHARDS, *The Sodomy Cases: Bowers V. Hardwick and Lawrence V. Texas* 77-78 (2009).

<sup>29</sup> *Id.* at 78.

consenting adults, no matter their sex, even in the privacy of their own homes.<sup>30</sup> Hardwick challenged the law, claiming that the statute violated citizens' fundamental right to privacy.<sup>31</sup>

Linda Edwards uncovered a pervasive sodomy metaphor running throughout Hardwick's Supreme Court brief in her article *Once Upon a Time in Law: Myth, Metaphor, and Authority*.<sup>32</sup> Her article focuses on the narrative captured in the brief – a rescue myth in which a precious right to consensual sex between adults in the privacy of their own homes was being threatened by the State of Georgia.<sup>33</sup> Edwards compares the myth told in the *Bowers v. Hardwick* brief to the great biblical rescue myths of the baby Moses and the baby Jesus.<sup>34</sup>

Edwards describes the narrative as part of a “masterful brief” that “very nearly won this difficult case.”<sup>35</sup> But the brief failed, Hardwick's conviction remained, and the State's ability to criminalize private, consensual sodomy remained the law of the land until *Lawrence v. Texas* in 2003.<sup>36</sup> Experts have advanced many different arguments to explain why the *Bowers* Court split five to four in favor of upholding Georgia's criminal statute.<sup>37</sup> The case was winnable, it seems. In addition to the five to four split, Justice Powell later expressed that he probably made a mistake by siding with the majority in *Bowers*.<sup>38</sup> In fact, he later explained that “[w]hen [he] had the opportunity to reread the opinions a few months later, [he] thought the dissent had the better of the arguments.”<sup>39</sup> Of course, that's exactly what makes metaphors so powerful. It targets our intuitive, fast-thinking cognition and does so outside the awareness of our rational, skeptical cognition.<sup>40</sup> It causes us to go with our gut instinct rather than to sift through the evidence carefully.<sup>41</sup>

Amazingly, just 17 years after the *Bowers* decision, the Court directly overruled itself in an opinion that could be seen as placing the *Bowers* decision in the same category as *Plessy v. Ferguson*<sup>42</sup> – wrong from the start.<sup>43</sup> Lawrence Tribe later attributed the loss, at least in

<sup>30</sup> Brief for Respondent, *supra* note 27, at 1-2.

<sup>31</sup> *Id.* at 5.

<sup>32</sup> Linda H. Edwards, *Once Upon A Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 901 (2010).

<sup>33</sup> *Id.* at 902.

<sup>34</sup> *Id.* at 903.

<sup>35</sup> *Id.* at 907.

<sup>36</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>37</sup> See generally Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464 (2004).

<sup>38</sup> Edwards, *supra* note 32, at 907. Justice Powell originally voted to affirm the lower court's decision – rendering the Georgia statute unconstitutional. His deliberation in *Bowers* seemed deeply conflicted. He supported the Court's earlier privacy decision in *Roe v. Wade*, and he believed that punishing the kind of consensual act in which Hardwick engaged, in his own home, with a felony conviction would be cruel and unusual punishment. But Justice Powell had a Mormon law clerk, Michael Mosman, who strongly advocated overturning the lower court's decision. He argued that if the Court were to strike down the Georgia statute, it would “open the doors to unchecked sexual freedom.” RICHARDS, *supra* note 28, at 85. Justice Powell had another law clerk at the time, Cabell Chinnis, who urged him to affirm the lower court's decision. Chinnis, a gay man, did not disclose his sexual orientation to Justice Powell during his clerkship, and Powell was ultimately persuaded to vote in favor of upholding the Georgia sodomy statute. *Id.* at 88-92.

<sup>39</sup> *Id.* at 104.

<sup>40</sup> For a more extensive discussion of intuitive processing and more skeptical, rational processing, see generally DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).

<sup>41</sup> See generally *id.*

<sup>42</sup> 163 U.S. 537 (1896).

part, to the Court's singular focus on the *act* of sodomy rather than the private intimate relationships between homosexual and heterosexual couples.<sup>44</sup> However, the *Hardwick* brief brought this into focus, drawing attention to *the act* by incorporating a sodomy metaphor throughout. As Edwards points out, in developing the brief's rescue myth, the brief brought the State of Georgia to life.<sup>45</sup> Georgia became an actor with human attributes who, by enforcing this heinous law, was literally sodomizing the citizens of Georgia.<sup>46</sup> But the State of Georgia was not involved in a consensual act. "[U]nlike the lovers in the case, the State's act is violent and nonconsensual."<sup>47</sup>

As Edwards masterfully illuminates, the sodomy metaphor plays a role throughout the brief.<sup>48</sup> From the beginning, the brief defines the issue for the Court as such: "whether a state must have a substantial justification when *it reaches that far into so private a realm*."<sup>49</sup> The brief describes the State's desire to "*invade . . . the zone of privacy*,"<sup>50</sup> and the law against sodomy as "a law that *so thoroughly invades individuals' most intimate affairs*."<sup>51</sup> Tribe argues that the Constitution requires the state to "give especially substantial justification to the *individual whose personal dwelling it would enter* in order to control,"<sup>52</sup> while framing the State's position as one where it "may *extend the arm of the criminal law into 'the most intimate' of human relationships*"<sup>53</sup> or "*extend its criminal authority deep inside the private home*."<sup>54</sup>

Like any metaphor, the sodomy metaphor running throughout the *Hardwick* brief most likely evoked an implicit response from the members of the Court. The Court was being asked to protect a fundamental liberty – the liberty to engage in the act of sodomy. But the *Hardwick* brief portrayed the act of sodomy, through the use of metaphor, as violent, non-consensual, and repulsive – an act, the reader might be reminded, that sacred scripture condemns. Never mind that the brief portrayed the State of Georgia as the aggressor, the metaphor most likely evoked a response of disgust from the Justices on the Court.<sup>55</sup> Much like a research participant asked to judge someone's moral culpability after being exposed to an unpleasant odor, the Justices were more likely to make more severe moral judgments about *Hardwick's* act and, therefore, more willing to uphold the ban on sodomy.<sup>56</sup>

When the Supreme Court accepted the invitation to once again rule on a state statute criminalizing sodomy – this time only sodomy between homosexual participants – it was not

<sup>43</sup> Tribe, *supra* note 23, at 1914; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today.>").

<sup>44</sup> *Id.* at 1901.

<sup>45</sup> Edwards, *supra* note 32, at 901.

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

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

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

<sup>49</sup> Brief for Respondent, *supra* note 27, at 5.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 9.

<sup>53</sup> *Id.* at 9.

<sup>54</sup> *Id.* at 14.

<sup>55</sup> See, e.g., John A. Terrizzi, Jr., et al., Disgust: A Predictor of Social Conservatism and Prejudicial Attitudes Toward Homosexuals, 49 *PERSONALITY & INDIVIDUAL DIFFERENCES* 587 (2010).

<sup>56</sup> *Id.* In fact, Justice White's majority opinion has been criticized as an "intellectual hit-and-run incident" by his biographer, Denis J. Hutchinson, and Chief Justice Burger's concurrence as "rhetorically shrill," noting his citation with approval of the historical fact that homosexuals were once put to death for engaging in acts of sodomy. RICHARDS, *supra* note 28, at 93, 98.

asked to focus on the act itself, but on the relationships that the State of Texas sought to criminalize.<sup>57</sup> Nor was the Court primed by an allusion to a violent, non-consensual act. Instead, John Lawrence and Tyrone Garner's Petition for Certiorari made sure the Court understood that their crime was to violate Texas's "Homosexual Conduct" law by engaging in "consensual, adult intimacy that is an integral part of forming and nurturing long-term relationships."<sup>58</sup> Because the law targeted only same-sex sodomy, the Petitioners did not have to frame the State as intruding into the most intimate personal realms of its citizens. Instead, the Petitioners could frame the State as playing favorites – elevating the sexually intimate relationships of heterosexuals while condemning homosexuals.<sup>59</sup> Petitioners invited the Court to see the law as a "discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not."<sup>60</sup> The Petition did not focus on bedrooms or sex acts; it did not draw attention to unwanted intrusion. Instead it blamed the Texas criminal law for "tear[ing] at gay relationships and stigmatiz[ing] loving behavior that others can engage in without the brand of 'lawbreaker.'"<sup>61</sup>

The Court accepted the Petitioners' invitation to look beyond the "atomistic individuals torn from their social contexts" and focused on "the equal liberty and dignity . . . of . . . people as they relate to, and interact with, one another."<sup>62</sup> And Justice Kennedy, writing for the majority, made it clear that the Court is protecting homosexual *relationships* when it protects the intimate conduct that accompanies those relationships. "When sexuality finds overt expression in intimate conduct with another person," Justice Kennedy wrote, "the conduct can be but one element in a personal bond that is more enduring."<sup>63</sup>

Many have opinions about what caused the Court to change its focus from the sexual act to the intimate relationship.<sup>64</sup> Some credit the Court's change in composition.<sup>65</sup> Others argue that society's growing acceptance of homosexuals should get the credit.<sup>66</sup> It is quite possible that Professor Tribe is right, that "*Lawrence v. Texas* is a story . . . of shifting societal attitudes toward homosexuality, sex, and gender,"<sup>67</sup> more than it is a story about the power of metaphor to construct reality and drive the readers' judgments. But even though our views about homosexuals may have changed between 1986 to 2003, there is at least an

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<sup>57</sup> Petition for Writ of Certiorari, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) 2003 WL 152352.

<sup>58</sup> *Id.* at 1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 8.

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

<sup>62</sup> Tribe, *supra* note 23, at 1898.

<sup>63</sup> *Id.* at 1904-05.

<sup>64</sup> See, e.g., Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1336 (2007) (influence of international law); Daniel Hurewitz, *Sexuality Scholarship as a Foundation for Change: Lawrence v. Texas and the Impact of the Historians' Brief*, 7 HEALTH & HUM. RTS. 205 (2004), available at <http://www.hhrjournal.org/archives-pdf/4065355.pdf.bannered.pdf> (arguing that historical scholarship played a role in the decision).

<sup>65</sup> Many have argued that Justice Kennedy has heavily influenced the Court's jurisprudence when it comes to issues of gay rights. Cf. Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237 (2006); Kevin Drum, *Gay Marriage and Justice Kennedy*, MOTHER JONES (Aug. 4, 2010), available at <http://motherjones.com/kevin-drum/2010/08/gay-marriage-and-justice-kennedy>.

<sup>66</sup> See Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523 (2009).

<sup>67</sup> See Tribe, *supra* note 23, at 1896.

argument to be made that the language used to construct the *Hardwick* brief's narrative slowed the progress of lesbian and gay rights for almost two decades.<sup>68</sup>

## II. *Shahar v. Bowers* and the dangers of exposing lesbian love

Metaphors describe the gay and lesbian experience, and many of them focus on the secrecy and shame that often accompanies the simple state of being homosexual. Metaphors like *in the closet* versus *out of the closet*, or simply *out*, describe our attempts at hiding our sexuality, and the sense of safety that it provides us.<sup>69</sup> We go into closets often for protection. Being out of the closet exposes us to danger.

Playing on this aspect of homosexual life is the metaphor of being *openly* gay, or honest about one's sexuality. However, the act of *outing* oneself or another seems more confrontational than simply being honest about one's sexuality. Perhaps that's because people who display their homosexual orientation *openly* are often met with metaphorical responses such as, "don't put your sexuality in my face," or "stop forcing your sexuality on me." So there is an aspect of the closet that protects the heterosexual public from our displays of affection and even from our acknowledgments about who we love.

This secrecy is adaptive given the fact that many in the public find homosexual displays of affection somewhat revolting. For example, researchers have uncovered implicit biases against gay men displaying affection in public.<sup>70</sup> Although many Americans say that gay men and lesbians should have the right to be affectionate in public, they express more disgust and negative moral judgment when shown two men kissing than when shown a man and a woman kissing.<sup>71</sup> So the closet serves two purposes. It protects homosexuals from negative moral judgment and, at the same time, protects heterosexuals from feelings of disgust.

This theme of coming out and provoking disgust ran throughout a case litigated just a decade after the *Bowers v. Hardwick* decision. In that case, Robin Shahar sued the same Georgia Attorney General, Michael Bowers, who had defended Georgia's sodomy law. This time, Bowers defended his right to withdraw Robin Shahar's employment offer when he found out she had participated in a lesbian "marriage."<sup>72</sup> Curiously, Bowers never argued that he could refuse to employ Shahar because she would likely engage in illegal activity – privately committing sodomy with her female partner. Instead, he focused on her openness about marrying another woman. In fact, Bowers explicitly argued that, "Shahar's Offer Was Withdrawn Because Of Her Conduct Of *Holding Herself Out* As Marrying Another Woman, Not *Because Of Her Status As A Homosexual*."<sup>73</sup>

Robin Shahar worked at the Georgia Attorney General's Office while she was in law school. Bowers made her a permanent offer of employment, but during the summer before

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<sup>68</sup> See, e.g., Sherene D. Hannon, License to Oppress: The Aftermath of *Bowers v. Hardwick* Is Still Felt Today: *Shahar v. Bowers*, 19 PACE L. REV. 507 (1999).

<sup>69</sup> See G. Kristian Miccio, Closing My Eyes and Remembering Myself: Reflections of A Lesbian Law Professor, 7 COLUM. J. GENDER & L. 167, 176 (1997).

<sup>70</sup> See Jesse Bering, Equal Right to Kiss? Why You May Be Disgusted by Gay Behavior Without Knowing It, SCIENTIFIC AMERICAN (June 18, 2009), <http://www.scientificamerican.com/article.cfm?id=unconscious-disgust-gay-behavior>.

<sup>71</sup> Id.

<sup>72</sup> *Shahar v. Bowers*, 114 F.3d 1097, 1099 (11th Cir. 1997).

<sup>73</sup> Brief for Appellee at 8, *Shahar*, 114 F.3d 1097 (No. 93-9345) 1994 WL 16126193 (emphasis added).

her job was to begin, Ms. Shahar invited friends, family, and congregants to her “wedding” ceremony. The wedding was not legal, and Shahar didn’t seek legal sanction. Georgia did not and still does not recognize marriage between same-sex couples.<sup>74</sup> Nevertheless, her rabbi performed the ceremony, and the congregation joined in the celebration of Robin’s union with her female partner, Francine.<sup>75</sup> But when Bowers learned of the upcoming “wedding,” he withdrew Shahar’s offer of employment.

In her lawsuit, Shahar claimed that when Bowers retracted her offer of employment, he violated her rights of intimate and expressive association, freedom of religion, and equal protection of the law.<sup>76</sup> As the Eleventh Circuit noted, “the facts [were] not much in dispute.”<sup>77</sup> Interestingly, the only fact seemingly in dispute was just how *open* Shahar was about her marriage.

Shahar’s lawyers did their best to frame her marriage as private. They painted the picture of a plaintiff who disclosed her sexuality only to willing recipients of the information, including her family, close friends, and a few people in the office. First, the brief describes Shahar as essentially closeted at work but, “in certain circumstances, open about her sexual orientation and her relationship.”<sup>78</sup> It went further to point out that Shahar did not out herself to Bowers. It was her “planned religious marriage [that] alerted . . . Bowers, for the first time, to the facts that Shahar was a lesbian and that she was, *in certain circumstances, open about her sexual orientation and her relationship.*”<sup>79</sup>

The religious ceremony took center stage in Shahar’s brief. The brief took pains to describe her wedding as private, an “invitation-only event” in a “reserved area” of a public park,<sup>80</sup> and quoted Shahar’s deposition testimony, “We very much viewed our ceremony as a private, religious celebration in front of the gathered community of our family and friends.”<sup>81</sup> The brief also highlighted the fact that even though Shahar told a department administrator that she was getting married over the summer, “Shahar did not mention the lesbian nature of her upcoming ceremony to Coleman because he was not someone she knew well.”<sup>82</sup> Although Shahar told a couple of people she worked with about the ceremony, the brief highlights the fact that the disclosure was not planned – it happened when she saw her co-workers in a restaurant while making wedding plans with her partner.<sup>83</sup> Shahar’s attorneys portrayed Bowers’ learning about her upcoming marriage as the result of “second- and third-hand” gossip and not the result of a revelation intentionally unleashed by Shahar.<sup>84</sup>

Bowers disagreed with Shahar’s portrayal of herself as mostly closeted and her wedding as mostly private. His response brief jumped right into the dispute over just how open Shahar had been: “Far from being a private religious affair, Shahar invited 270 people to her

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<sup>74</sup> Ga. Code Ann. § 19-3-3.1 (West 2012).

<sup>75</sup> Brief for Appellant at 4-5, *Shahar*, 114 F.3d 1097 (No. 93-9345) 1994 WL 16126194.

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Shahar*, 114 F.3d at 1100.

<sup>78</sup> Brief for Appellant, *supra* note 75, at 1 (emphasis added).

<sup>79</sup> *Id.* at 1 (emphasis added).

<sup>80</sup> *Id.* at 5.

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

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

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

<sup>84</sup> *Id.* at 7.

‘Jewish, lesbian-feminist, out-door wedding.’”<sup>85</sup> The guest list was a significant fact according to Bowers. It included “two employees of the Department of Law, various practicing attorneys, several of Shahar’s colleagues from Emory University, and some of Shahar’s partner’s co-workers at the Federal Penitentiary.”<sup>86</sup> Bowers also focused on her behavior while clerking in the summer. While Shahar claimed she was mostly closeted at work, Bowers said she “announced to various co-workers her intention to ‘marry’ a woman,” “told her supervisor . . . she was a lesbian,” asked “whether she should bring her female partner to a [work-related] social gathering,” and “told some of her fellow summer clerks that she had a relationship with a woman.”<sup>87</sup> Even though Bowers claimed to value honesty, he was offended that “Shahar listed her ‘marital status’ as ‘engaged’ [on her employment form] and altered the form to *volunteer* that her ‘future spouse’ was a woman.”<sup>88</sup>

Bowers was concerned not just with Shahar’s disclosures at work. He emphasized that Shahar and her partner changed their last names after their wedding by filing a *public* petition.<sup>89</sup> Shahar, he said, reached out to her insurance company, receiving a “married” rate from Allstate,<sup>90</sup> and she even told her doctor that she was “married” to a woman.<sup>91</sup> Finally, Bowers found the fact that “Shahar and her partner [were] also considering having children together” relevant to his decision to withdraw her employment offer.<sup>92</sup> After admitting that “the Attorney General’s past employment practices demonstrate that he does not use sexual orientation as a basis for making employment decisions,” Bowers’ brief got straight to the point of why Shahar had to go: “The Attorney General Had A Legitimate Interest In Shahar’s *Conduct Of Holding Herself Out As Marrying Another Woman Because It Is Contrary To Georgia Law.*”<sup>93</sup> Shahar, it seems, would have been welcomed into the office if she had just stayed in the closet.

The Eleventh Circuit Court of Appeals sided with the Attorney General, carrying forward the underlying metaphor of Shahar’s *openness* about her sexuality being forced upon Bowers’ office.<sup>94</sup> Adopting Bowers’ version of the facts, the court noted how Shahar shared with a couple of co-workers that she was getting married to a woman. The court described how these co-workers revealed this information about Shahar’s wedding to others in the office.<sup>95</sup> “This revelation,” you could almost hear the court gasping, “caused a stir.”<sup>96</sup> Pointing out that Shahar displayed a wedding ring and changed her last name in a public filing, the court demonstrated its concern – “These things were not done secretly, but openly.”<sup>97</sup> In siding with Bowers, the court noted that “Staff Attorneys inherently do (or must be ready to do) important things, which require the capacity to exercise good sense and

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<sup>85</sup> Brief for Appellee, *supra* note 73, at 6.

<sup>86</sup> *Id.* at 5.

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

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> *Id.* at 7.

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

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

<sup>92</sup> *Id.* at 8.

<sup>93</sup> *Id.* at 10.

<sup>94</sup> *Shahar*, 114 F.3d at 1100.

<sup>95</sup> *Id.* at 1101.

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

<sup>97</sup> *Id.* at 1107.

discretion.”<sup>98</sup> Shahar failed to exercise good sense and did not “appreciate the importance of appearances” when she decided “to ‘wed’ openly – complete with changing her name – another woman (in a large ‘wedding’).”<sup>99</sup> Evidently, because Shahar had not exercised discretion in her personal life, by keeping her homosexual relationship hidden, Bowers could assume that her presence would call into question the entire Office’s credibility. Therefore, the court reasoned, he had sufficient reason to revoke her offer of employment.<sup>100</sup>

Despite the fact that sodomy was still a crime in Georgia when Shahar brought her suit,<sup>101</sup> Bowers did not attempt to brand Shahar a criminal, and thereby justify her dismissal. Instead, the entire lawsuit revolved around the issue of Shahar’s cheek – publicly holding herself out as “married” to another woman.<sup>102</sup> It was the act of disclosure, not the act of sodomy, that sank Shahar’s ship.

### III. *Diaz v. Brewer*: How will the story end?

In 2009, the Arizona legislature passed a law that stripped many state employees of an essential part of their employment packages – the ability to provide their domestic partners with health insurance through the state’s health care plan.<sup>103</sup> The legislature was reacting to an earlier move by Governor Janet Napolitano. Before leaving office, Napolitano used the regulatory power of the Governor’s office to change the definition of dependent for the purpose of state health coverage.<sup>104</sup> Her action meant that, along with 19 other states,<sup>105</sup> Arizona would provide a health insurance option for unmarried couples who were not or could not otherwise get married.<sup>106</sup> Because of Napolitano’s action, many gay and lesbian state employees in long-term, committed relationships took advantage of the benefit their heterosexual co-workers had long enjoyed and put their partners on their state health insurance plans.<sup>107</sup>

After Napolitano’s departure, the legislature and Governor Jan Brewer acted quickly to limit coverage to only legally recognized spouses and children.<sup>108</sup> They offered several reasons for the change. They argued that family health coverage is an “optional” subsidy, and that removing unmarried partners from the state health care plan would save the state money during a time of enormous deficits.<sup>109</sup> They also said that stripping unmarried employees of this coverage would further the state’s interest in promoting marriage<sup>110</sup> – presuming all of the unmarried partners would get married to retain their benefits. Of course,

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<sup>98</sup> *Id.* at 1104.

<sup>99</sup> *Id.* at 1105.

<sup>100</sup> *Id.* at 1110.

<sup>101</sup> It was not until the next year, in 1998, that the Georgia Supreme Court struck down Georgia’s sodomy statute as violative of the Georgia constitution. *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

<sup>102</sup> See Cynthia J. Frost, *Shahar v. Bowers: That Girl Just Didn’t Have Good Sense!*, 17 *LAW & INEQ.* 57, 81 (1999).

<sup>103</sup> *Collins v. Brewer*, 727 F. Supp. 2d 797, 800-01 (D. Ariz. 2010), *aff’d sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).

<sup>104</sup> *Diaz*, 656 F.3d at 1010.

<sup>105</sup> Motion to Dismiss at 5, *Collins*, 727 F. Supp. 2d 797 (No. 09-2402), 2010 WL 544391 (counting 18 states plus the District of Columbia).

<sup>106</sup> *Diaz*, 656 F.3d at 1010.

<sup>107</sup> *Id.* at 1011.

<sup>108</sup> *Id.* at 1010.

<sup>109</sup> Motion to Dismiss, *supra* note 105, at 8.

<sup>110</sup> *Id.* at 10.

the Governor and the legislature knew that gay and lesbian state employees could not simply get married.<sup>111</sup> But they argued in that case that access to health care is not a right, and the state presumably can parcel it out in whatever fashion it chooses, preferring some employees over others.<sup>112</sup>

I, along with many other gay and lesbian state employees, had used the state health care system to provide health coverage for my partner.<sup>113</sup> As many other partners of state employees did, my partner canceled her existing insurance plan to move onto my plan. This process was relatively easy – moving from a self-funded plan for the self-employed to a group plan. There are no health screenings and no denials for age or physical condition. But transferring from a group plan to a self-employed plan is not so easy. Many gay and lesbian employees found that their partners either could not purchase health insurance on the open market or would find it prohibitively expensive.<sup>114</sup> And even if purchased, the quality, choice, and coverage of the plans were severely limited compared to the state plans.<sup>115</sup>

On the verge of losing our coverage, I joined several other gay and lesbian state employees and sued Arizona Governor Jan Brewer and some of the state's top-level administrators.<sup>116</sup> We relied on Lambda Legal Defense to expertly guide us through litigation in the Federal District Court in Arizona.<sup>117</sup> Throughout the litigation, I have listened to others' opinions about the likelihood for success. Many of the people I spoke to gave us little hope. They saw this as a difficult case to win, especially in Arizona. But this case was very different from other gay rights cases. We were not claiming protection for our conduct in the bedroom. We were not forcing ourselves on the citizens of Arizona by displaying our affections openly. We were simply seeking equal compensation for the same work, and we were protecting ourselves and our partners from the devastating consequences that lack of health insurance coverage can bring to anyone.

Yes, the language of this case differed from *Bowers* and *Shahar*. Gone were references to unnatural acts and open indiscretion. But I'm convinced that our case has been successful, so far, because it tells a familiar story. Like metaphor, story is one of the most persuasive tools a writer can use. Stories operate, like metaphor, on an unconscious level. They provide for us a way to understand ourselves, our world, and our place in the world.<sup>118</sup> Stories give events meaning.<sup>119</sup> They also function as mental shortcuts.<sup>120</sup> We tend not to question stories when they unfold in a predictable way.

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<sup>111</sup> In 2008, the Arizona voters passed Proposition 102, a constitutional amendment that defined marriage as between one man and one woman. ARIZ. CONST. art. XXX, § 1.

<sup>112</sup> Motion to Dismiss, *supra* note 105, at 13.

<sup>113</sup> *Diaz*, 656 F.3d at 1011.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Amended Complaint for Injunctive and Declaratory Relief, *Collins*, 727 F. Supp. 2d 797 (No. 09-2402), 2010 WL 545309.

<sup>117</sup> See [www.lambdalegal.org](http://www.lambdalegal.org).

<sup>118</sup> See Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 281 (2011) ("Like metaphor, stories are entangled in culture, resulting in common archetypes, myths, and master stories that help construct social and cultural norms, both by shaping them directly and by supporting particular ways of interpreting experiences."); Edwards, *supra* note 32, at 886; Robbins, *supra* note 4, at 774.

<sup>119</sup> See Mary Ann Becker, What Is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing, 46 GONZ. L. REV. 575, 602 (2011).

Cultures have shared stories.<sup>121</sup> And once a familiar story gets started, we have expectations about where it should go and how it should end.<sup>122</sup> Stories are shared between the storyteller and the audience, and the audience is often unwilling to allow the story to stray too far outside a certain narrative coherence.<sup>123</sup> In *Thinking, Fast and Slow*, Daniel Kahneman discusses the cognitive underpinnings of story through his experience watching *La Traviata*, a Verdi opera. In the opera, a young aristocrat and a young woman of ill repute fall in love. The young man's father persuades the young woman to give him up. She does. She becomes ill and death seems certain. The young man is alerted, and he journeys to see her. He arrives at her side just before her death. Kahneman asks why we care so deeply that the young woman's lover arrives in time. If she had lived another 5 years but had never reunited with her lover, we would likely rate her life as less desirable. As Kahneman explains, we search for meaningful endings, and we place more significance on endings than on what happens mid-way through the story. Like Verdi, when lawyers advocate for their clients they are conveying their client's story not on a blank tablet, but in a culture of stock stories with which the reader is intimately familiar.<sup>124</sup> When we tell our clients' stories, we do so knowing that our audience has a desire to see the story resolved in a fitting way. It is within this context that we urge the audience – in many cases, a court – to provide a meaningful ending.

Since the release of the film *Philadelphia* in 1993, the American public has become acquainted with the story of the gay protagonist. Tom Hanks won the Academy Award for playing the role of Andrew Beckett, an ambitious, closeted gay man at a large law firm. He had been diagnosed with HIV/AIDS, but he hadn't disclosed this fact to the law firm. He was fired from the firm when his condition became apparent to some of his co-workers. At first, no lawyer would take his case, but eventually a homophobic black lawyer played by Denzel Washington agreed to sue the firm for employment discrimination.

Through the course of the litigation, Beckett's health deteriorated, but the filmmakers focused on Beckett's committed, supportive, and loving relationship with his partner Miguel Alvarez, played by Antonio Banderas. Alvarez rushed to the hospital to be with Beckett, confronted doctors about Beckett's care, changed his IV, shared an intimate dance with Beckett, and spent time with his loving family. In the midst of the stressful trial, Beckett collapsed. At the hospital, Beckett's friends and family gathered knowing that he was probably near death. Of course, if Beckett had died before the jury delivered its verdict, we would feel cheated – as if the young man in the opera never made it back to his lover's side. But the jury awarded Beckett \$4.5 million, and his lawyer, who once said that what gay men do made him sick, rushed to the hospital to deliver the news. Once Beckett learned of the

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<sup>120</sup> See Edwards, *supra* note 32, at 883; Robbins, *supra* note 4, at 768-69 (“Because people respond—instinctively and intuitively—to certain recurring story patterns and character archetypes, lawyers should systematically and deliberately integrate into their storytelling the larger picture of their clients' goals by subtly portraying their individual clients as heroes on a particular life path.”).

<sup>121</sup> See Berger, *supra* note 118, at 276 (stating that “the stories and images we acquire from our culture and experience provide mental blueprints that, for better or for worse, help us sort through and understand new things”).

<sup>122</sup> See *id.* at 278 (asserting that “if the story you are telling is one that already is embedded in tradition and culture, you need not fill in all the details; you can simply name the characters, and the plot will spring to life in the listener's mind”).

<sup>123</sup> See *id.* at 281-82.

<sup>124</sup> See *id.* at 282; Robbins, *supra* note 4.

victory, his friends and family cleared the room and the camera focused on an intimate moment between Beckett and Alvarez. As Alvarez leans toward his lover, Beckett proclaims that he's ready to die.

Despite our propensity to react with disgust when we are confronted with disease<sup>125</sup> or homosexual sex acts,<sup>126</sup> these filmmakers were able to refocus our disgust and the heightened moral judgment that accompanies it. Audiences focused their moral judgment squarely on the big law firm that so arbitrarily discriminated against one of its best attorneys simply because he was gay and ill. Perhaps the filmmakers did this by focusing on the relationship and not the sex. In fact, only one scene depicted a short kiss, and other scenes showing Hanks and Banderas in bed were cut from the final production. By portraying a lover dutifully attending to his dying partner's needs, the film created a universal story where love is all-important and bigotry is to be conquered.

*Diaz v. Brewer* follows a similar, and now familiar, storyline. Gay and lesbian employees were singled out and stripped of an important part of their employment packages. Taking compensation away from some employees and not from others would likely strike most people as unfair. But the State didn't simply reduce the compensation packages of gay and lesbian employees; it also left these employees and their partners in uncertain territory, threatening their partners' ability to access health care at all.

Looking at how the case has progressed so far, the judges seem to be drawn into this narrative framework. The District Court granted our motion for a preliminary injunction, allowing our partners to continue on the state insurance plan until the litigation is resolved.<sup>127</sup> The court also denied Defendants' Motion to Dismiss, finding a cognizable claim in our potential loss of coverage.<sup>128</sup>

Defendants appealed the District Court's decision, and the Ninth Circuit accepted briefing and scheduled oral arguments. During oral arguments, the judges peppered the attorneys with questions. Those questions provided a window into how the judges saw the story unfolding. Yes, the State sought to remove all domestic partners, homosexual and heterosexual, from the State's health care plan. But as Judge Mary Schroeder, one of the three judges sitting for argument, twice reminded counsel for Defendants, "opposite-sex couples could do something about it";<sup>129</sup> they could get married. The arguments began to unfold as a give-and-take about whether gay and lesbian employees were being treated unfairly and whether the unfair treatment would have potentially devastating consequences for their partners.

Counsel for the State dismissed the idea that Plaintiffs' loss of health coverage could cause them irreparable harm,<sup>130</sup> and his responses to questions about what would happen if coverage was suddenly wiped away showed that he really didn't understand the story needed a satisfactory ending. Like the law partners at Andrew Beckett's firm who simply wanted to be rid of Andrew, the State's attorney had no concern for the end result, and his answers to the judges' questions were inaccurate and alarming.

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<sup>125</sup> See Terrizzi, *supra* note 55.

<sup>126</sup> See *id.*

<sup>127</sup> *Collins*, 727 F. Supp. 2d at 814.

<sup>128</sup> *Id.* at 807.

<sup>129</sup> Oral Argument, *Diaz*, 656 F.3d 1008 (No. 10-16797), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000007958](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000007958).

<sup>130</sup> *Id.*

First, counsel for the State said he assumed that the employees' partners would be covered by AHCCCS, Arizona's Medicaid plan – a plan he described as “the plan of last resort.”<sup>131</sup> Judge Sidney Thomas, also concerned about how this story would end, corrected the mistake. He pointed out the additional injustice in the case – AHCCCS is for low income citizens, and Plaintiffs' partners would not qualify. That's because AHCCCS treats cohabiting couples like married couples when it comes to qualifying for health care.<sup>132</sup> The State counts both partners' incomes. Judge Thomas rhetorically asked, “Aren't gays and lesbians in a Catch-22?”<sup>133</sup> The State's attorney brushed aside the correction, claiming he was “not an AHCCCS expert.”<sup>134</sup> Of course, he never believed he needed to be because his story ends when Andrew Beckett walks out of the law firm with his belongings in hand. So the State's attorney was never able to provide an answer to the question because, he said, “[AHCCCS] is too complicated a process to prognosticate.”<sup>135</sup> Judge Schroeder, perhaps trying to force the State's attorney to provide a different ending, seemed disturbed: “If it's too complicated to figure out and . . . you know you could get hit by a truck the next morning so that you face . . . an incredibly complicated prospect, that seems like it's a pretty bad situation.”<sup>136</sup> The judges seemed unwilling to leave the story where the State would – without a health plan and with an uncertain future.

Judge Schroeder later authored the Ninth Circuit's opinion upholding the District Court. In it, she reached out to Justice Robert H. Jackson, repeating his oft-quoted language:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>137</sup>

Once this framework was established, the opinion blessed the District Court's ruling as “consistent with longstanding equal protection jurisprudence holding that ‘some objectives, such as ‘a bare ... desire to harm a politically unpopular group,’ are not legitimate state interests.”<sup>138</sup> With her attention turned to the unfair treatment levied on one group of state employees, Judge Schroeder wrote the ending to the story, or at least the first chapter, by leaving the injunction in place and allowing the lawsuit to go forward.<sup>139</sup> When I imagine what her ending looks like, it ends much like Beckett's story ends – with the employee at

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

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

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Diaz*, 656 F.3d at 1014 (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

<sup>138</sup> *Id.* at 1014–15.

<sup>139</sup> *Id.* at 1015.

her partner's bedside. They are not distressed about how they will afford to pay for the care, nor are they knee-deep in financial forms attempting to obtain uncertain coverage through the State's "plan of last resort." Instead, they are finding comfort in the certainty that their love (and their adequate health care plan) will see them through even this tragic accident.

#### IV. Conclusion

Our society's view of gay and lesbian people has changed dramatically in the last 25 years. Perhaps our change in attitudes is responsible for the recent gains homosexuals have made in the courts. That is one explanation. But it is difficult to ignore the striking role that language and storytelling plays in our jurisprudence.<sup>140</sup> Narrative and metaphor are powerful vehicles that drive readers' cognitive processes. We, as advocates, should be cognizant of the direction we take our readers by paying attention to our plots, our protagonists, and our villains. We should treat language as the building blocks of justice. And we should be paying attention to the interdisciplinary research in areas such as narratology and psychology. When Martin Luther King, Jr. spoke of justice, he often used metaphor. But when he proclaimed that "the arch of the moral universe . . . bends toward justice,"<sup>141</sup> he almost certainly did not mean that it naturally or inevitably bends that way.<sup>142</sup> Our words and our stories must serve as the force that pushes the law closer to justice.<sup>143</sup> If we are to succeed in advancing our cause, our words must infiltrate our readers' minds and hearts, and lead them to a just ending.

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<sup>140</sup> See Berger, *supra* note 118, at 277 ("Although they are as old as rhetoric, it is hard to understand the continuing objections to the study and use of metaphor and narrative in legal arguments.").

<sup>141</sup> See Jamie Stiehn, *Oval Office Rug Gets History Wrong*, WASH. POST (Sept. 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/03/AR2010090305100.html> (arguing that the quotation attributed to King was actually a paraphrase of a quotation by abolitionist Theodore Parker).

<sup>142</sup> See Drew Westen, *What Happened to Obama?*, N.Y. TIMES, Aug. 6, 2011, available at <http://www.nytimes.com/2011/08/07/opinion/sunday/what-happened-to-obamas-passion.html?pagewanted=all>.

<sup>143</sup> See *id.* (arguing that President Obama has failed in his storytelling and has failed to put weight behind King's metaphorical "arch.").