TO HARM, TO VICTIMIZE, AND TO DESTROY: THE UGLY REASON WHY THE *CHAMBERS* MAJORITY OPINION WAS SO RIGHT

*Matthew J. Skinner**

"[A]ny serious effort on the part of judges to discover the thought or reference behind the language of a legislative enactment must be based upon a painstaking effort to reproduce the setting or context in which the statutory words were employed."[1]

"The homosexual in 1961 was smothered by law."[2]

I. INTRODUCTION

In December 2007, the Supreme Court of Rhode Island decided a case widely anticipated since the real possibility of state-sanctioned same-sex marriages first entered the American political consciousness in the 1990s.[3] After May 17, 2004 (and, actually,

* J.D., Albany Law School, 2009; B.A., University of Notre Dame, 2006. I would like to thank Prof. Stephen Clark for taking the time to edit my work and offering much-needed advice along the way, and I wish to dedicate this article to the attorneys at Gay & Lesbian Advocates & Defenders (GLAD) in Boston, who continue to fight for equality.

[1] Harry Willmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 967 (1940) (quoted in Chambers v. Ormiston, 935 A.2d 956, 961 n.8 (R.I. 2007)).

[2] WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 98 (1999).

[3] *See* ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 117 (2006) (explaining that Congress passed the Defense of Marriage Act, 28 U.S.C. § 1738C (2000), in 1996 because "Congress was afraid that, once same-sex marriages were recognized in Hawaii, other states would be required to recognize them, too"). The author of the statute, who ironically went on to become the Libertarian Party candidate for president in 2008, has recently admitted that this was one of the Defense of Marriage Act's goals. Bob Barr, Op-Ed., *Wedding Blues: The Defense of Marriage Act Must Go, Says the Lawmaker Who Wrote It*, L.A. TIMES, Jan. 5, 2009, at 13 ("[T]he first part of DOMA

even before then based on developments in several foreign nations),[4] when the Commonwealth of Massachusetts first began issuing marriage licenses to same-sex couples pursuant to the mandate of the Supreme Judicial Court of Massachusetts's decision in *Goodridge v. Department of Public Health*,[5] legal commentators knew it was only a matter of time before other states in the Union would be confronted by a couple seeking legal recognition of a same-sex marriage obtained elsewhere.[6] With *Chambers v. Ormiston*,[7] the Supreme Court of Rhode Island became the first state high court in the nation to have this thorny and complicated issue come before it.

Beyond being a case of first impression, the court's task in the case was complicated by other legal complexities (or lack thereof) almost completely unique to Rhode Island. At the time the case reached the high court, Rhode Island was one of only two states left (the other being New Mexico) that either had no explicit constitutional or statutory definition of marriage *or* had not yet faced a constitutional challenge and resolution by the state's highest court concerning the exclusion of same-sex couples from the state's marriage laws.[8] The only real legal precedent available to the

---

was crafted to prevent the U.S. Constitution's 'full faith and credit' clause . . . from being used to extend one state's recognition of same-sex marriage to other states whose citizens chose not to recognize such a union.").

[4] KOPPELMAN, *supra* note 3, at 9 (noting the legalization of same-sex marriage in the Netherlands, Belgium, and Canada before its legalization in Massachusetts).

[5] 798 N.E.2d 941, 969 (Mass. 2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

[6] *See* KOPPELMAN, *supra* note 3, at xii (noting that "people move around" and that this issue cannot realistically be confined within any state's borders).

[7] 935 A.2d 956 (R.I. 2007).

[8] *See generally* KOPPELMAN, *supra* note 3, at 138 (describing the legal landscape in all fifty states regarding same-sex marriages as of October 2005). Since publication of this book, the state of the law has changed in Wisconsin, California (several times), Connecticut, New Jersey, New York, Iowa, Vermont, Maine, and New Hampshire. *See, e.g.*, WIS. CONST. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."); *In re* Marriage Cases, 183

Supreme Court of Rhode Island in state law was *Ex parte Chace*,[9] a 1904 case involving the validity of an opposite-sex marriage obtained by a Rhode Island couple in Massachusetts purportedly in violation of Rhode Island's guardianship laws.[10] Operating in such a legal vacuum, the court was ultimately presented with a total of twenty-seven briefs, by the parties and numerous interested amici, over three rounds of briefing.[11]

In a three-to-two split,[12] the court ultimately concluded that, based on the definition of "marriage" understood by Rhode Island state legislators when they adopted the statute creating a family court in 1961, the Rhode Island Family Court today did not have jurisdiction to entertain a divorce petition of a same-sex couple married in Massachusetts in 2004 without further legislative action.[13] Notably, the court's interpretation of the statute relied

---

P.3d 384, 427 (Cal. 2008) ("In light of the fundamental nature of the substantive rights embodied in the right to marry—and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation."), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008) ("Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others."); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) (ordering that "the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples"); Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006) (holding that the "limitation of marriage to opposite-sex couples is not unconstitutional").

[9] 58 A. 978 (R.I. 1904).

[10] *Id.* at 979.

[11] *See* Chambers v. Ormiston, http://www.glad.org/work/cases/chambers-v-ormiston/ (last visited May 29, 2009).

[12] The Supreme Court of Rhode Island is made up of only five justices. R.I. GEN. LAWS § 8-1-1 (1997).

[13] Chambers v. Ormiston, 935 A.2d 956, 967 (R.I. 2007) ("We conclude that the word 'marriage,' . . . [in] the statute which empowers the Family Court 'to hear and determine all petitions for divorce from the bond of marriage,' was not intended by the General Assembly to empower the

exclusively on definitions from dictionaries published in and around 1961.[14] Using this analysis, the court was able to completely avoid addressing the much more complex subjects[15] of comity,[16] the Full Faith and Credit Clause of the United States Constitution,[17] and the Defense of Marriage Act.[18]

This Comment does not serve to present the legal framework that could or should have applied.[19] However, considering the historic nature of the case and the certainty that other same-sex marriage recognition cases will emerge in other states (leading their courts to look to the Rhode Island high court's disposition), this Comment will critically confront the analysis used in the court's majority opinion. In particular, there is a rich historical gap that is almost completely absent from their opinion, but which is nonetheless absolutely necessary to truly accept why the conclusion that the court reached was "so obvious."[20]

Essentially, the court cannot hearken back to this period to import a purportedly benign and uncomplicated definition of marriage without also simultaneously importing the horrific discriminatory and targeting practices that defined the experience of gay Americans of the time. This oft-forgotten history no doubt at least partially explains why the court could not find a dictionary

---

Family Court to hear and determine petitions for divorce involving . . . 'two persons of the same sex who were purportedly married in another state.'").

[14] *Id.* at 962.

[15] *Id.* at 963 n.14; *see also* KOPPELMAN, *supra* note 3, at xv ("[I]t is always possible for courts to disregard the law, and sometimes they will.").

[16] *See* KOPPELMAN, *supra* note 3, at 13 (defining the common law principle of comity as "respect for the actions of other states").

[17] U.S. CONST. art. IV, § 1.

[18] 28 U.S.C. § 1738C (2000).

[19] *But see, e.g.*, *Chambers*, 935 A.2d at 974 (Suttell, J., dissenting) (reading the jurisdictional statute much more broadly and finding that the family court could entertain a divorce petition of a same-sex couple even without assessing the underlying validity of the marriage in Rhode Island); KOPPELMAN, *supra* note 3, at 97–113 (discussing various situations and respective rules for courts to apply in deciding whether or not to recognize foreign same-sex marriages); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2218 (2005) ("The proper way to frame the analysis in a recognition dispute . . . is to inquire into the most sensible way to treat the married gay and lesbian couples who will inevitably live within a jurisdiction . . . .").

[20] *Chambers*, 935 A.2d at 965.

that offered as a possibility that the institution of marriage could include same-sex couples, even though some gays and lesbians of the time had in fact started to use the term in that way.

In Part II, a short background of events leading up to the Supreme Court of Rhode Island's decision is provided, followed by a discussion of the majority's already briefly noted analysis and rationale in greater detail. In Part III, there is an examination of the court's use of dictionaries and a presentation of primary source evidence that other usages of the word "marriage" were to be found around 1961, although not reflected in dictionaries. Next, in Part IV, general and then Rhode Island-specific historical pictures of the experience of gays and lesbians at the time around the adoption of the statute at question in this case are outlined. These pictures actually serve to vindicate the core assertion made in the *Chambers* majority opinion, but that vindication also comes at the price of (or what should be) incredible shame about how the Rhode Island state legislators, if general American attitudes and even some Rhode Island-specific history of the time are any guide, felt about how gays and lesbians should be treated "some forty-six years ago."[21]

The legitimacy of the majority's decision is tainted not because it is incorrect, but because the reason it is correct invokes such a disgusting history that any reasonable jurist today would (or should) assumedly shirk from using it as the underlying validation for a modern decision. Finally, Part V concludes with a brief commentary noting the effect this kind of legal justification has on the modern gay community. Unfortunately, the court's glossing over of the true historical justification of its decision does not make the result here any less disheartening or damaging. Hopefully, then, this exercise can in some way serve to prevent another court from following a similar path in the future.

II. THE DECISION

Margaret Chambers and Cassandra Ormiston crossed the Rhode Island-Massachusetts border and obtained a marriage license in Fall River, Massachusetts on May 26, 2004,[22] apparently finding a municipal clerk that was not honoring Massachusetts Governor Mitt Romney's order at the time to desist from issuing licenses to

[21] *Id.* at 963.

[22] *Id.* at 958.

same-sex couples from outside of Massachusetts.[23] A justice of the peace performed a marriage ceremony, and the couple returned to Rhode Island.[24]

When Chambers filed a divorce petition in October 2006, the chief judge of the family court decided to send a certified question[25] to ask the supreme court if his court had jurisdiction to dissolve a same-sex marriage.[26] After some clarification from the family court, the supreme court heard oral argument in October 2007 and issued its decision in December 2007.[27]

Justice William P. Robinson III, writing for the majority that included Chief Justice Frank J. Williams and Justice Francis X. Flaherty, immediately began his analysis by noting that upon reflection, he and his two joining colleagues decided that the crucial issue in this case was "what did the word ['marriage'] mean at the time that the members of the General Assembly enacted the statute [creating the family court and defining its jurisdiction]."[28]

---

[23] In the final weeks before Massachusetts would begin issuing marriage licenses to same-sex couples in May 2004, Governor Romney announced he would invoke a state law passed in 1913, MASS. GEN. LAWS ch. 207, §§ 11–12 (2003) (repealed 2008), to prevent same-sex couples from outside of Massachusetts from obtaining marriage licenses. SUSAN GLUCK MEZEY, QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY 108 (2007). Another constitutional struggle in the courts ensued, with plaintiff couples from Vermont, New York, Connecticut, Rhode Island, Maine, and New Hampshire. Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 631 n.1 (Mass. 2006). Although the Massachusetts Supreme Judicial Court ultimately found no constitutional violation in *Cote-Whitacre*, a Superior Court judge on remand later used the framework offered in Chief Justice Margaret Marshall's concurrence and ordered that "a declaratory judgment enter that same-sex marriage . . . is not prohibited in Rhode Island." Cote-Whitacre v. Dep't of Pub. Health, No. 04-2656, 2006 WL 3208758, at *5 (Mass. Super. Ct. Sept. 29, 2006). Ironically, then, as this decision came out on September 29, 2006, Chambers and Ormiston only officially had a Massachusetts marriage to dissolve for twenty-four days before Chambers filed a divorce petition in the Rhode Island Family Court on October 23, 2006. *Chambers*, 935 A.2d at 959.

[24] *Chambers*, 935 A.2d at 958.

[25] *See* R.I. GEN. LAWS § 9-24-27 (1997).

[26] *Chambers*, 935 A.2d at 959.

[27] *Id.* at 956, 959.

[28] *Id.* at 959; *see* R.I. GEN. LAWS § 8-10-3(a) (1997) ("There is hereby established a family court . . . to hear and determine all petitions for divorce from the bond of *marriage* . . . .") (emphasis added).

Starting his statutory analysis, Justice Robinson invoked the typical plain meaning rule and declared that "[i]t is clear to us that in this instance we are *not* confronted with an ambiguous statute;" consequently, all this exercise required was a "determin[ation of] what the words in this statute were intended to mean."[29] Specifically, the "crucial" element in Justice Robinson's determination was reaching "the ordinary meaning *as of the time of enactment*," because although "[i]t is possible that today's members of the General Assembly might have an understanding of the term 'marriage' that differs from the understanding of those legislators who enacted [the statute] in 1961," the court cannot "speculate as to what some other not-yet-enacted statute might say or mean."[30]

His judicial task laid out and justified, Justice Robinson then attempted to accomplish it and determine meaning at the time of enactment exclusively by citation to "contemporaneous" dictionary definitions, a method he described as "appropriate and often helpful."[31] Based on three dictionaries—the first published in 1961, the second published in 1955, and the third published in 1963[32]—he confidently declared that "there is absolutely no reason to believe that, when the act creating the Family Court became law in 1961, the legislators understood the word marriage to refer to any state other than 'the state of being united to a person of the opposite sex,'" since "the primary dictionary definition of marriage [in each of the dictionaries cited] refers only to a union between a man and a woman."[33] And, just as importantly, Justice Robinson could find "absolutely no indication in any of the dictionary definitions that a union between two persons of the same sex was any part of the definitional schema."[34]

Satisfied with this conclusion, Justice Robinson next found it

---

[29] *Chambers*, 935 A.2d at 961.

[30] *Id.* (citing W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 n.7 (1991); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987); State v. Perry, 77 P.3d 313, 315–16 (Or. 2003)).

[31] *Id.* at 962 (citing Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995); *Saint Francis Coll.*, 481 U.S. at 610–11; *Perry*, 77 P.3d at 315).

[32] *Id.* (citing THE AMERICAN COLLEGE DICTIONARY 746 (1955); FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 829 (1963); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1384 (1961) [hereinafter WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY]).

[33] *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 32, at 1384).

[34] *Id.* at 962 n.12.

"pertinent to note" that Chief Justice Marshall admitted in her *Goodridge* majority opinion to making "'*a significant change in the definition of marriage* as it has been inherited from the common law, and understood by many societies for centuries.'"[35] With that in mind, Justice Robinson's necessary analysis was now all but complete:

> We have concluded that § 8-10-3(a) is unambiguous, and we have ascertained its plain meaning by looking to the meaning of the word "marriage" at the time of the statute's enactment in 1961—some forty-six years ago. Once having arrived at that plain meaning, our role is to apply it to the situation at hand. The plain meaning of the word "marriage" in § 8-10-3(a) indicates to us that the Family Court is without jurisdiction to entertain the instant petition for divorce.[36]

Justice Robinson did proceed to offer a second rationale for his result, employing the *noscitur a sociis* canon of statutory interpretation[37] and stressing the prominence of gendered terms throughout Rhode Island's marriage laws,[38] but he also clearly indicated the second exercise was ultimately unnecessary.[39] Instead, Justice Robinson provided it more to offer "analysis [that] would be informative and useful to the public at large in this instance."[40] Quite simply, according to Justice Robinson, "[t]here are times, and this is one such time, where one may properly infer that the General Assembly considered something to be so obvious that no explicit statutory statement of definition was necessary."[41]

---

[35] *Id.* at 963 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003)).

[36] *Id.* (citation omitted).

[37] *See* WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 201 (2007) ("The noscitur a sociis canon asserts that a word's meaning is known by its neighbors."); *see also Chambers*, 935 A.2d at 964 n.18 (defining the canon).

[38] *Chambers*, 935 A.2d at 964–65.

[39] *See id.* at 963 ("[A]lthough we perceive *absolutely no ambiguity* in the statutory term 'marriage,' it is noteworthy that we would have reached the same result even if there were statutory ambiguity and we were required to consult the canons of statutory construction . . . ."); *see also id.* at 962 n.13 (noting that "recognized dictionaries suffice to reveal to us the plain and unambiguous meaning of § 8-10-3(a)").

[40] *Id.* at 963 n.16.

[41] *Id.* at 965.

After explaining that it was beyond the constitutional authority of the court to broaden the statute[42] and reminding that the General Assembly could potentially pass "divorce legislation that it might possibly deem more appropriate,"[43] Justice Robinson wrapped up his opinion with an awkward note to the parties.[44]

III. DICTIONARIES AND STATUTORY INTERPRETATION

Although there are numerous criticisms of using dictionaries in statutory interpretation, *Chambers* falls under one major subset of that larger umbrella, in what Professor Lawrence M. Solan has described as "cases in which what the dictionary has to say is not really relevant to the dispute because the debate is over subtleties in meaning more refined than the dictionary even purports to resolve."[45] In that regard, Justice Robinson's majority opinion calls for an examination into the nature of the relationship between word usage and the reflection (or lack thereof) of that usage in mainstream dictionaries, through the particular historical lens of early homosexual groups and their publications in the 1950s and early 1960s. This also ends up being very relevant to this case, especially considering the historical approach that was so crucial to Justice Robinson's conclusion in his opinion.

This exercise, however, is not to try to prove that the Rhode Island General Assembly's understanding of marriage was actually different than what Justice Robinson concluded; he was ultimately no doubt correct about the mindset of the state legislators of the time. Rather, this section's purpose is simply to attempt to explain why Justice Robinson was unable to find any dictionary definition of marriage implicating same-sex couples during the noted time period, despite the historical fact that some gays and lesbians of the time had actually already begun to use the word to describe their own relationships (or the possibility of them) and modern dictionaries, since the early 1960s, were (and are) supposed to

---

[42] *Id.*

[43] *Id.* at 966.

[44] *See id.* at 966–67 ("We know that sometimes our decisions result in palpable hardship to the persons affected by them. . . . We are cognizant of the fact that this observation may be cold comfort to the parties before us.").

[45] Lawrence M. Solan, *Finding Ordinary Meaning in the Dictionary*, *in* LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE 255, 267 (Marlyn Robinson ed., 2003).

reflect current usage. In answering that question, the widespread erasure of gay and lesbian existence during this period begins to come into focus.

A. The Flawed Source of Dictionary Definitions

To begin, Solan observes that "we commonly ignore the fact that someone sat there and wrote the dictionary which is on our desk, and we speak as though there were only one dictionary, whose lexicographer got all the definitions 'right' in some sense that defies analysis."[46] Dictionaries hold particular prominence in American society and "[a]ll of us," according to Professor Ellen P. Aprill, "have used dictionaries uncritically, without asking or understanding what purposes they are intended to serve."[47] Notably, Solan (and Aprill) do not believe that this common misunderstanding is limited to just the general public. "In referring to dictionaries, judges rarely reveal sensitivity to the fact that these books are written by real people who make real decisions about what they should contain."[48]

In fact, there is a complicated and inherently imperfect process behind the definitions that ultimately end up in a given dictionary. The modern trend departs drastically from the centuries-old practice of leaving it solely to dictionary editors "to define and publish the proper meaning and usage of . . . terms."[49] As Samuel A. Thumma and Professor Jeffrey L. Kirchmeier explain, it was not until, coincidentally, the early 1960s that general usage dictionaries shifted from a "prescriptive" approach, one characterized by entries representing "proper" English usage, to a "descriptive" approach, wherein dictionaries became much more flexible and vibrant by "representing how language actually is being used."[50] Specifically, Merriam-Webster, the publisher behind the 1961 Webster's Third New International Dictionary of the English Language that Justice

---

[46] Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993).

[47] Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 277 (1998).

[48] Solan, *supra* note 45, at 259; *see also* Aprill, *supra* note 47, at 277 (stating that U.S. Supreme Court justices share in the popular misconception).

[49] Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 242 (1999).

[50] *Id.*

Robinson principally cited,[51] created a firestorm inside and outside the lexicographical world when it published the first dictionary compiled under this method.[52]

To succeed with this approach, dictionary editors had to devise some kind of procedure to discover new usages of words that might crop up. Other than definitions found in other dictionaries, Aprill explains that modern dictionary writers discover new usages by a system of "ongoing citation files," which are "collection[s] of potential dictionary entries based on a variety of written sources and a few spoken sources" and are filled by the dictionary's editors, part-time readers outside of the dictionary's staff paid to report back, and lastly ad-hoc contributions sent in by a dictionary's readers.[53] These files are crucial if dictionaries are to be truly "descriptive," because "language constantly changes and grows."[54]

However, the system, even today, is far from perfect. Perhaps obviously, "[u]sages will be missed because citation files are limited in their sources."[55] In particular, with the elite mainstream print press, such as newspapers like the *New York Times* and the *Wall Street Journal*, being the dominant source for current word usage, dictionary definitions very often can be biased against usage not yet distinctive enough to be found in major periodicals. Indeed, one feminist scholar has gone as far to declare that dictionaries "'speak only for some people, and their authority is political, not grammatical.'"[56]

Additionally, even if a usage is spotted and lucky enough to make it into the citation file, that is no guarantee that a given usage will eventually appear in the published dictionary. Aprill's illustration lays the frenzied scene:

> The commonplace idea that dictionary definitions are discussed leisurely by groups of scholars puffing pipes could hardly be more mistaken. Definitions are composed by definers working alone under the pressure of time to meet

---

[51] *See supra* text accompanying note 33.

[52] Thumma & Kirchmeier, *supra* note 49, at 242–43; *see also* Aprill, *supra* note 47, at 294 (detailing the criticism of the dictionary's omission of usage labels like "slang" and "nonstandard").

[53] Aprill, *supra* note 47, at 286.

[54] *Id.* at 285–86.

[55] *Id.* at 289.

[56] *Id.* at 292 (quoting DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 29 (1985)).

> daily quotas. Every definition calls for scores of small decisions that the definer has little time to ponder but must make promptly. Furthermore, these definers do only the first stage of word definition. Senior definers then review and generally redefine the word for consistency and clarity, thus reinforcing abstraction.[57]

Space is another major consideration—limiting the number of entries, the number of definitions in each entry, and the length of each definition.[58] Considering all of these challenges, constraints, and systematic weaknesses, "the lexicographer['s business] is to try, in a few lines, to do what . . . cannot be done" and "[i]nevitably, the lexicographer's success will only be partial, even in the best dictionaries."[59] Finally, even if the scheme did work perfectly, dictionaries would still be "out of date by the time they are published,"[60] because, as already stated, the evolution of language never stops, and dictionaries are hardly updated frequently enough to always keep pace with changes.[61]

B. Bold New Meaning, But Unacknowledged

It might seem shocking, considering its extremely controversial nature still today, but there is undeniable primary source evidence that members of early gay organizations began to use the word "marriage" both to describe a status that already had a kind of quasi-existence within their community and to debate a possible goal: the official acknowledgment of their relationships in some kind of similar fashion to the obviously already existing framework for opposite-sex couples. Now, this is not to say that they felt any kind of immediate sense that their relationships would accord formal recognition by any important authoritative body, be it religious or governmental.

---

[57] *Id.* at 293 (quoting SIDNEY I. LANDAU, DICTIONARIES: THE ART & CRAFT OF LEXICOGRAPHY 148 (1984)).

[58] *Id.* at 295.

[59] Solan, *supra* note 46, at 53.

[60] Aprill, *supra* note 47, at 287.

[61] *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1447 (1994); *see also* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 794 (4th ed. 2007) (stressing that dictionaries "are necessarily conservative, in the sense of reflecting past English usage rather than emerging usage").

However, all that is necessary to point out here is that the usage did exist within the limited, but nonetheless notable, gay community emerging in the postwar period. But having already described the nature of how a new usage makes it into the dictionary, and especially considering the dominant viewpoint of the time concerning gays and lesbians (that became official public policy as implemented through actual government censorship), it is not hard to see why this budding usage was kept out of dictionaries of the time. If nothing else, it serves as a good example of the failures of dictionaries given the system in place to be completely "descriptive," and therefore also demonstrates the falsity of the belief that dictionaries can provide all the possible usages of a word at a given time.[62]

The first important usage of the word "marriage" in conjunction with same-sex couples during this period comes from Donald Webster Cory's landmark book, *The Homosexual in America*, first published in 1951.[63] Cory, writing under a pseudonym, wrote authoritatively about the experiences and challenges of living as a gay man in this era.[64] As gay historian John D'Emilio notes,

> One important indication that changes had occurred in gay life during the 1940s was the publication of *The Homosexual in America*, by Donald Webster Cory. . . . He described the hostility gay men encountered, the persecution and discrimination they faced, the variety of homosexual lifestyles, and the institutions of the gay subculture. . . . The appearance of Cory's book not only provided gay men and women with a tool for reinterpreting their lives; it also implied that the conditions of life had changed sufficiently so that the book's message might find a receptive audience.[65]

To be clear, Cory's book was in no way any kind of a radical call

---

[62] *See* A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 74 (1994) (describing dictionaries as being "like 'word zoos'" because "[o]ne can observe an animal's features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings").

[63] DONALD WEBSTER CORY, THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH 200 (1951).

[64] JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970, at 33 (2d ed. 1998).

[65] *Id.*

for gay men to unite in a demand for same-sex marriage rights. In fact, Cory used the word "marriage" and the concept of being "married" in his work almost exclusively to refer to the official institution between a man and woman, in particular focusing much attention to exploring the common phenomenon at the time of gay men marrying women.[66] Still, throughout the book, one can detect his struggle, and ultimate inability, to employ a vocabulary to describe successful, stable gay relationships without using the word "marriage."

To modern readers, this audacious usage might be overshadowed by the references Cory recurrently made in his book to gay men married to women, as well as by his uncomfortable reticence to challenge stereotypes about gay male promiscuity. Putting those dated practices and assumptions aside, however, it is undeniable that Cory also repeatedly used the word "marriage" in his book to talk about the relational status of two men.

For example, in his chapter on the gay man's search for love, while laying out what he saw as the "several impediments that make difficult the formation of a permanent and marriage-like union between two men,"[67] he nonetheless pointed out that based on his observations most gay men do find out

> sooner or later that there is a single individual for whom attraction is combined with affection, sex with friendship, physical love with numerous common interests, and for whom desire not only does not diminish, but continues unabated, actually strengthened by each sexual experience and heightened by the passage of time.[68]

In these circumstances, not uncommon in Cory's view but in fact found in "[e]very submerged homosexual circle," Cory noted that "a more or less permanent union is sometimes formed" and "[s]ome such partnerships approach the heterosexual concept of marriage," making it necessary for him to offer "a comparison and a contrast

---

[66] *See, e.g.*, CORY, *supra* note 63, at 200 (asking if opposite-sex "marriage [is] the answer to the problem of the struggle for adjustment of the homosexual in a hostile world"). Despite his homosexuality, Cory married a woman when he was twenty-five. *Id.* at xv.

[67] *Id.* at 136. Cory described the impediments as being the inner hatred gay men feel towards their sexual partners, the lack of psychological fulfillment felt by gay men with their sexual partners, and the biological incompatibility between two men. *Id.* at 136–38.

[68] *Id.* at 138.

with such legal marriages."[69] He added that "despite the severe difficulties, it is not at all impossible to encounter among males affection whose duration is long-lived and faithful; devotion and sacrifice comparable to that of legal marriages."[70] Although he found it hard to generalize, he then presented the story of "Claude and John," whose "'marriage' [wa]s more than ten years old."[71] These "marriages" might not have been "legal" and they might have required quotation marks, but in Cory's opinion, there was no other word to aptly describe them.

Later concluding the chapter, Cory's struggle with vocabulary again crops up, if perhaps below the surface of a more apparent struggle with the social pressures of the time. From a hopeful perspective, he wrote that "those who have found a stable relationship or a true love have gone a long way toward solving the problem of the adjustment of the homosexual in a hostile society," but also included the awkward caveat that while enduring successful gay relationships are not "mutually exclusive with the road of [opposite-sex] marriage . . . the balance of a permanent homosexual 'marriage' with a legal marriage is unusually difficult."[72]

He repeated this conundrum later in the book, during the final chapter, in a collection of advice to young gay men reaching the point in life when they want to settle down, when "'[m]arriage,' either to one like yourself, unrecognized by all but a few, or to one of the opposite sex, seems increasingly urgent."[73] At this point, Cory cautioned that "you must choose your companion with the care that you would choose a wife in legal marriage" and warned that "[y]our own 'marriage' . . . will suffer from the ease with which it may be ruptured, the lack of economic pressure to hold it together, and the tendencies toward the temptation of infidelity that may descend upon you or him."[74] As difficult as it might be to make it work, Cory told his gay male readers in *1951* that a "marriage" to another man was not completely out of their reach.

The next important usage to mention comes from the magazine of ONE, Inc., *ONE*, the first national magazine for and by gay

[69] *Id.*
[70] *Id.* at 141.
[71] *Id.*
[72] *Id.* at 144.
[73] *Id.* at 259.
[74] *Id.* at 260.

Americans, founded in 1953.[75] ONE, Inc. was an offshoot of the Mattachine Society, a Los Angeles organization started in 1951 by a group of five homosexual men involved in leftist politics and the Communist Party.[76] Mattachine was the first "homophile" group, a term consciously used by homosexuals of the time to "minimize the source of their difference."[77] Still, the Society "affirmed the uniqueness of gay identity, projected a vision of a homosexual culture with its own positive values, and attempted to transform the shame of being gay into a pride in belonging to a minority with its own contribution to the human community."[78] Mattachine began to expand through a series of semipublic discussion groups that "succeeded in drawing frightened men and women into an organizational network"[79] by "creating among the discussion groups a common point of view that would serve as a foundation for unified action."[80] The idea for *ONE* came out of one such meeting.[81]

D'Emilio provides the proper context in which to place *ONE* and other early gay publications in his summation of their significance, by capturing what the writers for these periodicals were doing with a kind of new vocabulary, and offering a perfect case in point of the changing nature of language (despite the now obvious failure of dictionaries to capture it then):

> Although the debates in homophile periodicals were superficially similar to debates between writers and subscribers in any magazine, in one crucial way they were different. The gay press of the 1950s was inventing a form of public discourse. As the only place where homosexuals and lesbians could express in print their attitudes about their sexuality, the magazines became a laboratory for experimenting with a novel kind of dialogue. The awkward

---

[75] JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 28 (2001).

[76] D'EMILIO, *supra* note 64, at 58. The name "mattachine" comes from mysterious medieval figures the founders believed were homosexuals. *Id.* at 67. D'Emilio also marks the founding of Mattachine as the beginning of "a homosexual emancipation movement." *Id.* at 58.

[77] GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 29 (2004).

[78] D'EMILIO, *supra* note 64, at 58.

[79] *Id.* at 68.

[80] *Id.* at 69.

[81] MURDOCH & PRICE, *supra* note 75, at 30.

> phrasing that characterized much of what was published derived in part from the inability of contributors to draw upon a written tradition. . . . Despite the limited circulation of the magazines, they played a part in creating a common vocabulary. In evolving a shared language to articulate their experiences, gay men and women came a step closer to emerging as a self-conscious minority.[82]

For example, in the August 1953 issue, the editors of *ONE* put an "almost unimaginable question" in all caps on the cover: "Homosexual Marriage?"[83] This question referenced a letter sent to *ONE* by a reader that the editorial board decided to publish in the periodical.[84] The writer, an "unabashed advocate of promiscuity,"[85] asked the leaders of Mattachine and *ONE* to think about where their demands for equality would ultimately lead. "Equal rights mean equal responsibilities: equal freedoms mean equal limitations," he wrote.[86] "[W]e have a greater freedom now (sub rosa as it may be) than do heterosexuals and any change will be to lose some of it in return for respectability."[87] That proposition aside, although it is part of a debate that actually still exists within the modern gay community,[88] the writer also said such bold things as "[t]he acceptance of homosexuality without homosexual marriage ties would be an attack upon it" and "[u]ndoubtedly if [same-sex marriages] were possible there would be more who attempted it and many who might make it work," even though social pressures at the time made "success in such marriages highly unlikely."[89] The possibility of same-sex marriage, as impossible a reality as any for early gay activists (or their critics), was at least a possible goal

---

[82] D'EMILIO, *supra* note 64, at 114.

[83] MURDOCH & PRICE, *supra* note 75, at 29.

[84] E.B. Saunders, Letter to the Editor, *Reformer's Choice: Marriage License or Just License?*, ONE, August 1953, at 10.

[85] MURDOCH & PRICE, *supra* note 75, at 29.

[86] Saunders, *supra* note 84, at 12.

[87] *Id.*

[88] *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 113 (1999) ("Marriage, in short, would make for good gays—the kind who would not challenge the norms of straight culture, who would not flaunt sexuality, and who would not insist on living differently from ordinary folk. These behavioristic arguments for gay marriage are mostly aimed at modifying the sexual culture of gay men.").

[89] Saunders, *supra* note 84, at 11.

notable enough to discuss and question as the lead article in their most important and well-known publication.

However notable this usage might have been, though, it is necessary at this point to also discuss that this issue would mark the beginning of a long and protracted legal battle the staff of *ONE* would have to wage just for the right to send their magazine through the mail to subscribers. The August 1953 issue was held up three weeks before postal officials cleared it for distribution.[90] *ONE* prematurely proclaimed victory, because only a year later, postal officials permanently refused to deliver the magazine's October 1954 issue under a federal statute that forbade the mailing of "obscene, lewd, lascivious or filthy" publications.[91] Several theories have been put forth to explain why the government pounced on this issue, including payback for *ONE*'s references to gays working within the FBI, a letter sent from U.S. Senator Alexander Wiley of Wisconsin to the postmaster general arguing that the mailing of the magazine threatened U.S. security, and postal officials simply waiting for the right issue to fit within the legal "obscenity" framework.[92] Whatever the exact motive, the very existence of *ONE* was now under threat, just barely after it had gotten started. At the time, *ONE* was in no financial position to fight back, but thankfully, a young lawyer barely out of law school named Eric Julber agreed to take the case pro bono, and a challenge was filed in federal court trying to overturn the Los Angeles postmaster's decision that the magazine was unmailable.[93]

After defeats at the district court and court of appeals levels,[94] *ONE*'s vindication would finally come over three years later at the U.S. Supreme Court, in the first case dealing with gay rights to come before the nation's highest court. The Court's per curiam opinion did not say anything more than "[t]he petition for writ of certiorari is granted and the judgment of the United States Court of

---

[90] MURDOCH & PRICE, *supra* note 75, at 29.

[91] *Id.*

[92] *Id.* at 39–40.

[93] *Id.* at 31.

[94] *See* One, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957) ("An article may be vulgar, offensive and indecent even though not regarded as such by a particular group of individuals constituting a small segment of the population because their own social or moral standards are far below those of the general community.").

Appeals for the Ninth Circuit is reversed,"[95] with a cite to a First Amendment case decided only the previous year that had defined obscenity.[96] Though the decision was unsigned and the Court never heard the case, thanks only to one Justice's archived papers, we now know that behind closed doors only five of the nine Justices, after Justice Tom Clark changed his initial vote weeks earlier, voted to overrule the Ninth Circuit.[97] Nonetheless, with its decision, the significance of which is "almost impossible to overstate,"[98] the Court also said that "homosexual content in a publication did not automatically equal obscenity."[99]

This history is important because it also helps to explain how a different usage of the word "marriage" was missed by dictionaries and the larger public in the 1950s and early 1960s. The federal government censored the major publication where this new usage had begun to crop up for a large part of the first decade, starting with the *Homosexual Marriage?* issue, until a Supreme Court decision with a razor-thin vote margin came down declaring the government's actions unconstitutional. It is impossible to deny that this episode had a serious chilling effect on this magazine, underground to begin with, and its readership, especially during its early years.

Nonetheless, with this victory behind them, "marriage" began to crop up in more affirmative uses within the nascent gay community, right around the very time when the Rhode Island General Assembly passed the statute at issue in *Chambers*. It also came, however, at a time when the movement began to splinter. By this point, ONE, Inc. had expanded beyond solely publishing magazines into scholarly work and sponsored classes.[100] It also started to move ahead of the other two major organizations, namely, Mattachine and Daughters of Bilitis (the first major lesbian organization), in its tone and demands.[101] As opposed to the more assimilationist outlook of the other two groups, the writers at *ONE* now "projected

---

[95] One, Inc. v. Olesen, 355 U.S. 371, 371 (1958).

[96] *See* Roth v. United States, 354 U.S. 476, 487 (1957) ("Obscene material is material which deals with sex in a manner appealing to prurient interest.").

[97] MURDOCH & PRICE, *supra* note 75, at 45–47.

[98] *Id.* at 50.

[99] *Id.* at 47.

[100] D'EMILIO, *supra* note 64, at 108.

[101] *Id.*

an image of defiant pride in their identity; they intentionally tried to shake their readers out of a resigned acceptance of the status quo."[102] Preparations for ONE's annual convention in 1961 brought these differences in attitudes to the fore. ONE's director announced the theme of "A Homosexual Bill of Rights," an idea too radical for the men and women of Mattachine and Daughters of Bilitis.[103] Harsh remarks surrounded the bitter departure of members of those two groups from any involvement moving forward with ONE.[104]

Perhaps one idea, found in the list of suggested topics for drafting committees at the proposed convention, helped push less radical homosexuals over the edge (and also points to how far ahead of its time ONE was at this point). In the section on religious rights, one suggestion for inclusion in the final document was "[t]he right to church-approved homosexual marriage for those who wish it."[105] Ironically, this demand was not included in the section of demands for the government.[106] The gay radicals in 1961 apparently felt they had a better chance of getting marriage rights from religious institutions in the United States, as opposed to their governments.

Two other articles in 1963 are notable for their usage of "marriage" in the context of same-sex couples.[107] Donald Webster Cory, noted earlier,[108] along with John LeRoy, published a short article in the May 1963 issue of *Sexology* entitled *Homosexual Marriage*.[109] Although there is little departure from the negative stereotypes and assumptions that plagued Cory's book twelve years

---

[102] *Id.*

[103] *Id.* at 123.

[104] *Id.*

[105] *Document 57: A Homosexual Bill of Rights (1961)*, *in* GAY AND LESBIAN RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY 93, 94 (Walter L. Williams & Yolanda Retter eds., 2003).

[106] *Id.* at 93 (putting forth in the section on family rights only the vague demand of "the right to social equality with heterosexual brothers and sisters").

[107] Although beyond the year the Rhode Island General Assembly passed the statute, Justice Robinson cited a dictionary from 1963 in his opinion. *See supra* text accompanying note 32. Based on his analysis, then, it is not out of the question to look at usage of the word "marriage" as late as 1963.

[108] *See supra* text accompanying notes 63–74.

[109] Donald Webster Cory & John LeRoy, *Homosexual Marriage*, 29 SEXOLOGY 660, 660 (1963).

earlier,[110] the usage is still notable. They stated that "[h]omosexuals, like everybody else, are under great pressure to combine love and marriage" and "may feel that their union is just like a regular marriage."[111] After a description of gay wedding ceremonies, they added that "[m]ost homosexual couples go through no such ritual" because "[m]arriage, for them, is mating" and "means choosing a life partner, sexual or otherwise."[112] However, Cory and LeRoy also abruptly noted that "having gone to all the trouble of getting 'married,' it seems to those who have participated in such an affair that they are . . . entitled to 'live happily ever after,'" but "life after marriage is not necessarily any happier" and "often becomes more and more miserable."[113] At this point, Cory and LeRoy stated that couples would realize "their marriage has no legal, social, religious, or moral sanctions."[114] The article concluded with a description of "kept" boys and heterosexual male roommates, a kind of relationship the authors found "far more stable than those which try to imitate conventional marriage."[115] While they felt that "homosexuals want and need some form of permanent love," usually "the result is a temporary affair which lasts but a short time and soon becomes a memory."[116] For Cory and his co-author, "marriage" remained a notable phenomenon, but also had very little long-term success for the gay men they knew.

Meanwhile, in a cover story for *ONE* the following month proclaiming "Let's Push Homophile Marriage," writer Randy Lloyd took an entirely different approach and wrote an article describing

---

[110] *See supra* text accompanying note 74.

[111] Cory & LeRoy, *supra* note 109, at 660. In a book published the same year, the two authors somewhat clarify their position on where gay couples of the time stood with respect to the institution of marriage. *See* DONALD WEBSTER CORY & JOHN P. LEROY, THE HOMOSEXUAL AND HIS SOCIETY: A VIEW FROM WITHIN 19 (1963) (noting that "the homosexual is perpetually being reminded that marriage, by its very nature, must be between a man and a woman"); *see also id.* at 20 ("It is quite clear that a quasi-marital union, in which heterosexual marriage is mimicked, is not for homosexuals . . . . Heterosexual marriage is the institution through which children are born and assimilated into the culture. . . . Homosexuals cannot . . . fulfill this function.").

[112] Cory & LeRoy, *supra* note 109, at 661.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 662.

[116] *Id.*

why he found "the homophile married life so much more preferable."[117] Lloyd admitted that the "concept of homophile marriage is new, a modern concept,"[118] but also said that "there are plenty of single homophiles around both suited and eager for homophile marriage."[119] Ironically, he also warned that "spats and blow-ups are inherent in any marriage, and heteros have divorce laws . . . but we don't."[120] But looking to the future, Lloyd believed that "[o]ne thing is for sure about homophile marriages—the number taking place can only increase in the future" and that when society finally accepted homosexuals, it would first accept married couples, as these couples were "closest to their ideals."[121] He defiantly insisted that "[m]arriage is no more a strictly heterosexual social custom than are the social customs of birthday celebrations, funerals, house-warmings, or, for that matter, sleeping, eating, and the like."[122] Lloyd took part in those activities "not because they [were] heterosexual or homosexual things, but because [he was] a human being."[123] To Lloyd, marriage was "a way of living and . . . equally good for homosexuals and heterosexuals" and the "most stable, sensible, and ethical way to live for homophiles."[124] By mid-1963 then, a gay man not only used "marriage" to describe the status of certain same-sex couples. It was also a status that nearly all homosexuals should strive to achieve.

Therefore, while the usage was there for dictionary publishers that were beginning to try to be "descriptive," based on the flaws in the system to accomplish those tasks, it is not hard to see how this new usage was left out of dictionaries, even one like Webster's Third that was causing such a stir (as far as dictionaries can do such a thing) in 1961 with its new way of supplying definitions.[125] The new usage of "marriage" was not showing up in major national

[117] Randy Lloyd, *Let's Push Homophile Marriage*, ONE, June 1963, at 5.

[118] *Id.* at 6.

[119] *Id.* at 7.

[120] *Id.* at 8.

[121] *Id.* at 9.

[122] *Id.* at 10.

[123] *Id.*

[124] *Id.* This is another argument still made in the debate within the modern gay community. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 8–9 (1996) (arguing that gay men need to be married so as to be sexually civilized and domesticated).

[125] Thumma & Kirchmeier, *supra* note 49, at 242–43.

newspapers; if there were stories in these publications, they were notably hostile and had headlines like "Growth of Overt Homosexuality in City Provokes Wide Concern,"[126] as the first front-page story about homosexuals in the *New York Times* did in 1963.[127] Unless the dictionary editors were subscribers to *ONE*, it is difficult to imagine how they might have come across a copy; even outside readers responsible for reporting new usages that might have been subscribers would probably have been afraid to forward such a radical usage to the staff of a mainstream dictionary.

Even assuming a citation file did somehow include a copy of *ONE*, in 1961 and the surrounding years, it would have taken a bold act, one simply beyond the realm of anyone but the most radical lexicographer of the time, to publicly acknowledge in a widely published dictionary that one possible meaning of "marriage" that had cropped up in certain underground usage was the formalized uniting of gay and lesbian couples.[128]

C. So What?

Of course, the obvious question is what does it even matter what radicals debating within underground homosexual groups were talking about in some scattered writings, when the court is ultimately concerned with what the state legislators at the time knew or understood. In fact, it is more than likely that the Rhode

---

[126] Robert C. Doty, *Growth of Overt Homosexuality in City Provokes Wide Concern*, N.Y. TIMES, Dec. 17, 1963, at A1.

[127] THE COLUMBIA READER ON LESBIANS AND GAY MEN IN MEDIA, SOCIETY, AND POLITICS 349 (Larry Gross & James D. Woods eds., 1999). Popular nonfiction exposés, like Jess Stearn's 1961 investigative book *The Sixth Man*, which spent three months on the *New York Times* bestseller list, followed the sensationalist trend. D'EMILIO, *supra* note 64, at 139. "Dripp[ing] with venom and contempt," Stearn's work described the nationwide phenomenon of homosexuality as "almost endemic" and gay men as "anything but happy," leading "many [of them] to seek oblivion in drink and sex." *Id.*; JESS STEARN, THE SIXTH MAN 50, 86 (1961). Notably, though, Stearn reported that "[m]any homosexuals living together speak of themselves as married," and also quoted a formerly married gay man as saying he "had more of a marriage" with his current same-sex partner than he ever did with his wife. *Id.* at 215, 236.

[128] *But see* Aprill, *supra* note 47, at 283–84 (offering "marriage" as an example of how modern dictionaries could and should reflect shifting word usage).

Island state legislators did not know about this different usage.

A relevant and relatively simple legislative drafting theory helps support the proposition that legislators did not expect gays or lesbians would ever be a part of the recognized institution of marriage, as noted explicitly even in the dissenting opinion.[129] Professor Paul McGreal notes that "statutory drafters try to anticipate strategic conduct by later users of their texts"[130] and because they fear "those who will later use their words, legal drafters try to leave as little meaning to context as they can."[131] Basically, the legislative drafters would not have left the family court jurisdictional statute ambiguous and vague, with the possibility that one day a "married" homosexual couple like Chambers and Ormiston could fill it in with their context.

Even assuming that some of the Rhode Island state legislators did somehow know about these writings, they almost certainly saw them as crackpot fantasies or perverted delusions, because, frankly, if they had taken them seriously, they would surely not have left open the possibility that future gays and lesbians could take the statute and "act strategically, choosing the context that best serves their interests."[132] The reason they did not know, or did not accept it as anything close to realistic if they did, will finally become clear (if has not already begun to) in the next section.

IV. A PAINFUL HISTORY LESSON

A. General Picture

The only unassailable (at least in terms of facts), but of course much more uncomfortable, way to come to the all important conclusion that Justice Robinson needed to, based on the question the majority deemed to be controlling in this case—namely, discerning the understanding of Rhode Island state legislators at the time of statute passage—was to simply look to the general

---

[129] *See* Chambers v. Ormiston, 935 A.2d 956, 971 (R.I. 2007) (Suttell, J., dissenting) ("It would have been quite extraordinary indeed if the original drafters of the act had anticipated or even contemplated same-sex marriages.").

[130] Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325, 367 (2004).

[131] *Id.* at 347.

[132] *Id.* at 326.

treatment of the gays and lesbians of time by their governments, without crudely resorting to what have now been shown were inadequate dictionaries for this task. Based on that history, it is much more likely that the Rhode Island state legislators did not know that certain gays and lesbians had boldly begun to use the word "marriage."

Frank Kameny, who ironically may never have become a giant of American gay history if he had never been dismissed from his federal civil service employment after investigators discovered a prior arrest that pointed to his homosexuality,[133] filed a sixty-page certiorari petition with the U.S. Supreme Court on January 27, 1961, the very month the Rhode Island General Assembly created the family court in Rhode Island.[134] Holding nothing back, he wrote that "[o]ur government exists to protect and assist *all* of its citizens, not, as in the case of homosexuals, *to harm, to victimize, and to destroy them*."[135] The Court ultimately denied certiorari,[136] but Kameny's words nonetheless hold true in capturing where governments, at all levels in the United States and including Rhode Island's, stood in relation to gays in 1961.[137]

Also painting broadly, D'Emilio writes that

> [T]he harsh reality of oppression [in the 1950s] shaped the contours of gay identity and the gay world. The condemnations that did occur burdened homosexuals and lesbians with a corrosive self-image. The dominant view of them—as perverts, psychopaths, deviates, and the like—seeped into their consciousness. Shunted to the margins of American society, harassed because of their sexuality, many gay men and woman internalized the negative descriptions

---

[133] D'EMILIO, *supra* note 64, at 151.

[134] Petition for Writ of Certiorari at 60, Kameny v. Brucker, 365 U.S. 843 (1961) (No. 676); *Chambers*, 935 A.2d at 962 n.9 (quoting Rhode Island Cent. Credit Union v. Pazienza, 572 A.2d 296, 297 (R.I. 1990)); *see also* William N. Eskridge, Jr., *January 27, 1961: The Birth of Gaylegal Equality Arguments*, 58 N.Y.U. ANN. SURV. AM. L. 39, 48 (2001) (recognizing that Kameny's equal protection arguments in this brief laid the groundwork for future gay rights litigation).

[135] Petition for Writ of Certiorari at 49, Kameny v. Brucker, 365 U.S. 843 (1961) (No. 676) (emphasis added).

[136] Kameny v. Brucker, 365 U.S. 843, 843 (1961).

[137] *See, e.g.*, Eskridge, *supra* note 134, at 46 (summarizing how mainstream society in 1961 believed public policy should be shaped in various areas to respond to homosexuality).

> and came to embody the stereotypes. Moreover, even as some of them participated in an urban subculture that sustained the sense of belonging to a group, they confronted an ideology that viewed their situation as an individual problem. Whether seen from the vantage point of religion, medicine, or the law, the homosexual or lesbian was a flawed individual, not a victim of injustice.[138]

Fellow gay historian George Chauncey, however, clarifies that this was much more than just psychological: "Fifty years ago . . . homosexuals were not just ridiculed and scorned. They were systematically denied their civil rights: their right to free assembly, to patronize public accommodations, to free speech, to a free press, to a form of intimacy of their own choosing."[139] Professor Kenji Yoshino characterizes the 1950s as being part of the first of three distinct phases of American gay history.[140] In this era, extremely powerful societal forces demanded gays pursue "conversion."[141] During the "'gilded age' of conversion therapy from the 1940s to the 1960s, [when] gays entered therapy in droves,"[142] "gays were routinely asked to convert to heterosexuality, whether through lobotomies, electroshock therapy, or psychoanalysis."[143]

Putting everything in perspective, Professor William Eskridge goes as far as to declare the period after 1946 to be one of "a national antihomosexual Kulturkampf"[144] and further says that "[t]he antihomosexual campaigns in the United States from 1947 to 1961 were an echo of the antihomosexual terror in Nazi Germany from 1933 to 1945," the relevant difference being that "the Nazi goal was *Holocaust*, genocide, while the American goal was *Kulterkampf*, erasure."[145]

B. Rhode Island

While entire books have been written on the varied specifics of the

---

138 D'EMILIO, *supra* note 64, at 53.

139 CHAUNCEY, *supra* note 77, at 11.

140 KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 17–19 (2006).

141 *Id.*

142 *Id.* at 38–39.

143 *Id.* at 19.

144 ESKRIDGE, *supra* note 2, at 59.

145 *Id.* at 80, 82.

efforts nationwide to target gays and lesbians at this point in history, focusing in on just two facets of the larger "erasure" project Eskridge refers to illustrates that Rhode Island was not immune from these national predilections, but in fact followed the trends.

First, police harassment of gays and lesbians, part of a nationwide obsession with child molestation (be there an actual connection or not), radically escalated during the postwar period.[146] Much of this harassment occurred through police department vice or morals squads, or "officers wholly devoted to ferreting out sex crimes" whose "productivity was measured by the number of prostitutes, sexual perverts, and drug dealers they arrested."[147] As Eskridge points out, "[c]ities as different as Cincinnati, Cleveland, Denver, Minneapolis, Kansas City, Oklahoma City, Pittsburgh, *Providence*, Salt Lake City, Santa Monica, and Sioux City saw concerted antihomosexual vice campaigns in the 1950s."[148]

A short report by Jim Kepner, one of the groundbreaking gay journalists writing for *ONE* in the 1950s, offers a small glimpse into what life may have been like for gay citizens in Providence, the capital of Rhode Island, living under the terrifying specter of these vice squads. "Assisted by readers from around the country who sent clippings about police activities, . . . Kepner wrote detailed reports on the latest 'witch hunts.'"[149] Although only a one sentence snippet, Kepner's note in the February 1956 issue of *ONE* speaks volumes. "New Providence, Rhode Island, vice squad playing rough, with little respect for rights of victims . . . ."[150] One can only conclude that, in the few underground social settings that undoubtedly existed in mid-1950s Providence, gays and lesbians had much to fear from newly-formed police squads seeking to find them and quite possibly ruin their lives with arrests that could cost them careers and certain public humiliation.

Second, of course, the police had to have something to charge gays and lesbians with, and perhaps the most dignity-robbing charge was sodomy, "[f]or consensual same-sex intimacy . . . was illegal in every

---

[146] *Id.* at 60.

[147] *Id.* at 63.

[148] *Id.* at 64 (emphasis added).

[149] D'EMILIO, *supra* note 64, at 110.

[150] Jim Kepner, *Survey*, ONE, Feb. 1956, *reprinted in* JIM KEPNER, ROUGH NEWS, DARING VIEWS: 1950S' PIONEER GAY PRESS JOURNALISM 107 (1998).

state during [the] period."[151] A 1962 decision of the Supreme Court of Rhode Island, *State v. Milne*,[152] also offers a bleak (but realistic) glimpse into the way Rhode Island state officials felt about gay citizens at the time, much stronger at least than any indirect evidence found in dictionaries. The reaction to gay sexuality in the opinion clearly predates the "emerging awareness" and understanding of gay intimacy Justice Anthony Kennedy spoke of in his 2003 *Lawrence v. Texas* opinion, when the U.S. Supreme Court struck down all remaining state sodomy statutes.[153]

A man had been indicted in 1959 under a statute that forbade receiving one into a dwelling house "for the purpose of committing an indecent act."[154] Although it is not clear how the police caught the couple, the "submission of the youth was entirely voluntary and . . . at the time the act was consummated the participants were alone in the bedroom."[155] The defendant argued to the court that "in this case the act for which he received another into the room [could not] be held to constitute an indecent act," but the court felt that fellatio indeed fell within the purview of an "abominable and detestable crime against nature," as the statute read.[156] The court concluded that the legislative intent of the statute was "obvious," that "all unnatural sexual copulation was to be made unlawful."[157]

Responding next to the defendant's argument that the statute failed to meet a constitutional due process standard for notice, the court stated in no uncertain terms that "[i]t would not be reasonable to require a legislature to anticipate and describe in other than comprehensive terms all of the bizarre means for perverting the sexual function that are conceived by depraved minds" and "[i]t is obviously impracticable to attempt to prescribe rigid legislative criteria proscribing conduct in the area of sexual perversion and deviation."[158]

Indeed, then, it is not a stretch to reason that Rhode Island state legislators could not have fathomed gay couples being married at this time, when the Rhode Island General Assembly did nothing to

---

151 ESKRIDGE, *supra* note 2, at 65.

152 187 A.2d 136 (R.I. 1962), *cert. denied*, 373 U.S. 542 (1963).

153 Lawrence v. Texas, 539 U.S. 558, 572 (2003).

154 *Milne*, 187 A.2d at 137.

155 *Id.* at 138.

156 *Id.*

157 *Id.* at 139.

158 *Id.* at 140.

amend or repeal a sodomy statute that, in light of *Milne*, unquestionably applied to the sexual intimacy of its gay male citizens. In fact, the Rhode Island General Assembly did not even repeal its sodomy statute until only five years before *Lawrence* would have made it unconstitutional.[159]

C. Conclusions

Had the statute passed in another historical period, this decision would have been much less ugly. Unfortunately, the time Justice Robinson evoked because of the year of statute passage was not a historical moment when homosexuals were under the radar or ignored, but rather besieged, by greater society generally and their governments specifically.[160]

While Justice Robinson's opinion appeals to purportedly uncontroversial definitions of marriage, one cannot simply take those definitions outside the context of the disgusting sociopolitical atmosphere surrounding gay Americans of the time.[161] That atmosphere no doubt at least partially explains why the court could not find a dictionary that offered as a possibility that the word "marriage" could include same-sex couples, even though contemporaneous gay and lesbian primary source documents repeatedly incorporate that usage.

In retrospect, this period was simply too tainted by twisted perceptions now rightly (but arguably not long enough) disavowed, at least in our public laws, to legitimately read any statute today based on the understanding of gay and lesbian people at the time.

---

[159] *See* ESKRIDGE, *supra* note 2, at 335.

[160] *See* CHAUNCEY, *supra* note 77, at 14 ("Only in the twentieth century did the state begin to classify and discriminate against certain people on the basis of their sexual identity or *status* as homosexuals. . . . Although such antigay discrimination is popularly thought to have ancient roots, in fact it is a unique and relatively short-lived product of the twentieth century.").

[161] *See* Solan, *supra* note 45, at 258 ("[J]udicial resort to the dictionary [can] become[] nothing more than a vehicle for masking the exercise of judicial discretion. It is pernicious not because discretion was actually exercised, which was inevitable given the flexibility of language, but because resort to the dictionary absolves the judge of defending the decision as the best decision he could make, increasing the chances that the decision was made for other reasons which the judge wished to hide from public view.").

The fact of the matter is that the court could have gotten to the same result of non-recognition in a way that did not necessarily implicate the general understanding of gays and lesbians in 1961.[162] But by accepting a definition, one cannot help but also implicitly accept the rationale and thought processes, as put so succinctly in the 1962 *Milne* decision, that unquestionably led to the understanding behind the rigid outer limits of that definition.

While Justice Robinson would certainly counter that his opinion was not meant to endorse the treatment of gays and lesbians at this time in American history, one cannot rationalize why he (and even the dissenters[163]) found it so unquestionably obvious that state legislators would have known only an exclusionary definition of marriage without looking to how the general understanding of gay and lesbian existence was framed at the time.

To be blunt, the Rhode Island state government of the time would have had to redeploy the police forces, regularly organized into vice squads cracking down on the capital's gay citizens, to create a barrier around Providence City Hall. The gays and lesbians attempting to get married would have needed protection from the lynch mob of angry citizens and government officials that undoubtedly would have been there to note their furor over the unthinkable change in status quo that had occurred virtually overnight.

Indeed, the primary reason the possible definitions of marriage have expanded to at least *potentially* include same-sex couples now is because gays have escaped from and no longer exist under the backdrop of a sociopolitical environment whereby they are viciously oppressed by every arm of their governments, as they were in the time surrounding the enactment of the statute in *Chambers*.[164] Gay

---

[162] *See* KOPPELMAN, *supra* note 3, at 102 ("The type of case that most of the discussion of same-sex marriage has focused on is the evasive marriage, in which a couple leaves a state that forbids their marriage, marries in another, and then returns to their home state. It is also the weakest case for recognition.").

[163] *See supra* note 129.

[164] *See generally* Mary A. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 8 (2005) ("One of the great misconceptions about *Goodridge* is that four justices shocked the state with their recognition, out of the blue, of marriage equality for same-sex couples. The reality is far more nuanced. The *Goodridge* lawsuit was begun after several decades of growing recognition of equality in the legislature as well as in the courts.").

citizens of the time could not even safely come up for air, let alone ask for official recognition of the existence of their relationships by a state legislature.

V. LESSONS LEARNED (HOPEFULLY)

The history I just briefly mapped out is by no means well-known by the modern American public. It is certainly possible that Justice Robinson and his colleagues in the *Chambers* majority did not know the intricacies of it; I suppose I can assume he does not have a copy of D'Emilio's *Sexual Politics, Sexual Communities* in his office library. However, I am grateful that this Comment led me to add it to mine.

Indeed, Chauncey notes that "this history is almost entirely forgotten . . . [by even] well-educated Americans."[165] Still, summing up the result of this ignorance, Chauncey adds that

> [W]e forget this history at our peril. The opponents of gay rights themselves remain ignorant of this history, and the success of their arguments often depends on the gay community's historical amnesia and on the larger public's ignorance about the history and current realities of gay lives. Erasing the history of antigay discrimination makes it easier to argue that gay people do not need or deserve the most basic civil rights protections. Erasing the history of gay political disfranchisement makes it easier to vilify gay people as a powerful, conspirational class whose struggle for full equality threatens the American dream instead of fulfilling it. And forgetting this history weakens the gay movement internally as well, because it cannot understand where it is today unless it understands how it got here.[166]

Margaret Chambers and Cassandra Ormiston may get their divorce yet; Chambers almost immediately refiled her divorce petition in the Rhode Island Superior Court—the court of general jurisdiction, which had jurisdiction over divorces prior to the now infamous passage of the 1961 family court-creating statute.[167]

---

[165] CHAUNCEY, *supra* note 77, at 12.

[166] *Id.*

[167] Glenn C. Edwards, *Rhode Island Supreme Court Holds Family Court Cannot Divorce Same-Sex Couple Married in Massachusetts*, LESBIAN/GAY L. NOTES (LeGaL Found. of the LGBT L. Ass'n of Greater N.Y., New York, N.Y.), Jan. 2008, at 2.

Consequently, "the Supreme Court [of Rhode Island] may yet have to grapple with the issues of same-sex relationship recognition, next time perhaps without a dictionary in which to take refuge."[168]

[168] *Id.* Since the writing of this article, a superior court judge dismissed Chambers' new divorce petition, but also noted that the supreme court's interpretation of the family court statute likely made the statute unconstitutional by "violat[ing] state constitutional principles of equal protection." Edward Fitzpatrick, *Judge Points to Way Court Might Consider Same-Sex Issue*, PROVIDENCE J., June 12, 2008, *available at* http://www.projo.com/news/content/samesex_divorce_hearing_06-12-08_SGAFVM6_v40.39d6d7d.html. Meanwhile, Ormiston has begun renting an apartment in Cambridge, Massachusetts to establish residency there. *Id.*