

# The Geronimo Bank Murders: A Gay Tragedy

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*The Geronimo Bank Murders examines the intersection of homosexuality and capital punishment through the lenses of cultural criticism, queer theory, and legal analysis. The paper's subject is Jay Neill, who was executed in 2002 for murdering four people in a gruesome Geronimo, Oklahoma bank robbery in 1984, and for being gay. Current capital punishment doctrine permits, and perhaps even encourages, such results. The Geronimo Bank Murders recasts Neill's story, privileging homosexuality and gender, and uses that account to make three points, each based in law, culture, and politics. First, as a matter of legal doctrine, recognizing the error in using homosexuality to obtain a death sentence requires a normative judgment about gay identity, one that courts are increasingly prepared to make. Second, the gay-centric reading of Neill's trial reveals the shallow literalism of harmless error review of capital sentencing errors, the chief mechanism through which flawed verdicts such as Neill's are executed. Finally, the interpretation of Neill's life, crimes as well as punishment, as a gay story usefully challenges and disrupts the valorizing and assimilative tendencies of the gay rights movement.*

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## INTRODUCTION

Jay Wesley Neill was executed on December 12, 2002, for murdering four people in a gruesome Geronimo, Oklahoma bank

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\* © 2008 Joan W. Howarth. William S. Boyd Professor of Law, University of Nevada, Las Vegas. Through his attorney, James L. Hankins, Jay Neill chose to cooperate with this project, permitting his lawyer to give me transcripts and other materials from the case. I am very grateful to both of them. This project began when I was Scholar-in-Residence at the Boalt Center for Social Justice, and was finished with research support from the Boyd School of Law. I presented earlier versions of this Article at a faculty workshop at the University of San Francisco School of Law and at *Assimilation and Resistance: Emerging Issues in law and Sexuality*, a conference sponsored by the Seattle University School of Law. I am grateful for the institutional support and helpful comments I received in all of those settings. I also appreciate the thoughtful comments on an earlier draft by my UNLV colleagues Raquel Aldana, Annette Appell, Mary LaFrance, Ann McGinley, Nancy Rapoport, and Elaine Shoben and by David Dow and Timothy Kaufman-Osborn. Judy Cox (Boyd '08) provided superb research assistance, and Diana Gleason added excellent library support.

robbery on December 16, 1984, and for being gay.<sup>1</sup> At trial, in the closing argument for death, the prosecutor told the jurors that Neill's identity as a homosexual was a reason to return a death verdict.<sup>2</sup> Later that afternoon they did.<sup>3</sup> A divided panel of the United States Court of Appeals for the Tenth Circuit determined that the prosecutor's words were error, but not prejudicial.<sup>4</sup> By what analysis is such an argument error? In what world is such an error harmless?

Neill's terrible story calls out for a critical cultural, legal, and political reading. Neill's case reveals the power of law to construct and condemn homosexual identity. Constitutional death penalty doctrine requires capital jurors to choose life or death by judging the defendant's character.<sup>5</sup> This inquiry makes cases of gay capital defendants potentially powerful sites of contested meanings of gay identity,<sup>6</sup> and rich cultural artifacts about homosexuality.<sup>7</sup> Sentencing a person to death because of moral distaste for homosexuality is itself morally reprehensible, but current capital doctrine permits and perhaps even encourages such results. The Tenth Circuit's treatment of the prosecutor's arguments about homosexuality lays bare the faulty formalism that underlies harmless error review of death verdicts. Neill's crimes and punishment also challenge and disrupt the valorizing tendencies of the identity-based gay rights movement. What if Neill's gay identity was as salient to his crimes as to his punishment?

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1. See Jay Wesley Neill, [http://action.web.ca/home/lgbt/alerts.shtml?x=27183&AA\\_EX\\_Session=3e17ae55455400578f2256b8bbbcfea5](http://action.web.ca/home/lgbt/alerts.shtml?x=27183&AA_EX_Session=3e17ae55455400578f2256b8bbbcfea5) (last visited Apr. 4, 2008).

2. Neill v. Gibson (*Neill II*), 278 F.3d 1044, 1061 (10th Cir. 2001), *cert. denied*, 537 U.S. 835 (2002) (citing to Trial Transcript at 1287).

3. Neill v. Gibson (*Neill I*), 263 F.3d 1184, 1188 (10th Cir. 2001) (rehearing granted, petition for rehearing en banc denied).

4. *Id.* at 1197; *Neill II*, 278 F.3d at 1061.

5. Oregon v. Guzek, 546 U.S. 517, 526 (2006) ("The Eighth Amendment . . . insists that a sentencing jury be able 'to consider and give effect to mitigating evidence' about the defendant's 'character or record or the circumstances of the offense.'" (quoting Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989))).

6. David Garland shows that punishment is symbolically powerful because "the intractable problems of social and human existence provide a rich soil for the development of myths, rites and symbols, as cultures strive to control and make sense of these difficult areas of experience." David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, 11 STUD. L. POL. & SOC'Y 191, 216 (1991).

7. "Treating law as a cultural reality means looking at the material structure of law to see it in play and at play, as signs and symbols, fantasies and phantasms." Christian Boulanger & Austin Sarat, *Putting Culture into the Picture: Toward a Comparative Analysis of State Killing*, in THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES 1, 15 (Austin Sarat & Christian Boulanger eds., 2005) (footnote omitted).

To address these issues, Part I of this Article presents a close reading of the Tenth Circuit appellate decisions that considered and rejected Neill's claim that his death sentence was impermissibly tainted by prejudicial, antihomosexual prosecutorial misconduct. Part II provides a reading of Neill's crime and punishment as a gay story, considering both the explicit and the many more subtle references to homosexuality and gender throughout the formal legal proceedings against Neill and within the contemporaneous local journalism about his crimes. Part III turns to the question of what makes the prosecutor's argument error. Recognition of the error is, fundamentally, a positive normative judgment about homosexuality, similar in many ways to the normative perspective taken by the United States Supreme Court in *Lawrence v. Texas*.<sup>8</sup> Neill's case showcases enormous changes in how homosexuality has been culturally framed and legally constituted in the past two decades, in a sense creating an error where none existed before.

Part IV uses the extravagantly shifting meanings of homosexuality and the prominence of Neill's homosexuality in the trial participants' understanding of his crimes, to reveal the shallow methodology of harmless error analysis as used for constitutional errors in capital penalty trials. The Article concludes by recognizing that reading the Geronimo Bank Murders as a gay tragedy pushes the identity-based gay rights movement outside its assimilative comfort zone, and endorses the usefulness of that push.

#### I. CONDEMNING BIAS, CONDEMNING NEILL

By the time Neill's case reached federal habeas corpus review, the last meaningful stage in capital litigation,<sup>9</sup> his best legal argument was a claim that his execution would be unconstitutional because it was based on the explicit exhortation by the prosecutor to execute Neill in part because he was a homosexual. A panel of the Tenth Circuit addressed these issues twice.<sup>10</sup> The gruesome and horrible facts of Neill's crimes were set forth by the Tenth Circuit:

A jury sentenced Neill to death after convicting him of four counts of first degree malice murder stemming from Neill's armed robbery of a

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8. 539 U.S. 558 (2003).

9. See generally Andrew Gelman, James S. Liebman, Valerie West & Alexander Kiss, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004) (providing data related to state and federal court reversals of death verdicts).

10. See generally *Neill I*, 263 F.3d 1184 (10th Cir. 2001); *Neill II*, 278 F.3d 1044 (10th Cir. 2001).

Geronimo, Oklahoma bank in December 1984. Neill did not contest his guilt during the trial's first stage. The State's evidence established that Neill, then age nineteen, and his codefendant, Grady Johnson, age twenty-one, were roommates involved in a homosexual relationship. In 1984, they were having serious financial difficulties. During the week before the bank robbery, the pair purchased two knives, obtained a gun permit, bought a .32 caliber handgun and ammunition, and made plane reservations to San Francisco for Friday afternoon, December 14. On that Friday, shortly after 1:00 P.M., Neill robbed the bank. During the robbery, Neill stabbed three bank employees to death. All three women died from multiple stab wounds to their head, neck, chest and abdomen. One woman was seven months pregnant. Neill also attempted to decapitate each woman with a knife.

Five customers entered the bank during the robbery. Neill forced all five to lie face down in the back room where the employees had been stabbed. He then shot each customer in the head, killing one and wounding the other three. . . .

Neill and Johnson then flew to San Francisco, where they spent some of the approximately \$17,000 stolen from the bank on expensive jewelry and clothing, hotels, limousines and cocaine. FBI agents arrested the pair there three days after the robbery.

Prior to this trial, Neill gave a videotaped interview to a religious television program, "The 700 Club," and wrote several letters to an author writing a book about the murders. Neill also wrote letters and made telephone calls apologizing to several victims. In these communications, Neill admitted committing the crimes.<sup>11</sup>

Neill did not contest his guilt,<sup>12</sup> but did seek life rather than death at trial, and challenged the death verdict in direct appeals and habeas corpus proceedings in Oklahoma and federal courts.<sup>13</sup>

Among multiple claims, Neill contended to the Tenth Circuit that the prosecutor's repeated description of Neill as homosexual during closing argument constituted prejudicial prosecutorial misconduct.<sup>14</sup> Oklahoma's statutory capital sentencing scheme requires the jury to weigh mitigating factors (support for life) offered by the defendant

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11. *Neill I*, 263 F.3d at 1188-89 (footnote omitted); *see also Neill II*, 278 F.3d at 1049-50 (footnote omitted). The Tenth Circuit's cautious description of Neill and his codefendant as "roommates involved in a homosexual relationship" reveals some discomfort, and distancing, from the passionate romance and sexual relationship that was at the center of this story. *Neill I*, 263 F.3d at 1188; *cf.* MICHAEL WILLHOITE, DADDY'S ROOMMATE (1991) (children's book published by gay press in which a little boy tells about his parents' divorce and his father's relationship with his new "roommate").

12. *Neill I*, 263 F.3d at 1188.

13. *See* *Neill v. State*, 896 P.2d 537 (Okla. Crim. App. 1994), *cert. denied*, 516 U.S. 1080 (1996); *Neill v. State*, 943 P.2d 145 (Okla. Crim. App. 1997). Neill told the jury that he would not appeal from a sentence of life without parole. *Neill I*, 263 F.3d at 1198.

14. *Neill I*, 263 F.3d at 1197.

against enumerated aggravating factors (support for death) presented by the state.<sup>15</sup> The Oklahoma Supreme Court had identified as appropriate mitigation any evidence suggesting that a capital defendant was acting under “extreme mental or emotional disturbance” when he committed the crime.<sup>16</sup> Neill’s defense argued that this mitigating factor applied because Neill had committed the crimes suffering from extreme emotional disturbance caused by his fear of losing his relationship with Johnson, and the jury was given an instruction that supported this claim of mitigation.<sup>17</sup> In response, the prosecutor argued to the jury that Neill was “a vowed homosexual. He had a gay lover he didn’t want to lose.”<sup>18</sup> Judge Deanell Reece Tacha’s opinion noted that “[t]he prosecutor then compared Neill’s situation to the breakup of a heterosexual relationship or marriage, arguing neither instance justified murder.”<sup>19</sup>

Having set forth the contested argument, Judge Tacha offhandedly rejected the claim:

These comments on Neill’s homosexuality were accurate, in light of the evidence, and were relevant to both the State’s case and Neill’s defense theory. Trial counsel, therefore, was not ineffective for failing to object.

The prosecutor made additional remarks aimed at Neill’s homosexuality. Because defense counsel did object to those remarks, however, he was not constitutionally ineffective.<sup>20</sup>

This cavalier treatment of the issue provoked a blistering dissent by Judge Carlos F. Lucero.<sup>21</sup> With rhetorical escalation beyond the usual voice of the federal appellate judiciary,<sup>22</sup> Judge Lucero blasted: “Because the prosecutor’s blatant homophobic hatemongering at sentencing has no place in the courtrooms of a civilized society, and Neill’s appellate counsel’s failure to raise the issue on direct appeal constitutes clear and

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15. See OKLA. STAT. ANN. tit. 21, §§ 701.10, 701.11 (West 2007).

16. Cox v. State, 644 P.2d 1077, 1079 (Okla. Crim. App. 1982).

17. Neill v. State, 896 P.2d 537, 558 (Okla. Crim. App. 1994).

18. *Neill I*, 263 F.3d at 1197 (quoting Transcript of Trial Proceedings at 1283). “A vowed” was a misstatement or mis-transcription of “avowed.” The mistake evokes marriage vows, decidedly not available to Neill and Johnson in Oklahoma at the time of this case. Alternatively, as suggested to me by Timothy Kaufman-Osborn, this might evoke the performative utterance, “I promise to be gay,” the meaning of which might entail adoption of a particular identity, sexual desire, activity, relationships to others, or something else.

19. *Id.*

20. *Id.*

21. See *id.* at 1199-1204 (Lucero, J., dissenting).

22. See Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1563 (1990) (claiming that passionate writing that sounds more like the “rhetoric of politics” than the “rhetoric of law” is often found in dissents on such sensitive subjects as the death penalty or homosexuality).

plain prejudicial neglect, I respectfully dissent.”<sup>23</sup> While expressing reservations about the phrase and the standard, Judge Lucero described Neill’s argument as a “dead-bang winner”<sup>24</sup> and provided a more complete excerpt of the prosecutor’s argument to the sentencing jury:

If I could ask each of you to disregard Jay Neill and take him out of the person but consider these things in a generic way. I want you to think briefly about the man you’re setting [sic] in judgment on . . . and believe me, . . . you have every thing [sic] in this case, the good, the bad, everything that the law allows to aid you in this decision. But just generic, just put in the back of your mind what if I was sitting in judgment on this person without relating it to Jay Neill, and I’d like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you’re sitting in judgment on—disregard Jay Neill. You’re deciding life or death on a person that’s a vowed [sic] homosexual. . . . But these are areas you consider whenever you determine the type of person you’re setting [sic] in judgment on. . . . The individual’s homosexual. He’s in love with Robert Grady Johnson.<sup>25</sup>

Judge Lucero’s skepticism cut through the prosecutor’s self-justification: “While thinly disguising his intent by denying that a person’s ‘sexual preference’ is an ‘aggravating circumstance,’ the prosecutor deviously and despicably incited the jury with the [preceding] statement.”<sup>26</sup> Judge Lucero understood these comments as “susceptible of only one possible interpretation: among other factors, Neill should be put to death because he is gay.”<sup>27</sup>

Judge Lucero captured the prosecutor’s purpose out of his convoluted, strange argument. Somehow, the trial attorney had wrapped himself up in some of the most difficult deontological questions. What is left when one takes Jay Neill “out of the person”? Was it possible for a juror to sit in judgment on the defendant Jay Neill “without relating it to Jay Neill”? We can surmise that the prosecutor, rather than purposively

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23. *Neill I*, 263 F.3d at 1199 (Lucero, J., dissenting).

24. *Id.* at 1199. The “dead-bang winner” phrasing would be even more remarkable if Oklahoma used a firing squad instead of lethal injection.

25. *Id.* (quoting Trial Transcript at 1285-87). The prosecutor’s awkward invitation to “disregard Jay Neill and take him out of the person” was presumably a poorly executed attempt to counter the standard defense strategy of humanizing the capital defendant. *Id.* “Wake up a capital defense lawyer in the middle of the night and ask, *what is your most important task in the penalty phase?*, and the response will be, *humanize my client.*” Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 736 (2006).

26. *Neill I*, 263 F.3d at 1199 (Lucero, J., dissenting).

27. *Id.* at 1201.

embarking on some post-structuralist detour,<sup>28</sup> feared that some members of the jury might have found something human and worth saving in Jay Neill. Perhaps they felt sorry for him. Perhaps they were moved by his attempts to make amends,<sup>29</sup> or his religious faith.<sup>30</sup> Or perhaps they were moved by his successful communications with his victims and the testimony of one of the victims that she had forgiven him.<sup>31</sup> Perhaps they were inclined to find redemption in him because of his renunciation of his homosexuality on Pat Robertson's 700 Club.<sup>32</sup>

Defending against any of these possibilities, the prosecutor needed to separate the humanity from the defendant. His first rhetorical move then, consistent with the well-entrenched traditions that associate homosexuality with evil, crime, or sin, was to emphasize Neill's homosexuality as the aspect of his identity that marked "the true person, what kind of person he is."<sup>33</sup> In this perverse way, the prosecutor joined in the now-familiar discourse asserting that gay identity is central to personhood.<sup>34</sup>

Judge Lucero's Tenth Circuit dissent emphasized the monumental prejudicial impact of the remarks.<sup>35</sup> Judge Lucero accepted as appropriate the prosecutor's withering argument that "losing a lover" does not justify robbing a bank, but found that the additional comments emphasizing Neill's identity as homosexual "add nothing to the critique and only serve to highlight the irrelevant and prejudicial fact of Neill's sexual orientation. The prosecutor's comments a few pages later in the transcript are totally unresponsive to Neill's mitigation evidence and are designed solely to inflame the jury's prejudices."<sup>36</sup>

To the State's claim that these comments were all permissible because "it was Neill himself who 'introduced the issue of his sexual

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28. See, e.g., Judith Butler, "Appearances Aside"; 88 CAL. L. REV. 55, 59 (2000) ("[W]hat is it we purport to judge when we judge a person? Do we judge something that exists, or does our judgment bring into being by its own presumption about personhood, operating performatively, as it were, to install its speculative premise as human reality?").

29. *Neill I*, 263 F.3d at 1189.

30. *Id.* at 1198.

31. *Id.*

32. *Killer Tells of Slaying at Geronimo*, DAILY OKLAHOMAN, Apr. 1, 1986, at 1, 2.

33. *Neill I*, 263 F.3d at 1199 (Lucero, J., dissenting (quoting Trial Transcript at 1285-86)).

34. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

35. "As the prosecutor knew, emphasizing that Neill was gay likely had a tremendous negative impact on jurors." *Neill I*, 263 F.3d at 1201 (citations omitted) (Lucero, J., dissenting). Judge Lucero cited Fourth, Ninth and Tenth Circuit decisions, law review commentary, and a report from a Judicial Council of California Sexual Orientation Fairness Subcommittee to support this claim. *Id.* at 1201-02.

36. *Id.* at 1202.

orientation,”<sup>37</sup> Judge Lucero countered with an analogy to anti-Semitism: “To my mind that argument is no different from claiming that a Jewish defendant opens the door to a prosecutor’s anti-Semitic arguments by wearing a yarmulke in the presence of jurors.”<sup>38</sup> Concluding with an argument focused on the constitutional requirement that death sentences “be, and appear to be, based on reason rather than caprice or emotion,”<sup>39</sup> Judge Lucero determined that Neill’s appellate counsel rendered constitutionally defective assistance of counsel by failing to raise as error on appeal these “bigoted comments”<sup>40</sup> of the prosecutor, and that the procedural default was excused.<sup>41</sup>

Echoing the status versus conduct preoccupation of legal theory attempting to deal with *Bowers v. Hardwick*,<sup>42</sup> Judge Lucero concluded, “I cannot sanction—because I have no confidence in—a proceeding tainted by a prosecutor’s request that jurors impose a death sentence based, even in part, on who the defendant is rather than what he has done.”<sup>43</sup> Although morally appealing, this complaint makes no sense under well-established capital jurisprudence. In the thirty years since the Supreme Court decided *Woodson v. North Carolina*<sup>44</sup> and *Lockett v. Ohio*,<sup>45</sup> capital sentencing in the United States has been precisely a project of determining who the defendant is.<sup>46</sup> *Lockett* established that a capital sentencing jury must “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death.”<sup>47</sup> Judge Lucero must have been using shorthand, meaning that one’s identity as a homosexual, unlike, for example, one’s identity as a murderer, is an impermissible basis for a sentence of death.

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37. *Id.* (quoting Appellee’s Brief at 42).

38. *Id.* The opinion proceeds to compare antihomosexual rhetoric to racial, national, or religious prejudice. *Id.* at 1202-03.

39. *Id.* at 1203 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality)).

40. *Id.*

41. *Id.* Judge Lucero also found that Neill’s counsel was ineffective for failing to ask three jurors whether they were predisposed to impose death. *Id.* at 1203-04. The combined prejudice from both errors was sufficient, according to Judge Lucero, to require vacation of Neill’s death sentence. *Id.*

42. 478 U.S. 186 (1986); see, e.g., Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170 (1988).

43. *Neill I*, 263 F.3d at 1203 (Lucero, J., dissenting); cf. Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1907-10 (2006).

44. 428 U.S. 280 (1976).

45. 438 U.S. 586 (1978).

46. See *Woodson*, 428 U.S. at 303-05.

47. *Lockett*, 438 U.S. at 604 (italics omitted).

The righteousness and vigor of Judge Lucero's dissent got the attention of the rest of the Tenth Circuit panel, which granted Neill's petition for rehearing.<sup>48</sup> The second time around the result and the two-to-one decision remained the same, but both sides modified their rhetoric.<sup>49</sup>

Writing again for the majority, Chief Judge Tacha rejected Neill's arguments about the first contested comments of the prosecutor—that losing a lover did not justify robbing a bank—with an extended treatment that reached the same conclusion.<sup>50</sup> Judge Tacha seemed to have had her consciousness raised, though, regarding the second set of comments. Her revised opinion now condemned the prosecutor's emphasis on Neill's character as “a vowed homosexual”:<sup>51</sup> “There does not appear to be any legitimate justification for these remarks. They are improper.”<sup>52</sup>

Thus, the two *Neill* Tenth Circuit opinions provide one answer to the question implied by Justice Scalia's lament in his *Romer v. Evans* dissent: when did it become un-American to condemn homosexuality?<sup>53</sup> In the weeks or months between the first and second *Neill* opinions, the Tenth Circuit *Neill* panel reflected a cultural transformation analogous to that made by the Supreme Court between *Bowers v. Hardwick*<sup>54</sup> and *Lawrence v. Texas*:<sup>55</sup> the transformation from condemning homosexuality to condemning antihomosexual bias. Judge Tacha cited no authority for her new conclusion that the prosecutor's highlighting of Neill's homosexuality was improper.<sup>56</sup> Instead, the error that had been ignored in the first opinion became self-evident in the second.

Unfortunately for Neill, although the court's rhetoric became more sensitive on rehearing, the result did not change.<sup>57</sup> Chief Judge Tacha reminded us that “not every improper or unfair remark made by a

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48. *Neill II*, 278 F.3d 1044, 1049 (10th Cir. 2001).

49. *See generally Neill I*, 263 F.3d 1184 (10th Cir. 2001); *Neill II*, 278 F.3d 1044 (10th Cir. 2001).

50. *Neill II*, 278 F.3d at 1060.

51. *Id.*

52. *Id.* at 1061.

53. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“Coloradans have been guilty of ‘animus’ or ‘animosity’ toward homosexuality, as though that has been established as un-American.”).

54. 478 U.S. 186 (1986) (holding that the Fourteenth Amendment Due Process clause does not provide a fundamental right to engage in acts of consensual homosexual sodomy).

55. 539 U.S. 558 (2003) (overruling *Bowers*, 478 U.S. 186).

56. *See generally Neill II*, 278 F.3d at 1044-64.

57. *See generally id.*

prosecutor will amount to a federal constitutional deprivation,”<sup>58</sup> and that the “relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting [sentencing decision] a denial of due process.”<sup>59</sup>

After reciting the strong case of guilt, which was not contested, and the most prejudicial facts, including that after the murders “Neill flew to San Francisco with Johnson, where they spent the stolen money on expensive jewelry and clothing, hotels, limousines and cocaine,”<sup>60</sup> the appellate court concluded: “without in any way condoning the prosecutor’s remarks, we cannot say that they tipped the scales of justice in the State’s favor or precluded jurors from considering the evidence fairly.”<sup>61</sup> In other words, the prosecutor’s attempt to persuade the jury to sentence Neill to death because he was gay was harmless error.

On rehearing, Judge Lucero moderated his rhetoric but continued to dissent.<sup>62</sup> Judge Lucero commended the majority’s new conclusion that these words were improper, but refused to join the majority in reducing the prosecutor’s argument to “a matter of propriety.”<sup>63</sup> To the contrary, Judge Lucero concluded that the prosecutor’s words deprived Neill of a fair trial.<sup>64</sup> The dissent challenged the majority’s failure to consider the context of widespread antihomosexual bias in which the trial was conducted: “unmentioned in [the majority’s] analysis is the reality that gays and lesbians are held in contempt by substantial numbers among us. This well-known prejudice presents the *only* rationale for the prosecutor’s direct plea that the jury ‘disregard’ Neill as a person and consider him instead ‘a vowed [sic] homosexual.’”<sup>65</sup> Judge Lucero argued that blatant and direct pleas to bias “cannot be ignored”<sup>66</sup> and compared the anti-homosexual remarks to racist comments: “We must draw the line where the racial or sexual plea is blatant and direct, and we must resolutely

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58. *Id.* at 1061 (quoting *Tillman v. Cook*, 215 F.3d 1116, 1129 (10th Cir. 2000) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 338 (1985) (plurality), *cert. denied*, 531 U.S. 1055 (2000) (No. 00-6580)).

59. *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

60. *Id.*

61. *Id.*

62. *See generally id.* at 1064-76 (Lucero, J., dissenting).

63. *Id.* at 1064.

64. *Id.* (“[T]he level of repugnancy of a crime must not dictate the level of adherence to those constitutional principles that define a fair trial in this country.”).

65. *Id.*

66. *Id.* at 1065.

resolve subject cases under that standard to assure that the line remains indelible.<sup>67</sup>

Judge Lucero proceeded to document evidence of widespread contempt against gay people.<sup>68</sup> Tellingly, Judge Lucero used Chief Justice Burger's infamous concurrence in *Bowers v. Hardwick* as a prime example of such contempt.<sup>69</sup> Chief Justice Burger's concurrence was issued six months after Neill's crimes.<sup>70</sup> At the time it was written, the Burger concurrence was denounced as judicial hate speech by gay rights advocates.<sup>71</sup> By 2001, it was used by a federal judge as an exemplar of impermissible bigotry.<sup>72</sup>

Neither Judge Lucero's passionate dissent nor Neill's attorneys' vigorous defense saved his life.<sup>73</sup> Following this loss in the Tenth Circuit and an unsuccessful petition for certiorari to the Supreme Court,<sup>74</sup> Jay Neill was executed on December 12, 2002.<sup>75</sup>

## II. *STATE OF OKLAHOMA V. NEILL*: "A QUEER DEAL"?"<sup>76</sup>

Judge Lucero expressed outrage that the prosecutor emphasized Neill's homosexual identity in his argument for death. Yet, from the moment that Jay Neill and his lover, Grady "Robby" Johnson, were arrested three days after the murders, homosexuality was a salient and highly prejudicial aspect of this case for virtually everyone who knew

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67. *Id.* He continued, "If by balancing the evidence against the challenged comments we allow the repugnancy of the crime to define the minimum standard of fairness of the adversary's sullied fray, we also allow an open appeal to prejudice to prevail." *Id.*

68. *See id.* at 1066.

69. *Id.* (citing *Bowers*, 478 U.S. 186, 196-97 (1986)). Judge Lucero also used the *Darden* standards to evaluate the prejudicial impact of the prosecutorial misconduct, almost wavering between the justice of a per se rule of reversal and the more forgiving analysis currently under favor. *Id.* at 1069-73.

70. *Neil I*, 263 F.3d 1184, 1188 (Okla. Crim. App. 2001); *Bowers*, 478 U.S. at 186.

71. *E.g.*, "The opinions against Hardwick's position from the Justices themselves sound similar to anti-gay epithets, albeit framed in legalisms." Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1, 14 (1994); *cf.* Astrid A.M. Mattijssen & Charlene L. Smith, *Dutch Treats: The Lessons the U.S. Can Learn From How the Netherlands Protects Lesbians and Gays*, 4 AM. U.J. GENDER & L. 303, 314-15 (1996) (citing Burger's concurrence as an example of "common homophobic misinformation and prejudice" in the United States).

72. *See, e.g., Neill II*, 278 F.3d at 1066.

73. *See Neill, supra* note 1.

74. 537 U.S. 835 202 (No. 01-10121).

75. *See Neill, supra* note 1. According to press reports, Neill's last words, to members of the victims' families who witnessed the execution, were, "I'm really sorry for what I did. I'm not sorry because I'm lying here dying." Bob Doucette, *Geronimo Bank Slayer Executed at Penitentiary*, DAILY OKLAHOMAN, Dec. 13, 2002, at 1-A.

76. *See* Chris Brawley, *Police, Psychiatrist Dispute Homosexual Role*, OKLAHOMAN, June 16, 1985, at 1-A (claiming that law enforcement officers privately called this a "queer deal").

about them. A gay-centric accounting of the case establishes that no one made sense of the crimes or the legal proceedings except as a story about homosexuality.<sup>77</sup> The impact of the prosecutor's closing argument should be assessed in the context of the entire case.

The state's reading of this as a gay crime began as soon as Neill and Johnson were identified as suspects, or even before, by police accounts. As reported in the local press (and thus communicated to all participants in the case), the official story was that the gruesome brutality of the crimes showed that the perpetrator was homosexual. In discussing this investigation the chief inspector for the Oklahoma State Bureau of Investigation claimed that in "most cases of overkill . . . the perpetrator turns out to be a homosexual," a supposed fact and actual exemplar of breathtaking bigotry that he said agents were trained to know.<sup>78</sup>

Other law enforcement officials said they knew—before Neill and Johnson were arrested on a shopping spree in San Francisco—that it was homosexuals who viciously stabbed the three women at the Geronimo branch of the First Bank of Chattanooga. "That's the first thing I said," said Tony Burns, district attorney for Grady County. "There had to be sexual overtones towards the women. It had to be someone with an emotional problem towards women and (who) needed to feel superior to them."<sup>79</sup>

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77. Privileging the multiple constitutive performances and constructions of homosexuality is just one of many possible versions of this story. Another, for example, could make this a story of the West, emphasizing the frontier mentality, the claimed libertarianism of many of the jurors, and Neill's gender transgressions of the mythic, hyper-masculine Western outlaw. Cf. Judith Randle, *The Cultural Lives of Capital Punishment in the United States*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* 92 (Austin Sarat & Christian Boulanger eds., 2005) (focusing on capital punishment in the United States as illuminating regional identifications of the North and the South); see also RICHARD SLOTKIN, *GUNFIGHTER NATION* (1992), *quoted in* *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* 129 (Austin Sarat & Christian Boulanger eds., 2005) ("The primary social and political function of the extraordinary violence myth is to sanction the ordinary violence of oppression and injustice, of brutalities casual or systematic, or the segregation, insult or humiliation of targeted groups."). Neill's case also could be constructed as a story about childhood and youth, or perhaps about mental illness.

78. Brawley, *supra* note 76. The newspaper account claimed that law enforcement officers privately call this a "queer deal." *Id.*

79. *Id.* At the time of this crime, many medical examiners, including the chief medical examiner's office in Oklahoma City, used a text that claimed:

Deaths resulting from male homosexual practices usually have a characteristic pattern both in the findings at the scene of the crime and in injuries resulting in the death. . . . [A]ccording to the medical examiner's book, murder with a homosexual aspect includes overkill, wounds all over the body and the use of a wide range of weapons, including knives, scissors, guns, bottles and hammers.

*Id.*

Shortly after Neill and Johnson were arrested, officials investigating the crimes told the press that the killings might have been retaliation for an antigay slur made by one of the victims when Neill and Johnson were at the bank attempting to arrange for a car loan.<sup>80</sup> An operations officer for the bank described Neill and Johnson as problem customers: “There are certain people that draw attention.”<sup>81</sup>

Not only did the state that sought to execute Neill understand this as a homosexual case, but defense tactics also aggressively highlighted the gay context of these crimes. Most dramatically, prior to trial, Neill’s attorney claimed that the marital privilege prevented the introduction into evidence of comments Neill and Johnson had made to each other.<sup>82</sup> Although the strategy of attempting to control the harm to Neill from incriminating evidence from Johnson was quite sensible, promoting gay marriage at this time and place and in the context of this murder trial proved to be highly inflammatory. According to the press, part of the basis for the motion was the codefendants’ joint checking account in the First Bank of Chattanooga in Geronimo, the very bank where the victims were murdered.<sup>83</sup> The defense motion also argued that Neill and Johnson were living “in the nature of a marriage relationship,” including sharing a bedroom in their apartment and sharing a hotel room in San Francisco during their flight after the crime.<sup>84</sup>

Editorializing against the marital privilege motion, the Lawton, Oklahoma newspaper, THE DAILY OKLAHOMAN, pointedly reminded its readers that homosexual sodomy was a serious felony under Oklahoma law: “It seems odd . . . that at least part of the defense strategy would be based on something illegal under Oklahoma law: homosexual conduct. A person guilty of a crime against nature, which includes homosexual acts, is subject to a prison term of up to 10 years.”<sup>85</sup> The editorial concluded, “The Geronimo defendants are trying to give new meaning to

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80. Chris Kinyon, *Remark May Have Led to Deaths in Geronimo*, DAILY OKLAHOMAN, Dec. 18, 1984, at 1 (“Financial problems and what an alleged killer took to be a derisive remark about being gay may have smoldered and burst into the violence that led to the deaths of four people and the injuring of three others in the bank at Geronimo last Friday, officials said Monday. Jay Wesley Neill, 19, . . . had an account at the bank . . . and was allegedly at one time teased by one of the victims about being gay.”).

81. Chris Kinyon, *Slaying Suspects Plagued by Debts*, DAILY OKLAHOMAN, Mar. 5, 1985, at 1, 2.

82. Chris Kinyon, *‘Marital Privilege’ Denied Geronimo Slayings Suspects*, DAILY OKLAHOMAN, May 3, 1985, at 20.

83. *Id.*

84. *Id.* The prosecutor’s later misstatement about Neill as a “vowed homosexual” is particularly ironic in light of the earlier marital privilege motion that had established resoundingly that Neill and Johnson were not “vowed” homosexuals.

85. *Strange Defense Strategy*, DAILY OKLAHOMAN, May 2, 1985, at 18.

the phrase, 'marriage of convenience,' but it looks like a queer strategy to us."<sup>86</sup> The editorial's language was actually more restrained than that of the Oklahoma legislature, which punished then and purports to punish today "the detestable and abominable crime against nature."<sup>87</sup> Indeed, the only group more appalled by Neill and Johnson's claim of marital privilege than the local citizenry might have been any gay rights advocacy groups attempting to design a winning litigation strategy for same-sex marriage.<sup>88</sup> A newspaper account of the marriage claim quoted the lieutenant in the sheriff's office who was supervisor of the jail as saying that "[t]he two have never mentioned being married" but that he had "heard conversations between the two that 'they're going to get married when they get out.'"<sup>89</sup> He added that if they had wedding rings, they were not allowed to wear them in jail.<sup>90</sup>

Not only was the publicity surrounding the case filled with explicit references to Neill and Johnson's homosexuality, but the formal court proceedings were replete with explicit and more subtle cues, signals, and taunts. For example, in testimony dripping with contempt, the state

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86. *Id.*

87. OKLA. STAT. ANN. tit. 21, § 886 (West 2007). The statute in full provides, "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." *Id.* Oddly, *Lawrence v. Texas*, 539 U.S. 558 (2003), apparently has not led to any legislative reworking or repeal of the statute. Section 886 appears to apply to consensual acts. Compare this section to OKLA. STAT. ANN. tit. 21, § 888 (West 2007), which addresses forcible sodomy. In 1986, the Oklahoma Supreme Court ruled the "crime against nature" statute unconstitutional as applied to heterosexual sodomy, but, following the lead of *Bowers v. Hardwick*, 478 U.S. 186 (1986), reserved the question of the continuing applicability of the statute against homosexual activity. See *Post v. State*, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) ("It now appears to us that the right to privacy, as formulated by the Supreme Court, includes the right to select consensual adult sex partners. . . . We stress that our decision today in no way affects the validity of 21 O.S. 1981, § 886 in its application to bestiality, forced sexual activity, sexual activity of the underaged, or public or commercial sexual acts. We do not reach the question of homosexuality since the application of the statute to such conduct is not an issue in this case.").

88. To provide historical context, the National ACLU Lesbian and Gay Rights Project was not started until June 1986, and the ACLU became perhaps the first non-gay organization to endorse same-sex marriage in October 1986, six months after Neill's same-sex marriage privilege claim was filed. Nan Hunter, *Memories of the Beginning of the Project*, in ANNUAL UPDATE OF THE ACLU'S NATIONWIDE WORK ON LGBT RIGHTS AND HIV/AIDS 12 (2006), available at [http://www.aclu.org/images/asset\\_upload\\_file401\\_26559.pdf](http://www.aclu.org/images/asset_upload_file401_26559.pdf). Within gay and lesbian communities, a prominent debate that marked the beginning of high visibility for efforts to achieve same-sex marriage was not published until 1989. See Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Autumn 1989, at 8; see also Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Autumn 1989, at 8.

89. Chris Kinyon, *Geronimo Suspects Claim 'Marriage'*, DAILY OKLAHOMAN, May 1, 1985, at 1-2.

90. *Id.*

psychiatrist who testified that Neill was competent to stand trial described him as “a little guy who wants to pout and put on a show.”<sup>91</sup>

At trial, the jurors were reminded of the salience of Neill’s gay identity from their first appearances at jury selection. Neill’s attorney attempted to root out antigay bias in his initial questioning of potential jurors. He began, “Now, my client, as everybody in the community knows, is a homosexual. That is the label that is constantly applied with him. You’ve heard that before, haven’t you?”<sup>92</sup> They had. And if they had not heard it before, they heard it countless times during jury selection.<sup>93</sup>

The voir dire provides a sample of religious thought regarding homosexuality in Lawton, Oklahoma, at the time, and a tricky tightrope walk for defense counsel attempting to ferret out bias without solidifying it for the group. Most potential jurors claimed affiliation with a Christian church; some did not know the views of their churches on homosexuality, but several stated that their churches were opposed.<sup>94</sup>

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91. Chris Kinyon, *Psychiatrist Says Killers Competent*, DAILY OKLAHOMAN, Sept. 2, 1987, at 10. In attempting to establish that Johnson was not competent to stand trial, his defense presented direct evidence relating to his homosexuality, specifically that psychological tests done prior to the crimes showed that Johnson was “extremely disturbed . . . with substantial psychological, sexual, social and identity problems.” J. Green, *Neill, Johnson Tests Insufficient, Doctor Hans VonBrauchitsch Testifies*, THE LAWTON CONSTITUTION, Sept. 1, 1987, at 1A. The defense psychiatrist testified that the test results suggested that Neill was paranoid, and that he should have been tested for brain damage caused by encephalitis he suffered as a child. *Id.*

92. Transcript of Trial Proceedings at 149, *State v. Neill*, No. CRF-84-597 (District Court of Comanche County, Okla. Sept. 22, 1992) (unpublished transcript, on file with author) [hereinafter Trial Transcript].

93. *See generally id.* at 75-250.

94. *See generally id.* When asked his church’s teaching on homosexuality, potential juror “Smith” explained, “It’s really not publicized. Some people are for it; some people don’t have any viewpoint; some people are totally against it. It depends.” *Id.* at 150. All jurors have been given pseudonyms to protect their privacy. Transcripts with actual juror names are on file with *Law & Sexuality*. The next potential juror, “Jones,” explained that her church was against homosexuality: “we—in the bible it’s against, you know, all of our views on that.” *Id.* That same potential juror, who was church clerk of the Mission Village Baptist Church, averred that her religious attitudes against homosexuality would not affect how she would react to the evidence. *Id.* at 151. The next potential juror, a Baptist, agreed that his church, too, taught that homosexuality is contrary to the Bible but that it would not cause him to be biased. *Id.* at 153-54. The defense counsel asked the entire panel whether any of them were “affiliated with a group on either side of the homosexuality issue.” *Id.* at 154. Ms. “Richards” indicated that she was, as the wife of a minister of the New Zion Baptist Church, but that she could “definitely” give Neill a fair trial. *Id.* Potential juror “Winchester,” a member of the Holy Family Catholic Church, explained that his church’s views on homosexuality were the same as the Baptists’. *Id.* at 155. But Mr. “Winchester” explained that his twenty-one years in the military meant that he “had to deal with several situations of that nature” and that “it never bothered [him] before.” *Id.* The next potential juror was Catholic, and described the same views, and that it would not bother him. *Id.* at 156. The next potential juror attended the Stecker Assembly of God, where he had never heard homosexuality mentioned. *Id.* at 157. This juror, too, disclaimed any prejudice against gays. *Id.*

One potential juror acknowledged that he was not affiliated with any church.<sup>95</sup> He answered that his “viewpoint on homosexuality” was that “[t]hey’re people. That’s it.”<sup>96</sup> In light of the pervasive Christian affiliations expressed by so many jurors, the prosecutor’s explanation that he used a peremptory challenge against an African American woman in part because of her “close religious affiliation”<sup>97</sup> is difficult to credit, although the trial court did so in denying the defense’s *Batson*<sup>98</sup> motion based on the prosecutor having used peremptory challenges against the first three possible African American jurors.<sup>99</sup>

Having probed the religiously-based attitudes toward homosexuality, Neill’s attorney presented the group with a more open-ended inquiry: “Is there anybody here who’s—who themselves or their spouse have ever had homosexuals that have somehow affected their life or intruded into their life and brought their lifestyle into collision with your

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Potential juror “Dean” attended the First Assembly of God in Lawton, and the next potential juror, “Samson,” attended the Cache Christian Church, which she did not think discussed homosexuality. *Id.* at 158-59. Potential juror “Samson” summarized her position on homosexuality stating, “It’s their business as long as it doesn’t affect me and their jobs or whatever.” *Id.* at 159. The next juror, Mrs. “Page,” attended Lawton Christian Center, where “[the minister has] never preached a sermon on it, but I can say that he probably doesn’t agree with it.” *Id.* at 161. Mrs. “Page” agreed, though, that what someone else does does not bother her. *Id.* Potential juror “Washington” went to the Bethlehem Baptist Church, *id.* at 187, but she did not know the Church’s position on homosexuality. *Id.* She would not be bothered by the city hiring a “homosexual fire fighter” or “homosexual teacher.” *Id.* at 162. The next potential juror was a member of the Fletcher Baptist Church, which she characterized as teaching that homosexuality is “wrong.” *Id.* at 190. She claimed that she would not discriminate against a homosexual in hiring. *Id.*

95. *Id.* at 162.

96. *Id.*

97. *Id.* at 181.

98. *See* *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the Equal Protection clause forbids the prosecutor to challenge potential jurors solely because of their race).

99. *See* Trial Transcript, *supra* note 92, at 180-81. Ms. “Richards,” a black woman, was the first juror excused by the prosecutor. *Id.* at 181. In response to a *Batson* challenge, the prosecutor claimed that her “close religious affiliation” made him leery, and that “[s]he had a very small—about a three inch hat—sitting on the middle of the top of her head much like an organ grinder would. . . . [D]uring the time Mr. Pearson’s voir dire she was shaking her head adamantly up and down on issues of fair trial and would hear all the evidence and would not convict unless the evidence was beyond a reasonable doubt.” *Id.* The prosecutor challenged all three of the first three blacks that were potential jurors. *Id.* at 277. The prosecutor’s explanation of his challenge to Mrs. “Green” included that “[s]he is very independent and haughty in her actions. That’s how the State perceives her and that’s why I’m asking to take her off.” *Id.* In the discussion about the overruled *Batson* motion, defense counsel stated, “I don’t consider Hispanics to be minorities. They are fine people.” *Id.* at 278. The prosecutor subsequently challenged the only other black potential juror, Mr. “Daly,” because he retired from the military at a relatively low rank (sergeant first class) and because he was born and raised in the Chicago area. “Whether it be right or wrong I have a feeling about the crime rate in an urban area and this individual’s exposure to it. Has grown up with the idea of seeing and hearing in the news every day about killings and deaths.” *Id.* at 463-64.

own lives?”<sup>100</sup> Neill’s attorney’s question assumed that none of the potential jurors was gay, and his use of “intruded” and “collision” betrayed either his own discomfort and distancing from homosexuality or his strategic reflection of attitudes likely to be held by potential jurors. We can imagine that defense counsel’s discomfort was negligible, however, in comparison to that of the potential jurors he was questioning. The question required one potential juror, Ms. “Anderson,” to out her brother-in-law.<sup>101</sup> She told the court that her husband’s brother is a homosexual, and that “[w]e just both tell him that we can’t judge him. Only God can judge; we can’t judge him on what he does. If that’s what he wants to do that’s—it’s up to him.”<sup>102</sup> Loyally, in answer to the defense counsel’s question whether the gay brother had been banished from the family, Ms. “Anderson” said, “No. No. We love him very dearly. He’s a very good man.”<sup>103</sup>

Defense counsel’s question to potential juror “Simmons” was terribly clumsy: “Have you ever had a homosexual involvement—I mean people coming into your life and causing you or your family trouble or interruptions or offended you in any way because of some homosexual relationship?”<sup>104</sup> She answered, “Not just because of homosexual, no.”<sup>105</sup> In a variety of ways, again and again, jurors with religious attitudes against homosexuality and those without, all declared that their attitudes about homosexuality would not prevent them from rendering a fair trial.<sup>106</sup> In other words, just in the process of jury selection, jurors were repeatedly reminded that Neill was homosexual, that most of the religions in town were against homosexuality, that being

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100. *Id.* at 160.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 199.

105. *Id.*

106. *See id.* at 75-250. Potential juror “Green” declared that “[Neill’s homosexuality] isn’t a factor to me because he is a human being his sexual preferences are his own and that does not bother me in the least.” *Id.* at 210. Potential juror “Brown” said that she did not at all have a problem with hiring a homosexual to be a school teacher or a mail carrier or a police officer. *Id.* at 223. Potential juror “Dolan” said that in his military career he never knowingly came into contact with people who were homosexual and that he “would have had to report it should I have known.” *Id.* at 258. He disclaimed any problem if his employer hired a person who was homosexual. *Id.* The next potential juror had heard quite a bit on television that Neill had a homosexual past, but she was not bothered by homosexuality and homosexuals had never intruded into her life or her marriage. *Id.* at 268. The prosecutor later asked a potential juror: “The fact that Mr. Neill is a homosexual does that cause you any problem with setting [sic] on this case?” That juror answered in the negative. *Id.* at 429. Apparently the defense counsel only asked the first panel of potential jurors the homosexuality questions. *See id.* at 75-250.

opposed to homosexuality was normal, and that being against homosexuality did not mean being unfair.<sup>107</sup>

Once the jury was impaneled, the first thing the prosecutor told the jury about the facts of the case in his opening statement was that “Robert Grady Johnson and Jay Neill were homosexual lovers.”<sup>108</sup> The prosecutor’s statement proceeded with countless references to Neill and Johnson’s homosexual relationship, and with multiple more subtle references to stereotypes about gay men, namely that they are woman-hating, materialistic, flamboyant, flighty, superficial, and selfish.<sup>109</sup> For example, the prosecutor emphasized three occasions on which Neill had referred to a bank employee or other woman as a “bitch.”<sup>110</sup> He also presented Neill as irresponsibly flighty: “One day [in December, Neill] did not come to work claiming that he was so disgusted with the bank he did not think he could work or perform.”<sup>111</sup> The prosecutor emphasized that Neill pretended to have money,<sup>112</sup> and that shortly after the robbery Neill and Johnson “appeared happy. Dressed alike. Very nice.”<sup>113</sup> Inevitably, the prosecutor emphasized the co-defendants’ flight to San Francisco, their partying in the Castro district, and that they brought a man back to their hotel suite.<sup>114</sup>

The prosecutor also used his opening statement to tell the jurors that when Neill was arrested by FBI agents in San Francisco, Neill “asked them whether or not his mother would have to find out.”<sup>115</sup> That the prosecutor focused the jury’s attention on this is surprising, because usually the defense—not the prosecution—attempts to humanize the defendant by highlighting his youth and immaturity.<sup>116</sup> But Neill’s sad and pathetic question about his mother fit the prosecution’s implicit

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107. Of course, even critical commentary about stereotypes repeats them and therefore reinforces them. See also Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 165 (2007) (reviewing studies of judicial experiences of sexual minorities and finding that “visibility and knowledge of minority sexuality cannot be ignored once learned”).

108. Trial Transcript, *supra* note 92, at 566.

109. *Id.* at 568-655.

110. *Id.* at 570, 656, 658. Neill and Johnson made the bank teller (later killed) “uneasy and uncomfortable.” *Id.* at 580.

111. *Id.* at 590.

112. *Id.* at 583 (stating that Neill told the travel agent he did not dress like he had a lot of money but money was no problem).

113. *Id.* at 586.

114. See *id.* at 625.

115. *Id.* at 642.

116. See, e.g., Williams, *supra* note 25.

theme of gay neurosis, perhaps specifically the trope of gay men being unnaturally close to their mothers.<sup>117</sup>

Whether disturbing or banal, Neill's homosexuality was a persistent theme throughout the rest of the trial. For example, a neighbor testified that she was aware that "Neill and Johnson's sexual preference" was "homosexual."<sup>118</sup> She also testified during the trial of Robert Grady Johnson that "Johnson and Neill both like expensive clothes and jewelry" and that "Johnson would manipulate Neill by asking for things and getting upset when he didn't get them."<sup>119</sup> A friend and roommate of the couple was also asked whether she was aware of their sexual preference; yes, she answered, she knew that they were homosexuals.<sup>120</sup>

In response to the state's questioning, the neighbor testified that she never discussed religion with Neill and Johnson, and did not know if they were practicing any religion.<sup>121</sup> The roommate testified that to her knowledge, Neill and Johnson were not practicing Christians.<sup>122</sup> The prosecution's strategy of emphasizing not only that Neill and Johnson were homosexuals, but that they were *God-less* homosexuals, made excellent sense in light of the deep and wide Christian affiliations of the jurors. The relevance of Neill and Johnson's lack of religious activity to Neill's guilt for the crimes is much less clear.

Not surprisingly, the damning specifics of the escape to San Francisco were emphasized in the prosecutor's opening statement, through testimony, again in closing argument,<sup>123</sup> and, indeed, in the Tenth Circuit recitation of the strength of the case against Neill.<sup>124</sup> At trial, a hotel clerk from the Holiday Inn Union Square testified that Neill and Johnson told her that "they were out here for a good time and they were kind of like on a shopping spree."<sup>125</sup> She remembered specifically that

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117. This theme had made its way into legal scholarship of a decidedly antigay perspective. See, e.g., A. Dean Byrd & Stony Olsen, *Homosexuality: Innate and Immutable?*, 14 REGENT U. L. REV. 383, 402 (2002) (citing as authority a 1992 book on so-called "reparative therapy," that is, therapy to eliminate homosexual desire).

118. Trial Transcript, *supra* note 92, at 677.

119. Tom Jackson, *Johnson No Murderer; Defense Lawyer Says*, THE LAWTON CONSTITUTION, July 16, 1993, at A1.

120. Trial Transcript, *supra* note 92, at 684. She also testified that "they fought a lot and it was very tense." *Id.* She testified that she knew that Neill was discharged from the Army before his enlistment was up. *Id.* at 685.

121. *Id.* at 679.

122. *Id.* at 690.

123. See, e.g., *id.* at 625, 884, 1038.

124. See *Neill I*, 263 F.3d 1184, 1188-89 (10th Cir. 2001); see also *Neill II*, 278 F.3d 1044, 1060-61 (10th Cir. 2001).

125. Trial Transcript, *supra* note 92, at 854.

Neill had admired her angora sweater.<sup>126</sup> Although years later the Lawton jurors might have been entertained by *Queer Eye for the Straight Guy*, at the time of the testimony, men on “shopping sprees” who were knowledgeable about angora were probably understood as gay in more clearly pejorative ways.

The San Francisco limousine driver was permitted to testify that he took Neill and Johnson to “expensive” stores in Union Square,<sup>127</sup> and drove them to a gay bar in the Castro Area, which the limo driver identified to the jury as “the gay area of San Francisco.”<sup>128</sup> The limo driver testified that they picked up a man at one of the bars, who stayed with them, while they went to another bar and then to their hotel.<sup>129</sup> The jurors learned that Neill and Johnson told the limo driver that “they liked San Francisco very much” and that they “thought they might like to live out there.”<sup>130</sup>

The prosecution’s case emphasized the couple’s San Francisco drug use<sup>131</sup> and exorbitant, self-indulgent spending on jewelry<sup>132</sup> and matching leather jackets.<sup>133</sup> Nothing could justify murdering four people while robbing a bank, but the trip to San Francisco and the shopping spree made the crimes even more horrible. Perhaps none of the San Francisco evidence was relevant to Neill’s guilt or innocence of the bank murders, or perhaps its minor relevance was overcome by its severe prejudicial impact. The prejudice to Neill was not merely the decadence of the story, but the likely abhorrence of the jurors—and the rest of the participants in the trial—to the specifically gay depravity of the story. But the defense motion to exclude the San Francisco evidence was denied.<sup>134</sup> The prosecution’s narrative of the depraved pilgrimage to a Mecca of gay culture was too powerful to be denied.

Neill did not contest his guilt, and the jury found him guilty on all counts.<sup>135</sup> Neill did, however, attempt to defend against the death penalty in the sentencing phase of his trial.<sup>136</sup> Neill’s homosexuality was a major

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126. *Id.* “They were happy. In good spirits. Having a good time.” *Id.* at 858.

127. *Id.* at 873.

128. *Id.* at 876.

129. *Id.* at 879.

130. *Id.* at 882. Neill and Johnson were “enjoying themselves” and “[v]ery happy.” *Id.* at 884.

131. *See id.* at 885.

132. *See id.* at 934-35.

133. *See id.* at 914.

134. *Id.* at 859.

135. *Id.* at 1065.

136. *Id.* at 1137.

theme in his penalty phase testimony about his life.<sup>137</sup> Neill also told about his severe health problems as a child, including several years in a chest hospital and having his head split open and going into a coma from his father throwing him against a wall for not stopping crying, which were typical of the kinds of life stories recounted by many capital defendants.<sup>138</sup> But Neill's testimony about his crimes situated them squarely as a symptom of his relationship with Johnson.

Neill testified that he met Johnson about ten months before the crimes at a club called Scandals that was "a homosexual establishment."<sup>139</sup> He described the unraveling of their life together, as their drug use became out of control and they ran out of money.<sup>140</sup> In testimony that simultaneously privileged gay sex as evidence of relative normality and contradictorily equated it with other dissolute behavior, Neill told the jury that before the robbery, "[s]ex had virtually ceased for two or three weeks and the parties and drugs had taken its place."<sup>141</sup>

Neill's testimony presented his relationship with Johnson as desperate and obsessive, and the bank robbery as a way to keep Johnson from leaving: "I wanted to prove to Robby what I'd do to keep his love."<sup>142</sup> Neill testified,

I think that he was trying to let me make a fool out of myself. I think he wanted out of the relationship very badly and he didn't know how to go about that and if I went ahead . . . I would probably in his eyes get arrested and the problem would be cured for him. He would have everything that was important to him which were our things . . . .<sup>143</sup>

Neill attempted to explain that that he needed money quickly to save his relationship with Johnson.<sup>144</sup> He testified that, "now that I look back and at that time I didn't realize it, but now—if there was no money there was no relationship on his side."<sup>145</sup>

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137. See *id.* at 1089-1137.

138. See *id.* at 1103-04. Like most capital defendants, see Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 766 (2005) ("Though capital defendants have usually committed (or participated in) heinous murders, they very frequently . . . are survivors of childhood abuse. . . ."), Neill's early family life was not stable; his parents divorced when he was two, and he was sent to live with his grandparents. *Id.* at 103. Neill explained that his mother had stopped coming to visit him because "[s]he's had two nervous breakdowns over this and she could not stand to see me in a position like that because she did not feel like this was her little boy." *Id.* at 1105.

139. *Id.* at 1107-08.

140. *Id.* at 1108-14, 1181.

141. *Id.* at 1181.

142. *Id.* at 1224.

143. *Id.* at 1116.

144. *Id.* at 1190.

145. *Id.* at 1114.

The plan was to spend the money and commit suicide: “I didn’t want to be separated from Robby and I didn’t feel like I could live with [the murders].”<sup>146</sup> Neill explained to the jurors that he had never shared a cell with Johnson on death row,<sup>147</sup> apparently refuting speculation about their lives in prison. Neill told the jurors that he no longer had contact with his mother because her psychiatrist had advised her to put Neill completely out of her life.<sup>148</sup> Neill testified that he would not appeal a sentence of life in prison without possibility of parole: “I don’t think this case deserves sympathy in any way, shape or form . . . I want this to end for my family. I want this to end for the families that are involved.”<sup>149</sup>

The gay relationship was central to the crime and the punishment, and prominent in both guilt and penalty phases of the trial. In his closing argument at the end of the penalty phase of the trial, the prosecutor emphasized that Neill was “[v]ery selfish.”<sup>150</sup> The prosecutor argued that the reason for the killings was “so the killers would have money to fly to San Francisco, party at the gay bars, to tour San Francisco and to have a good time.”<sup>151</sup> The prosecutor reminded the jury of evidence that Neill “kisse[d] Johnson as he [left] the apartment lightly and he [said] wish me luck.”<sup>152</sup> At the airport, “they’re dressed alike. They’re happy. They’re cheerful.”<sup>153</sup> “San Francisco. Stay in a suite, not a regular room, a suite. Want a room with a view, price is no object.”<sup>154</sup> “Saturday, went shopping. Sixteen hundred dollars in jewelry. Nine hundred and thirty-one dollars in leather jackets, top of the line all the way. Three items of jewelry sixteen hundred dollars. How many of us have ever paid that kind of money.”<sup>155</sup> “Saturday night they go partying. They go to the Castro area and make the homosexual bars.”<sup>156</sup> “And they pick up a party at that bar and they take him to Lord Jim’s with ’em . . .”<sup>157</sup> “Take the third party back to the room, more partying.”<sup>158</sup> “I submit to you if there’s any remorse in your soul you don’t pick up a total stranger third party

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146. *Id.* at 1127. Neill testified that after the murders, he went home “[a]nd walked into the bathroom and [he] got into the shower because [he] felt like [he] was gonna be able to wash something away that [he] couldn’t.” *Id.* at 1124.

147. *Id.* at 1138.

148. *Id.* at 1157.

149. *Id.* at 1245.

150. *Id.* at 1295.

151. *Id.* at 1296.

152. *Id.* at 1297.

153. *Id.*

154. *Id.* at 1298.

155. *Id.* at 1299.

156. *Id.*

157. *Id.* at 1300.

158. *Id.*

and bring him back to your room with a view to spend the night with you  
 . . . .<sup>159</sup>

On the defense side, Neill's case for life also depended on pathologizing his relationship with Johnson. Under Oklahoma's death penalty statutes, the jury determines life or death by balancing the aggravating circumstances against mitigating circumstances.<sup>160</sup> Following the Oklahoma Supreme Court's directive that "a mitigating circumstance for the jury to consider is whether 'the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance,'"<sup>161</sup> the jury that sentenced Neill was instructed by the court to consider as a possible mitigating circumstance that "[t]he defendant was suffering extreme mental and emotional disturbances with regard to his relationship with Robert Grady Johnson which affected his mental thought processes."<sup>162</sup> This defense instruction—that the extreme mental and emotional disturbance caused by Neill's relationship with Johnson was a possible mitigating factor—was the point that the prosecutor said he was addressing when he told the jury to consider that "[t]his man is a vowed homosexual. He had a gay lover he didn't want to lose,"<sup>163</sup> and that the "true person, what kind of person he is . . . is a homosexual."<sup>164</sup> These were the prosecutor's words recognized by the Tenth Circuit as error, but found to be harmless.<sup>165</sup>

### III. WHY IS CONDEMNING HOMOSEXUALITY WRONG?

The Tenth Circuit majority and dissent agreed that the prosecutor's identification in his closing argument of Neill as homosexual was error.<sup>166</sup> Commentators concur.<sup>167</sup> But, why, exactly, was it wrong?

159. *Id.*

160. *See* OKLA. STAT. ANN. tit. 21, §§ 701.10, 701.11 (West 2007).

161. *Cox v. State*, 644 P.2d 1077, 1079 (Okla. Crim. App. 1982) (quoting *Johnson v. State*, 121 P.2d 625 (Okla. Cr. 1942)).

162. Trial Transcript, *supra* note 92, at 1271.

163. *Id.* at 1283.

164. *Id.* at 1286. The disputed argument repeated Neill's homosexual identity three times. "I'd like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you're sitting in judgment on—disregard Jay Neill. You're deciding life or death on a person that's a vowed [sic] homosexual . . . . But these are areas you consider whenever you determine the type of person you're setting [sic] in judgment on. . . . The individual's homosexual. He's in love with Robert Grady Johnson." *Id.* at 1286-87.

165. *See Neill II*, 278 F.3d 1044, 1061 (10th Cir. 2001).

166. *See id.* at 1061, 1064.

167. For arguments that antigay bias is impermissible in capital sentencing, see Aaron M. Clemons, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 GEO. J. GENDER & L. 71, 73 (2005) (arguing that *Romer v. Evans* and *Lawrence v. Texas* establish that antigay bias is not a permissible factor in a death sentence and arguing for flushing out antigay

This would be an easy question, not worth raising, if evidence of Neill's homosexuality was not otherwise before the jury. The principle that prejudicial irrelevant evidence should not be introduced at trial is recognized without controversy.<sup>168</sup> Such evidence distracts from the proper evidence, adding prejudicial impact without corresponding value.<sup>169</sup> This is true in any criminal context, and even more true in the sentencing phase of a capital case, laced with constitutional protections that recognize that "death is different" and attempt to produce "reliable" death sentences.<sup>170</sup>

Neill's case, however, is much more difficult. Evidence of Neill's homosexuality was pervasive throughout the guilt and penalty phases of the trial, and was introduced by both the defense and prosecution.<sup>171</sup> Here, the prosecutor asserted that he was simply attempting to address the defense's own evidence that presented Neill's tortured relationship with Johnson as mitigation evidence.<sup>172</sup> Also, the prosecutor did not use any pejorative modifiers; he simply declared, repeatedly, that Neill was a

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bias in voir dire); LaDonna Childress, *To Fulfill a Promise: Using Canons 3B(5) and 3B(6) of the Judicial Code of Conduct to Combat Sexual Orientation Bias Against Gay and Lesbian Criminal Defendants*, 34 SW. U. L. REV. 607, 632 (2005) ("Any suggestion that sexual orientation provides additional justification for the infliction of the death penalty must certainly fall outside the scope of legitimate advocacy and result in reversible error."); Michael B. Shortnacy, *Comment: Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309 (2001) (discussing *Neill I* and *Neill II*, and other cases in arguing that unrelated evidence of homosexual status in penalty phases or prejudicial and inflammatory prosecutorial statements about homosexual identity should constitute reversible error); Joey L. Mogul, *The Dykier, The Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473 (2005) (decrying introduction of evidence of capital defendant's lesbianism). For analysis of bias against sexual minorities in the judicial system, see Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141 (2007).

168. See FED. R. EVID. 402, 403.

169. See GEORGE FISHER, EVIDENCE, 132-33 (2002) (explaining the many possible policy reasons underlying Federal Rules of Evidence 402 and 403).

170. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment. . . ." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Opn. of Stewart, Powell, & Stevens, JJ.); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment."). For an assessment of the gendered nature of the insistence that fundamentally discretionary death judgments are either reliable or accurate, see Joan W. Howarth, *Deciding To Kill: The Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1378-80.

171. See generally Trial Transcript, *supra* note 92.

172. *Id.* at 1283.

homosexual.<sup>173</sup> In this context, why was it wrong for the prosecutor to point to Neill's homosexuality in argument?

If homosexuals were not widely condemned, the prosecutor could point out that Neill was homosexual in the same way that he could point out that he was a young man, or lived in an apartment, or was a military veteran. It would not be improper because it would not be prejudicial. On the other hand, unless homosexuality is recognized as a social identity *worthy of protection*, the prosecutor could have safely identified Neill as a homosexual with the same impunity with which he identified Neill as a murderer, a debtor, and a cocaine user. In other words, determining whether the prosecutor's argument for death focusing on Neill's homosexuality was error requires a purely normative judgment about homosexuality.

As Neill sat on death row, with his case winding slowly through various courts, the fact of his crimes remained a terrible constant, but the normative meanings of homosexual identity, at least as constituted in United States law, were changing. Neill's crimes occurred six months before *Bowers v. Hardwick*,<sup>174</sup> his execution six months before *Lawrence v. Texas*.<sup>175</sup> In the shift from *Bowers* to *Lawrence*, the Supreme Court moved from aversion to homosexuality to aversion to antihomosexual laws.<sup>176</sup> Miranda Oshige McGowan has described the message of the *Lawrence* Court that gays and lesbians constitute a social group worthy of the law's protection as the transformation from outlaws to ingroup; according to McGowan, the court made a normative judgment that gays and lesbians are "socially salient groups whose common conduct it deems worth protecting."<sup>177</sup> The Tenth Circuit opinions in *Neill I* and *Neill II*, especially Judge Lucero's dissents, reflect and create a similar normative transformation.<sup>178</sup> Judge Lucero's *Neill I* and *Neill II* dissents recognized Neill as a member of an identity-based social movement, whose common conduct—homosexuality—was worth protecting.<sup>179</sup>

Homosexuality was not construed as conduct worth protecting at the time and place of Neill's crimes. Neill and Johnson's lives together as gay lovers occurred before substantial legal rights for gays and lesbians

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173. See generally *id.*

174. See 478 U.S. 186 (1986).

175. See 539 U.S. 558 (2003).

176. Compare *Bowers*, 478 U.S. at 186, with *Lawrence*, 539 U.S. at 558.

177. See Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1344 (2004).

178. See generally *Neill II*, 278 F.3d 1044 (10th Cir. 2001).

179. See generally *Neill I*, 263 F.3d 1184, 1199-1205 (10th Cir. 2001) (Lucero, J., dissenting); *Neill II*, 278 F.3d at 1064 (Lucero, J., dissenting).

had been established. At the time of the crimes, homosexual activity was illegal in Oklahoma,<sup>180</sup> elected officials “knew” that gays were angry, violent men who hated women, and harassment, isolation, and contempt were too ordinary parts of gay life.<sup>181</sup> At the time of the defense’s pretrial motion asserting marital privilege between Neill and Johnson, marriage for two gay men was available nowhere in the world, and was not a concept of which many Americans were aware. By the time of Neill’s execution in 2002, same sex marriage was about to arrive in Massachusetts.<sup>182</sup>

By the end of Neill’s life, homosexuality had become a more recognized, stable, normal identity. By the time Neill’s case reached the Tenth Circuit in 2001, Judge Lucero saw Neill’s homosexuality within a recently established category of gay person as victim of invidious discrimination. Judge Lucero’s opinion decries the bigotry in condemning homosexuality by explicitly comparing the prosecutor’s highlighting of Neill’s homosexuality to anti-Semitism or racism.<sup>183</sup> This comparison is possible only because of prior cultural success in repeatedly framing homosexuality as an identity status that deserves to be protected from bigotry and denunciation.

In Judge Lucero’s opinion, the strength of the normative judgment and the cultural resonance of the comparison of antigay bias to anti-Semitism and racism overwhelms any formal doctrinal weaknesses in the analogy. Those formal weaknesses are not hard to uncover. The Free Exercise Clause explicitly protects religious minorities from purposeful state discrimination,<sup>184</sup> and the Equal Protection Clause prohibits intentional race discrimination in sentencing.<sup>185</sup> The Supreme Court has recognized that the state may not “attach[] the ‘aggravating’ label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant.”<sup>186</sup> Although formal constitutional protection for gays and lesbians is much more tenuous, *Romer v. Evans*<sup>187</sup> and *Lawrence v. Texas*<sup>188</sup> support the prediction that the current Supreme

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180. See OKLA. STAT. ANN. tit. 21, § 886 (West 2007).

181. See Brawley, *supra* note 76.

182. See Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

183. *Neill I*, 263 F.3d 1184, 1202 (10th Cir. 2001) (Lucero, J., dissenting).

184. See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

185. See McCleskey v. Kemp, 481 U.S. 279 (1987). Although *McCleskey* recognizes that intentional race discrimination in capital sentencing would violate Equal Protection, McCleskey also made proving it exceedingly difficult.

186. Zant v. Stephens, 462 U.S. 862, 885 (1983).

187. 517 U.S. 620 (1996).

188. 539 U.S. 558 (2003).

Court would be bothered by explicit, irrelevant exhortations to base a death verdict on a defendant's homosexual identity.

The centrality of Neill's homosexuality makes his a much harder case, however. After all, with the constitutionally required individualized determination,<sup>189</sup> capital jurors must judge the blameworthiness of the criminal, not just the crime.<sup>190</sup> As mitigation, Neill presented evidence that his crimes were a result of extreme mental and emotional distress caused by his homosexual relationship, and that he had renounced his homosexuality as part of his conversion to Christianity.<sup>191</sup> If the defendant is allowed to seek life by giving evidence of having had the "burden of homosexuality" lifted from him, why isn't the prosecutor allowed to seek death by reminding the jury of the defendant's past homosexual identity?

The constitutionally required asymmetry of mitigation and aggravation is part of the answer. The state's interest in obtaining an execution is not protected by such individual rights as the guarantee of fundamental fairness and equal protection in the conduct of the trial or freedom from cruel and unusual punishment, all of which supports the defendant's mitigation case but not necessarily the state's case for death. But there is more at work than unequal burdens.

Even in this context, in which the defendant's homosexuality is pervasively presented by prosecution and defense, a prosecutor who emphasizes a capital defendant's homosexuality is violating the normative claim that gays and lesbians, as a group, deserve the state's protection from bigotry. Experimenting with other possible labels for Neill helps to clarify the power of the construction of homosexual as protected minority class. Would it be error to comment on someone having a heterosexual affair out of wedlock?<sup>192</sup> "The defendant is an adulterer" would be perfectly acceptable, if the defendant had presented evidence of emotional distress from an affair as mitigation. In fact, in Neill's case, the fragility of the normative claim can be seen from a hypothetical subtle shift in the prosecutor's words. If the prosecutor had

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189. *Lockett v. Ohio*, 438 U.S. 586, 606 (1978).

190. "State killing sets apart the condemned, choosing them to be dramatically expelled from the community, from civilization, from the world of the living." Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 ORE. L. REV. 183, 195 (2002); see Austin Sarat, *Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE* 3, 9-10 (Austin Sarat ed., 1999).

191. See generally Trial Transcript, *supra* note 92, at 1099-1258.

192. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (identifying the plaintiff as an adulterer and emphasizing public policy in favor of marriage).

emphasized that Neill was attempting to present as mitigation a relationship based on sexual conduct that violated Oklahoma's criminal laws, emphasizing illegal activity instead of status or identity, the error might have disappeared.

In other words, for the prosecutor's words to be recognized as error, the relatively new and fragile construction of homosexuals as a minority group subjected to unfair and invidious discrimination had to have taken hold. This normative judgment is the only reason that the Tenth Circuit judges could be sure, and Judge Lucero very sure, that the prosecutor's words were error. The prosecutor did not say "Godless homosexual," or "sexually perverted homosexual," or "twisted and sick homosexual"; he simply said "homosexual." Judge Lucero likely recognized that he did not need to use negative modifiers, because the jurors would supply their own.

There might also have been another, more subtle explanation that the court could read the prosecutor's words as wrong. Perhaps, ironically, the bluntness of the prosecutor's words violated the vestigial cultural norm that homosexuality is too dangerous to be discussed out loud. The prosecutor committed the error of something approaching uncouthness in emphasizing Neill's homosexual identity too explicitly. There is something distasteful about expressly calling attention to what was apparent. Is this an analogue to the goal of colorblindness? Or is it some vestige of the power of the closet, within which homosexuality can be tolerated, as long as it is not "flaunted?" Although the trial was replete with evidence of sordid sexual intimacies, the prosecutor erred by calling attention to them too bluntly.

Because it was too blatant, "the man is a homosexual"<sup>193</sup> could be read as bigotry. Thankfully, *Lawrence* and *Neill* show that at least some members of the federal judiciary are finding ways to begin to accept the cultural/political/legal message that "gay is good."<sup>194</sup>

## V. DEATH BY HARMLESS ERROR

The majority of the Tenth Circuit recognized that the prosecution's words were error, but not a big enough error to require reversal of Neill's death sentence.<sup>195</sup> Like much that has come before,<sup>196</sup> the subject of this

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193. See Trial Transcript, *supra* note 92, at 1289.

194. Cf. JOHN D'EMELIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 153 (1983) (describing Frank Kameny's slogan referencing "Black is Beautiful" and advocacy in the 1960s to promote less defensive gay liberation politics).

195. See *Neill II*, 278 F.3d at 1061.

section is the fallacy of conventional harmless error analysis in capital cases.<sup>197</sup> Even regarding determinations of guilt, which in theory are based on a right or wrong answer, the counterfactual exercise by which an appellate court attempts to determine what would have happened in the absence of the error is inevitably guesswork.<sup>198</sup> The speculation required in guessing what a penalty phase jury might have done in the absence of improperly admitted evidence, incorrect instructions, or prosecutorial misconduct is even less firmly tethered to logic or predictability. The penalty decision made by capital jurors is a highly discretionary and wide open act of conscience.<sup>199</sup> How can the counterfactual hypothetical be real when there was no right answer to the question, and each juror was entitled to vote against death for any reason at all, however personal, as long as it contributed to a “reasoned moral” choice?<sup>200</sup> However, these familiar arguments about indeterminacy and incoherence are not my primary focus here. Neill’s case illustrates these

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196. See, e.g., DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA’S DEATH ROW 208 n.3 (2005) (“It is actually impossible to determine whether a trial error has influenced the jury’s verdict, and most constitutional errors should therefore be treated as fundamental [requiring reversal.]”); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002) (emphasizing extreme malleability of harmless error analysis); David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483 (2000) (finding harmless error analysis conceptually and logically incoherent). For commentary criticizing harmless error analysis in review of prosecutorial misconduct, see Viliija Bilaisis, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457 (1983) (arguing that intentional prosecutorial misconduct should be reversible per se); William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161 (2001) (using econometric model to identify effective incentives to deter prosecutorial misconduct); and Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 426 (2006) (finding that appellate review provides no meaningful restraint on prosecutorial misconduct).

197. See, e.g., FED. R. CRIM. PROC. § 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”).

198. As David Dow and James Rytting have already concluded, “harmless error doctrine, in its present unsophisticated, incomplete, even incoherent form, is just a transparent device for overlooking constitutional violations, no matter how egregious, when the victims of those violations are men or women whom appellate judges believe to be guilty.” Dow & Rytting, *supra* note 196, at 536.

199. “At the penalty phase, . . . there is usually no correct answer. . . . If the prosecutor’s argument had a deleterious impact on the jury, it will generally be impossible to determine whether, in the absence of the argument, the jury would have nevertheless imposed a death sentence.” Welch White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1160 (2002); see also *id.* at 1151 (asserting that the prosecutor’s penalty trial closing argument is especially likely to influence the jury).

200. *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, concurring) (requiring capital sentencing that “reflect[s] a reasoned *moral* response to the defendant’s background, character, and crime”) (emphasis in original); see Howarth, *DECIDING TO KILL: REVEALING THE GENDER IN THE TASK HANDED TO CAPITAL JURORS*, 1994 WIS. L. REV. 1345, 1366-81.

arguments just as well as hundreds of other cases do, but perhaps no better.

My focus, instead, is a related critique of the frightfully superficial reading on which harmless error review rests, and the simplistic understanding of communication on which it depends. The gay-centric perspective on Neill's case highlights these points.

The prosecutor's exploitation of antigay bigotry required reversal of the death judgment because, as a normative matter, such prosecutorial misconduct should not be rewarded with an execution. But the Tenth Circuit was correct that the prosecutor's comments probably had very little impact on the jury's decision.<sup>201</sup> The Tenth Circuit majority found that the reminders about homosexuality were harmless when balanced against the gruesome evidence of the multiple murders.<sup>202</sup> Perhaps. But a much stronger explanation for why the comments in question may have had minimal impact on the jurors' verdict was that the case was about homosexuality from the first day in court. Jurors had been questioned about their own attitudes about homosexuality, made to reveal homosexual relationships, learned about sordid details of a very sad, dangerous, homosexual relationship, and heard countless details about homosexual conduct that was violent, effeminate, materialistic, drugged out, disturbed, and disturbing. Long before the prosecutor's closing argument, Neill's identity as a flamboyant, misogynist, materialistic, obsessive, sex-crazed, irresponsible homosexual had been firmly established.<sup>203</sup> Unless they had been sleeping, the jurors probably did not need the prosecutor to remind them that Neill's character as a homosexual was a reason to condemn him.

Harmless error analysis isolates a few words on a cold record, and speculates about their meaning to jurors. The very inquiry suggests an

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201. See *Neill II*, 278 F.3d at 1061.

202. See *id.*

203. Neill's is not the only case in which a death sentence was obtained in part on the basis of condemnation of homosexuality. Other notable examples include the cases of Calvin Burdine, Stanley Lingar, and Wanda Jean Allen, included in Richard Goldstein, *Queer on Death Row*, THE VILLAGE VOICE, Mar. 13, 2001, at 38. Calvin Burdine is more well-known as the defendant in the notorious Texas case in which the defense attorney was asleep during trial. See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001). Kerry Max Cook, an exonerated man formerly on Texas' death row, was convicted and sentenced to death erroneously in part on the basis of bigotry related to homosexuality. See KERRY MAX COOK, CHASING JUSTICE: MY STORY OF FREEING MYSELF AFTER TWO DECADES ON DEATH ROW FOR A CRIME I DIDN'T COMMIT 66, 79-82, 94-97 (2007). Antihomosexual bigotry also taints capital cases where the victims are gay or lesbian. See, e.g., BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY 57-58 (2007) (describing capital jury split on gender lines over attitudes about homosexual victim).

almost willful ignorance to the more complex ways that people understand information and construct knowledge.

The jurors who heard this case understood Neill's guilt and blameworthiness inevitably within their "knowledge" of what it meant to be homosexual. That knowledge almost certainly included "knowledge" that gays were sexually perverse, criminally-inclined, effeminate, overly emotional, misogynistic, theatrical, dishonest, and Godless.<sup>204</sup>

Harmless error analysis is not the only entrenched capital doctrine that requires willful ignorance of the complexities of jurors' formation of knowledge. For example, appellate courts continue to assume that jurors correctly understand the controlling legal principles, ignoring conclusive evidence that jurors in capital trials do not understand the instructions in the manner intended by the courts.<sup>205</sup>

In light of the record and what the jurors already knew before the trial started, how could the prosecutor's final explicit reference to homosexuality have made the difference? From beginning to end, this was a case about homosexuality. The harmless error analysis of the Tenth Circuit reveals the empty formalism of isolating certain words and assessing their impact with a simplistic methodology of literalism.<sup>206</sup> Neill's homosexuality was on trial with him. The jurors did not need the prosecutor to remind them that Neill was gay, and they did not need the prosecutor to remind them that homosexuality was widely understood to be something to condemn; these "truths" were pervasively constructed

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204. For studies from the era of the murders showing bias against homosexuals, see Sharon B. Gurwitz & Melinda Marcus, *Effects of Anticipated Interaction, Sex, and Homosexual Stereotypes on First Impressions*, 8 J. APP. SOC. PSYCH. 47, 51, 54 (1978) (describing a survey in which subjects perceived to be gay were rated by college students as less calm, dependable, honest, and religious and more clothes conscious, emotional, and theatrical than otherwise identical but non-gay subject); Alan Taylor, *Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals*, 9 J. OF HOMOSEXUALITY 37 (1983) (recounting earlier studies and finding prevalent stereotype that homosexuals behave like the opposite sex); and Stewart Page & Mary Yee, *Conception of Male and Female Homosexual Stereotypes Among University Undergraduates*, 12 J. OF HOMOSEXUALITY 109 (1985).

205. See, e.g., Stephen P. Garvey, Sheri Lynn Johnson, & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 L. & HUM. BEHAV. 575 (1997); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & HUM. BEHAV. 411 (1994); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993).

206. Cf. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1546 (1990) (noting the "growing and equally awkward tension between the ways that lawyers typically conduct their business and the insights, now fully acceptable in related disciplines but still resisted in law, of Saussurian linguistics, of structuralism, post-structuralism, and semiotics, and of various forms of pragmatism and contemporary philosophy").

throughout the case.<sup>207</sup> A more meaningful analysis of the unfairness of Neill's sentence would have recognized the unfairness of the damning visions of homosexuality used throughout his case, including the evidence of the San Francisco trip, the bigoted statements by investigators, and the rest of the case against homosexuality that was presented at trial.

What is to be done to protect a capital defendant whose life, before and after the capital crime, is likely to be misunderstood or reviled by the jurors assigned the task of judging that life? The well-established patterns of race, class, and gender in death row populations suggest that this is a systemic question beyond Jay Neill and other homosexuals.<sup>208</sup> The contingent and unstable meanings of homosexual identity—simultaneously drawing contempt and protection, in wildly different proportions—help to reveal fundamental questions about the Eighth Amendment imperative that capital jurors decide life or death in part on a judgment about the defendant. In too many cases, the tension between fundamental aspirations against invidious discrimination and for protection of human dignity through an individualized consideration for death might be simply unsustainable.

CONCLUSION: “WE ARE EVERYWHERE”<sup>209</sup>

The gay rights slogan “We Are Everywhere” caught fire as a counter to the invisibility and isolation of homosexuals. The valorizing tendency of the gay rights movement has led to extravagant claims of homosexual identity for historic giants and greats of literature and the

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207. Judith Butler has made a similar point about the way that the jurors who acquitted the police understood the videotape of Rodney King being beaten as in fact a picture of Rodney King threatening the police: “For if the jurors came to see in Rodney King’s body a danger *to* the law, then this ‘seeing’ requires to be read as that which was culled, cultivated, regulated—indeed, policed—in the course of the trial. . . . This is a seeing which is a reading, that is, a *contestable* construal, but one which nevertheless passes itself off as ‘seeing,’ a reading which became for that white community, and for countless others, the same as seeing.” Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in *READING RODNEY KING/READING URBAN UPRISING 16* (Robert Gooding-Williams ed., 1993).

208. See Statistics, Death Penalty Focus, <http://deathpenalty.org/index.php?pid=1%22> (last visited Apr. 10, 2008); National Death Penalty Fact Sheet: Death Penalty 101, American Civil Liberties Union, [http://www.aclu.org/images/asset\\_upload\\_file758\\_29292.pdf](http://www.aclu.org/images/asset_upload_file758_29292.pdf) (last visited Apr. 1, 2008).

209. “We Are Everywhere” was a slogan of the United States gay liberation movement of the 1970s and 1980s. For an appropriation of the slogan, see *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY & LESBIAN POLITICS* (Mark Blasius & Shane Phelan eds., 1997).

arts.<sup>210</sup> Isolated, tormented gays and lesbians can find comfort in such company, which is not merely legitimate, but exalted. Recognizing Jay Neill as a member of the same community is far less comfortable. Neill embodies sickness, criminality, and even evil, for those who believe in the concept, and more modest faults, including sexual obsession, materialism, selfishness, and drug addiction. Jay Neill is a provocative counter-example for a political and cultural movement working feverishly and with great success to throw off its identification with sickness, evil, and criminality. Beyond all of that, Neill himself renounced his homosexuality, as did Johnson.<sup>211</sup> The axis of pride and shame is a meaningful one for gay people,<sup>212</sup> and voluntary association with Jay Neill weighs heavily on the shame side of that tension, perhaps as much as Neill's homosexuality weighed on him.

Whatever gay identity means, it includes Neill's life and death. In death, Neill was a victim of antigay bias. And his life, including his terrible crimes, was a gay life. The meanings of gay identity are fluid, contingent, and illusive. Gay identity is constructed within competing narratives of transgression and normality: its boundaries are policed by the power of shame and pride, and its meanings are constituted with symbols of outcasts and paragons, outlaws and winners. Neill's horrible crimes wipe the romance out of a vision of the gay outlaw, and put a gay face on unspeakable evil. His is a gay story worth telling.

A presentation of Neill's life that privileged his gay identity as part of the case in mitigation, the case for life, was never possible in the

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210. See, e.g., *Gay & Lesbian People in History*, <http://www.gayheroes.com/main.htm> (last visited Apr. 1, 2008) (including Leonardo da Vinci, Michaelangelo, Tchaikovsky, and Abraham Lincoln); *Famous Gay People Including Gay Celebrities, Gay Politicians, Historians and Artists*, <http://www.famousandgay.com> (last visited Mar. 10, 2008) (including a list of over 700 people, past and present, who have been deemed homosexual or bisexual).

211. *Killer Tells of Slaying at Geronimo*, *supra* note 32, at 1, 2. Both Neill and Johnson, like other gay capital defendants, renounced their homosexuality while facing death sentences. *Id.* And, in this case, Neill was able to present to the jury that through his religious conversion "the burden of homosexuality was lifted from him." *Id.* at 2. Thus, we might understand capital punishment as a particularly brutal and expensive conversion technique. See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 31-49 (2006) (discussing gay conversion, especially psychological conversion attempts, and conversion as first stage of movement for full gay equality, before passing and covering). In an interview aired on Pat Robertson's *The 700 Club*, Neill discussed his conversion to Christianity. See *Killer Tells of Slaying at Geronimo*, *supra* note 32. Neill's lover and co-defendant Robert Grady Johnson also renounced his homosexuality as part of his Christianity: Johnson's mother told a reporter, "[he] said a light appeared in his cell and he heard the Lord tell him he didn't have to be a homosexual and that he was loved and needed." Mark A. Hutchison, *Johnson Claims Visit from God*, *DAILY OKLAHOMAN*, July 28, 1993, at 1-2.

212. See, e.g., Judith Halberstam, *Shame and White Gay Masculinity*, 23 *SOCIAL TEXT* 219 (2005).

courts in which he was tried. The jurors learned that Neill's parents divorced when he was an infant, and that he was raised by his maternal grandparents in rural Greenfield, Missouri.<sup>213</sup> But the defense did not ask the jurors to understand Neill better by telling them about the ridicule and scorn he suffered as a child because of his flamboyant gender transgressions.<sup>214</sup> The local newspaper reported that "friends and school officials remember other students in the farming community harassing Neill for his flamboyant displays, which included donning a shawl, stocking and pumps and going to school in drag. Each time, he was sent home."<sup>215</sup>

Like countless other teenagers who were abused at home and punished everywhere for gender transgressions, Neill joined the military.<sup>216</sup> He was discharged from the Army shortly after he met Johnson.<sup>217</sup> A newspaper described Neill "as a genial young man who returned from a stint in the Army a self-styled 'fighting machine.'"<sup>218</sup> Neill and Johnson "'were the ideal couple that everybody wanted to be like,' said a gay high school friend of Johnson's who asked not to be identified." For him, Neill was his dream—the all-American white boy.<sup>219</sup>

In contrast to these perceptions, the reality of Neill's life with Johnson was grim and desperate. Neill was supposed to be the breadwinner, but he had trouble earning a living after being discharged.<sup>220</sup> Neill and Johnson became heavy cocaine users.<sup>221</sup> Their financial problems and isolation became even more serious.<sup>222</sup> Neill imagined that robbing their bank would solve their problems and prove his love for Johnson.<sup>223</sup> Instead, during the bank robbery, Neill exploded with terrible

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213. "Neill, the adopted son of a longtime Missouri lawman, lived as a child with his maternal grandparents in Greenfield, Mo., after his mother and natural father divorced." Richard W. Break, *Grandmother Prays for Defendant*, DAILY OKLAHOMAN, May 24, 1985, at 1-2. Johnson also had a troubled childhood. Johnson's mother said about her son, "'He always had a problem with kids picking on him and never fought back. It got so that his father (a step-father) began calling him a sissy.'" Manny Gamallo, *Mom Claims Son Receiving Death Threats*, DAILY OKLAHOMAN, Nov. 4, 1985, at 4.

214. See generally Trial Transcript, *supra* note 92.

215. Paul English, *Bank Killings Trigger Outrage in Small Town*, UNITED PRESS INT'L (Lawton, Okla.), Dec. 24, 1984.

216. Trial Transcript, *supra* note 92, at 1106.

217. *Id.* at 1107.

218. English, *supra* note 215.

219. *Id.* ("Their arrests shocked friends who recalled their relationship as the envy of the gay community, while triggering outrage among parents and relatives of the victims.")

220. Trial Transcript, *supra* note 92, at 1100-09.

221. *Id.* at 1287.

222. *Id.* at 1113.

223. *Id.* at 1113-14.

violence, brutally stabbing to death three women who worked there and almost decapitating one of them with the force of his blows.<sup>224</sup> He then shot four customers who entered the bank during the robbery, killing one and wounding three.<sup>225</sup> He went home, showered, and took off with Johnson on a gay fantasy trip to San Francisco, where they partied in the Castro District and splurged on jewelry and leather coats for three days, until the FBI arrived to arrest them.<sup>226</sup>

Neill's crimes are beyond comprehension, but perhaps at least one element was that he was in the grip of a desperate and deeply wrong, hyper-masculine gay fantasy. Recognizing and acknowledging that Neill's is a gay story could help to loosen the hold of a valorized fantasy of gay life and identity, a fictional construction that has its own powerful grip, and unleashes its own set of dangers.<sup>227</sup>

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224. *Id.* at 1275.

225. *Neill I*, 263 F.3d 1184, 1188 (6th Cir. 2001).

226. Trial Transcript, *supra* note 92, at 1124, 1298.

227. *Cf.* Angela Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL OF RTS. J. 1539, 1575 (2006) (warning of a gay movement that "mimics rather than avoids the colonizing dynamic"); *id.* at 1569 (citing Marc Spindelman's critique of the "like-straight" argument for GLBT acceptance "valorizing those people who look just like straight people except for being gay and casting out (again) as weird, sick, and not representative of 'us' those whose queerness appears excessive"); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).