

Brokeback's Bareback: Queering Lex Populi

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1 The *Mise-en-Scène* of Writing: My Dinner With Penny

One evening, almost a decade ago, at a smart dinner party held in Northcote, an inner suburb of Melbourne, the utterly fabulous and now, sadly, late Penny Pether turned to me after some discussion of the then recent American gay rights decision, the Supreme Court's landmark *Lawrence v Texas*, and suggested, with her customary forthrightness that I should write about the case within the context of a film that both of us had only lately seen (her, on an aeroplane from America; me, at my local cinema in Brisbane), and which each of us, as we had discovered earlier in the conversation, had thoroughly enjoyed.¹ The film was unique, having begun its cinematic life as a modest art house production made on what was, by Hollywood standards, a shoestring.² By the time though that Penny and I spoke of the film, it had become a huge international blockbuster, winning a raft of prizes,³ garnering critical acclaim,⁴ and scoring staggering box office returns.⁵ That film was (and is), of course, Taiwanese Ang Lee's masterful screen adaptation (2005; 2006)⁶ of Annie Proulx's dazzling *New Yorker* short story, 'Brokeback Mountain' (1997; 2005). Ostensibly a 'Western'⁷ – but one with a 'twist', to indulge in a characterological pun; that is, punning on the literary and cinematic character, 'Jack Twist', played by Jake Gyllenhaal in the film, and his 'twisted', or at least *bent* sexuality.

For the character of Jack Twist is, with his celluloid sidekick, Ennis Del Mar (played by the late, great Heath Ledger), one half of the most celebrated – and much parodied – couples of the contemporary screen: the pair at the narrative centre of *Brokeback Mountain's* 'gay cowboy'⁸ story arc. Not surprisingly, at least for critics of law's politics such as Penny and myself, this pairing provoked calls for the film's censorship and/or withdrawal from circulation from jurisdictions such as Utah (Associated Press 2006), West Virginia (Starpulse 2006), China (*The Guardian* 2006), and the United Arab Emirates (Afkar 2006). What genuinely surprised both of us, however, was the widespread interest and support that the film secured from mainstream audiences in America, Europe and Australasia. Which prompted me to ask of Penny Pether then, and in this article in the here-and-now: *Why did Brokeback Mountain* become one of the top films of 2005–2006, all the while depicting in the most uncompromising manner imaginable, a tabooed desire, homosexuality, the love that still 'dares not speak its name' and is still seen, in many places, as *contra naturam*?

In summoning up a *natura* which admixes bad theology (the transcendent law of a divinely inscribed *lex natura*, proscribing same-sex relations) with even worse biology (the immanent law of a genetically hardwired heteronormativity), this Latin apothegm, *contra naturam*, distils precisely the sort of *animus* that the film's advertising campaign was intended to check in slogans like 'love is a force of nature' (*Brokeback Mountain Official Site* 2005; IMDb entry '*Brokeback Mountain* 2005'). What a strong declarative sentence such as that suggests is that far from being an exception to the rule, homosexuality is, like all love – gay, straight or otherwise – a force of implacable, unstoppable desire. So the statement's rhetorical effect, in this case, is to universalise the desire represented in *Brokeback Mountain*, linking it to other forms of desire, and *their* overarching 'laws'. I want, however, to do the reverse in this article, not universalising but particularising *Brokeback Mountain* (2006), situating it within a specific context, albeit one with a generalising reach. That is, my reading of the film will embed it within the on-going debate in global civic society over and about the legal status of homosexuals. That context remains as relevant in 2015

as it did in 2005; in fact, if anything, it has become, with the passing of time, even more pressing. This is so because, be it North America, the European Union, Australasia or elsewhere, the 'law of (same-sex) desire' remains one of the most hotly contested juridical issues of our times, both in terms of doctrine and policy, case law and legislation. Questions such as the following bedevil all the jurisdictions mentioned above: Do homosexuals have a right to marry? Or, failing that, do homosexuals have at least the right to have their relations recognised as civil unions? Is sexual orientation a category of anti-discrimination law, including hate crime? Do gays and lesbians have a right to desire differently? Answers to these questions are far from certain and have been mixed, even inconsistent⁹, with courts (or legislatures) answering some in the affirmative,¹⁰ some in the negative,¹¹ and some, not at all.¹²

Such socio-legal incoherence drives home the point that, as much as (and in some cases, even more than) issues of gender or racial discrimination, same-sex desire still discombobulates modernity, arousing profound ambivalences – attraction and repulsion, love and hate – across a spectrum of discourses and institutional sites: moral, political, aesthetic and legal. *Brokeback Mountain* taps into that ambivalence, and its set of conflicting and contradictory affects. On the one hand, the film actively solicits our voyeuristic gaze, eager for ever more graphic scenes between Jack and Ennis; while, on the other hand, it provokes a competing feeling of unsettling discomfort, one which may very well necessitate the averting of our eyes. I want to turn to this cinematic inscription of ambivalence – looking directly at, and away from, at once enticed and disturbed – because I believe it accounts for the tremendous power of *Brokeback Mountain* as a legal fiction: what I have called elsewhere *lex populi* (MacNeil 2007). For *Brokeback Mountain's* double gaze, of eyes simultaneously transfixed and looking away, repeats but also realises the perverse desire of the law to see too much (in all of its lurid, forbidden and full engagement) and too little (as something that does not exist, except as some sort of grotesque monstrosity) of homosexuality. But more than just critiquing the law, this parallax vision of *Brokeback Mountain* – of excess and scarcity, too much and too little – is also the grounds for

an auto-critique; namely, a critique of the film's own contradictory juridico-political assumptions (of liberal tolerance, of the right to be left alone) and the limits of that tolerance (of the closet). All of this suggests, as many other critics and journalists have (Clinton 2005; Lane 2005; Leavitt 2005, 2011; Lang 2005; Mars-Jones 2005; Ebert 2006; Alleva 2006; Arellano 2007), that there is nothing 'gay' about this putative 'gay cowboy film'; indeed, *Brokeback Mountain* may negate, sublimate and go beyond gay/straight binaries, articulating what might be called, following Judith Halberstam (2011) and others (Rich 2005; Lee 2006; Perez 2007; Needham 2010), a 'queering' of *lex populi* and its jurisprudence of popular culture.¹³

2 Sheathed in Literary and Cinematic Convention: Genre as a Rubbering of *Brokeback's* (Ob)scenario

Where would this queer reading of the film begin? Nowhere else than in what I take to be its paradigmatic scene, its *succès de scandale*, and the source of the endless puns on the film's title (such as this article's): *Bareback Mounting*, *Fudgepack Mountain* and so forth.¹⁴ Namely, one of the first scenes set on the mountain top itself (*BM*: sc 5) in which youthful sheep herders, Jack and Ennis, after a night of heavy drinking, repair to one of their pup tents and engage in love-making with such gusto that it dramatises, literally, the filmic tagline, 'love is a force of nature' (*Brokeback Mountain* Official Site 2005; IMDb entry '*Brokeback Mountain*' 2005). Certainly there is plenty of *force* on display here, this initial tryst between Ennis and Jack resembling nothing less than hand-to-hand combat. What with all of its thrusting, grunting and groaning, the scene leaves so little to the imagination that it mimes the 'money shot' of gay (and straight) porn. This (*ob*)scenario's 'frenzy of the visible', as cinema and cultural studies scholar Linda Williams would put it (Williams 1999), is very much at variance with all those 'tasteful' depictions of gay sexuality, rife in the 1980s; for example, consider Merchant-Ivory's *Maurice* (1987) or Kanievskaja's *Another Country* (1984) where same-sex coitus is all soft focus and floppy fringes. With its explicit scene(s) of anal sex, *Brokeback Mountain* is a world away

in time and space from these 'period' idylls, Edwardian or interwar. Though given its now historical mid-century setting, *Brokeback Mountain* (2006) is *still* a period piece and one clearly showing its age – nowhere more so than in depictions of the totally 'unsafe sex' in which the characters engage, with nary a condom to be seen. For Jack and Ennis have what I would call '60s (and '70s) sex', as uninhibited as it is unprotected in its spontaneous 'barebacking'.¹⁵ And why shouldn't they? With AIDS very much a phenomenon of distant futurity, of 'things yet to come', surely there is no need for either of them, as AIDS awareness used to have it, to 'rubber up' for safety (King, 1996), that first principle of contemporary sexual health having no purchase here.

I would like to suggest, however, that if condoms are missing from this scene in fact, then they are present, indeed omnipresent in metaphoric terms throughout *Brokeback Mountain*. For all its graphic, upfront, literal depictions of 'barebacking', this film is *sheathed*, figuratively, in nothing less than the conventions of romance: an encasing far more protective than any latex prophylactic. When read as a whole then, could there be anything more at odds with the film's brutal sex scene than its overall spectatorial context, itself a pleasurable treat not only aurally¹⁶ – with its haunting acoustic/pedal steel guitar score¹⁷ – but visually: from the mountainous sublime of the Canadian Rockies (for example *BM*: scs 2, 3, 4, 5, 6, 7, 12, 13, 15, 16), all densely forested peaks and cool, crystalline lakes, to the open vistas of American West's 'Big Sky Country', its windswept plains offering a beautifully desolate panorama as far as the eye can see (for example *BM* 2006: scs 1, 8, 14, 19). With such vertical and horizontal *longueurs*, the film metaphorises the insurmountable longing, as much as aching emptiness of Jack and Ennis. Their thwarted passion is conveyed in smouldering looks (*BM* 2006: sc 1), and stolen glances (*BM* 2006: scs 1, 8), as well as all the glimpses the film, itself, affords – at the campsite (*BM* 2006: sc 4), by the banks of a brook (*BM* 2006: sc 6) – of the erotically nude, and the respective cathexes they carry: the frisson over a naked thigh (*BM* 2006: sc 4), the shudder at an exposed buttock (*BM* 2006: scs 4, 6). In so rendering this relationship as desirable, even natural, *Brokeback Mountain* is carrying on, and out, culture's standard ideological work

here. In fact, as several journalistic and academic commentators have noted (Hoberman 2005; MacDowell 2006; Kitses 2009; Koziak 2009; Dale 2011; McCabe 2011), the combined effect of these cinematic gestures, shots and score are generically clear: *Brokeback Mountain* is at once an update and masculinisation (a transgendering?) of what used to be called the 'woman's film',¹⁸ the type of which 1950s German-born Hollywood director, Douglas Sirk (Halliday 1997), was the star practitioner. In a remarkable cinematic *oeuvre* that includes *All That Heaven Allows* (1955), *Written on the Wind* (1956) and *Imitation of Life* (1959), Sirk developed, refined and brought to full aesthetic fruition the genre's standard melodrama of star-crossed love with, variously, age discrepancies, career ambitions, family obligations, class differences, and racial divides being the stumbling block to the lovers, whose (often illicit) private passions are in bold relief to the contexts of dreary convention in which they find themselves.

Brokeback Mountain certainly replicates this form of melodrama's public/private divide.¹⁹ It does so by consigning both Jack and Ennis to their own versions of heteronormative hell: Jack's 'bird in a gilded cage' life with the well-to-do Lureen (*BM*: scs 10, 11, 13, 15, 17), the butt of his father-in-law's contempt (*BM* 2006: scs 11, 14), as much as his customers (*BM*: sc 13); and Ennis and Alma's hardscrabble existence in Signal, Wyoming, from an isolated and run-down farmhouse (*BM* 2006: scs 8, 9) to a squalid flat above a laundrette (*BM* 2006: scs 11, 12), all crying children, unmade beds and dirty dishes. Against this grim vision of the socially sanctioned domestic dysfunction is *Brokeback Mountain*, the sylvan retreat of those latter day shepherds (and satyrs), Jack and Ennis, the two cavorting against its magnificent scenery, leaping together off poolside cliffs (*BM* 2006: sc 12), wrestling in the mud (*BM* 2006: sc 6), even lassoing each other (*BM* 2006: sc 7). This high romantic backdrop serves to widen *Brokeback Mountain's* cultural frame of reference, invoking not only the generic staple of the '30s, '40s and '50s woman's film but, as a number of critics have observed (Alley 2007; Jones 2007; Boyle 2007; Koziak 2009; Holleran 2011), an ancient literary tradition with strong 'gay' resonances: specifically, the 'pastoral'.²⁰ With its bucolic tales of

frolicking shepherds and their herds, the pastoral stretches back from the nineteenth century - for example, Arnold's 'Thyrsis' (1986: 240-246); Shelley's 'Adonais' (2002: 407-426) - to the Renaissance - for example, Milton's 'Lycidas' (1957:116-124); Spenser's *The Shepheardes Calendar* (1996) - finally reaching Graeco-Roman times, with its source texts: principally, Vergil's *Eclogues* (1977) and Theocritus's *Idylls* (2003). *Brokeback Mountain*, however, goes even one step further, generically, and marries the pastoral to another literary and especially cinematic generic tradition less tractable - or seemingly so - to 'queerness'; namely, the Western, where the only real love a man has is for his horse.²¹ Or if indeed he is allowed a non-equine love interest, then one which is always introduced by way of postscript, the film closing with 'our hero' walking into the sunset with a partner who is always female: the rich rancher's daughter, the saloon moll with a 'heart of gold', or the 'pretty little schoolmarm from back East'.²²

This is not to say that the real West was exclusively heterosexual; far from it, an historical fact which the 'Western' - as an aesthetic form, either cinematic (Lee's film), literary (Proulx's fiction) or otherwise - seems to be just catching up with. All of which buys into a certain kind of revisionism that historians of the West (Limerick, Milner & Rankin 1991; Robinson 1997) have dubbed the 'New Western History' (see also Briley 2006); specifically, the scripting of a new historical narrative which rewrites the Old West in terms of its gendered, enraced and classified 'Others': women, Latinos/as, First Nations/Native Americans, even homosocial, if not homosexual men. What emerges from studies such as, for example, that of Chris Packard's seminal work, is a portrayal of the Old West as something like a homotopia, heaving, buffalo-like, with herds of 'queer cowboys', all branded with same-sex desire (Packard 2005). So much so that one might be sorely tempted to trot out yet another bad *Brokeback Mountain* pun here, one of the 'Homos, homos on the range' variety.²³ Not that this re-narration of the Old West-as-homotopia is entirely new. At least, that is, for popular culture, and its principal media: music, television and movies. Whether it be the comical gay stereotypes encoded by those delights of disco, *The Village People*, one of whom was an Indian chief, the other a cowboy;²⁴

or the bare-chested, bunkhouse antics of TV cowboys such as *Laramie's* Slim Sherman (played by John Smith), the often shirtless subject of repeated 'posing' shots (*Laramie* 1959-1963); or the homosocial, indeed homoerotic horseplay of Paul Newman's 'Butch' and Robert Redford's 'Sundance' (*Butch Cassidy and the Sundance Kid*, 1969): the Western has 'always/already' been, as Judith Halberstam and others have quite correctly advised,²⁵ 'queer' (Halberstam 2011: 201). That applies as equally to the Western in its heyday of the '30s, '40s and '50s, as much as to its post-1960 ironisation, including canonical masterpieces such as *Red River* (1948), *3:10 to Yuma* (1957) or *The Searchers* (1956). To take a personal favourite – admittedly a musical comedy, but set in the very heart of the Old West, Deadwood – that high camp classic, *Calamity Jane* (1953), where everyone, literally *everyone* from Howard Keel (as Wild Bill Hickock) to Doris Day herself (as the eponymous Calamity Jane) is cross-dressed, singing of their 'secret love', longing for a 'woman's touch' and otherwise modelling modes of gay icon (if not dykon) performance, *a la* Judith Butler.²⁶

While they may not 'carry on camping' with such flamboyance as Day's 'Calam' & Co, Jack and Ennis literalise the very expression 'camping' in the campsite they inhabit, which for all its dubious comforts – baked beans, flimsy gear, thin blankets, menacing bears and coyotes – is a site of pleasure, of enjoyment, be it Western, pastoral or romance. Indeed, the collective effect, when taken as a whole, of these various genres – the Western, the pastoral, the romance – is to *naturalise* same-sex desire by inserting even its rather startling acts of anal penetration into such well established and world-making modes of poetry, literature and film. This is precisely why I agree with US right-wing critics of *Brokeback Mountain* (2006), such as Bill O'Reilly, Charles Krauthammer and Jim Pinkerton, who condemned the film as having an 'agenda' (*Mediamatters*, 2006). Of course it has, and why not? Indeed, why shouldn't the film, for that matter all art, have an agenda, and what that 'agenda-having' implies: specifically, a politics? In fact, how can it *not*? After all, how could the makers of *Brokeback Mountain* ignore the tumultuous backdrop against which its filming took place? In the United States, that context took the form of very

heated debates over 'gay marriage',²⁷ with advocates such as EJ Graff (2004), Evan Wolfson (2004) and Andrew Sullivan (1998) arguing very much in favour, *contra* queer and feminist critiques (Robson 1990; Warner 1999; Franke 2004, Ettlbrick 2004), of marriage's paramount normativity. The protections, safeguards and security of which, same-sex couples were fully entitled as no different fundamentally, so the argument goes here,²⁸ from heterosexual relationships. *Brokeback Mountain* makes, this article contends, a similar point, its legal *fiction* here reinforcing legal *fiction* in a storyline about a love affair that is no more, or less intense than other heterosexual couplings just because it happens to be about two men.

3 The Interpenetration of Law and Cinema: *Bowers v Hardwick*, *Lawrence v Texas* and *Wyoming v McKinney* in *Brokeback Mountain*

Narrative content, however, is not the only way *Brokeback Mountain* reflects the debates on, and about same-sex desire and its relationships. The very *form* of the film does so too, especially in its conscious echoes, citations and use of much older literary and cinematic conventions. By the encoding of the Old West's homotopia as, variously, romance, pastoral and/or Western, *Brokeback Mountain* situates gay sexuality within a tradition extending back decades, centuries, indeed thousands of years: in short, to the very core of *Western* civilisation. In so doing, the film puts paid to the notion that homosexuality – as an acknowledged object choice, even as a legitimate way of life – is a 'modern' invention, the toleration of which is a symptom of post-war decadence. Such was the dubious '*O tempora, O mores*' trope impliedly informing the notoriously homophobic 1986 United States Supreme Court case, *Bowers v Hardwick* (*Bowers*), the decision upholding Georgia's sodomy law. Though it encompassed, potentially, both heterosexual and homosexual acts, sodomy's broad remit in the Georgia statute was significantly narrowed by the court, then selectively enforced against *homosexual* sodomy, even when such acts occurred, as they did in the case of respondent Michael Hardwick, *in private* and between

consenting adults. In the absence of an express 'fundamental right upon homosexuals to engage in sodomy' in the US Constitution, the court in *Bowers* was loath to strike down a law which so clearly expressed what the 'majority of the electorate in Georgia' believed: namely, 'that homosexual sodomy is immoral and unacceptable' (*Bowers*: 196). Homophobia was more than just referenced and (not-so-tacitly) endorsed here; indeed, such anti-gay prejudice was *universalised* by the judgement, the court finding that, in addition to the fifty states of the Union having, at one time or another, criminalised sodomy (*Bowers*: 192), *all eras, all cultures* – at least in the Occident – have been against it, and perforce its principal perpetrators: that is, (male) homosexuals. 'Decisions of individuals relating to homosexual conduct', so Burger CJ portentously advises, 'have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards' (*Bowers*: 196).

Against *Bowers*' re-contextualising of homosexuality as trans-historical transgression, *Brokeback Mountain* is much more akin to cases such as the 2003 decision of *Lawrence v Texas* (*Lawrence*), another sodomy law case from the South, and one involving a *Bowers*-style fact pattern: to wit, *presumed* sexual congress between two consenting adult men in private.²⁹ In striking down the Texas law, *Lawrence* made an astonishing interpretive move, particularly for an American court. For the decision hybridised itself precedentially, as much as *Brokeback* does generically, with the court in *Lawrence* drawing upon the jurisprudence of the European Union, as much if not *more* decisively than US doctrine. For example, European Court of Human Rights appeals such as Northern Ireland's 1981 *Dudgeon v United Kingdom* (*Lawrence*: 573, 576),³⁰ sit cheek by jowl here with classic American 'privacy' cases such as *Griswold v Connecticut* (1965), *Eisenstadt v Baird* (1972), *Roe v Wade* (1973), and *Carey v Population Services Int'l* (1977) (*Lawrence*: 576). Though fulminating vociferously against these 'foreign' sources (*Lawrence*: 598), even Scalia J's dissent mentions externalities such as Canada's legalisation of same-sex marriage (*Lawrence*: 604), if only to wag an admonitory finger at the court's majority. The implication

being that, for the dissent, citations to an alien jurisprudence are the ‘thin edge of the wedge’, with the *Wolfenden Report* (1963) curially cited one day (*Lawrence*: 572-573), gay marriage judicially legalised the next. A nomological slippery slope that should be resisted at all costs, exemplifying as it does the very worst hazards of judge-made law. Despite, however, the dissent’s best efforts here, there was no containing the judgement’s hybridity, once introduced into the text. For the combined, *intertextual* effect of *Lawrence*’s cosmopolitan sources was to challenge, and relativise *Bowers*’ universalisation of homophobia, opening instead ‘an(O)ther’ discursive space – at least in Kennedy J’s majority judgment – for an alternative history. That history turns out to be open-textured, contingent and pluralistic because it entertains the possibility that, while some eras and cultures abhor homosexuality – ‘for centuries there have been powerful voices to condemn homosexual conduct’ (*Lawrence*: 571) – others anticipate, even valorise our ‘modern’ tolerance of homosexuality – ‘To the extent *Bowers* relied on values we share with a wider civilisation, it should be noted that the reasoning and holding in *Bowers* has been rejected elsewhere’ (*Lawrence*: 576).

When coupled with a more expansive reading of certain substantive safeguards in the US Constitution – principally, the Fourteenth Amendment’s ‘Due Process Clause’ (Kennedy J and the majority) and the ‘Equal Protection Clause’ (O’Connor J, concurring) – this historical reassessment led the US Supreme Court to invalidate, as unconstitutional, the sodomy laws of Texas in *Lawrence*. Too late, though, by some twenty years, for Jack Twist. Not that *Lawrence* would have done Jack any good. This is because violence against gay men and lesbians is, at present, on the increase in the form of private outbursts and public attacks (Mustanski 2013), all the while official homophobia, at least in the ‘disciplinary’ discourses of the law (in its penal codes),³¹ medicine (in its list of disorders),³² and others (for example, psychology),³³ is on the decrease, if not in permanent decline. Or perhaps that decline is not so permanent. Think, after all, of that most *misnamed* of defences, the ‘gay panic defence’,³⁴ ‘misnamed’ because in the scenario in which it is most often invoked – the primal scene of homosexual seduction – it is definitely not the gay man who

panics, but the hysterical straight male (according to the British courts, 'the Guardsman'),³⁵ driven temporarily insane, by that 'fate worse than death', the sexual advance from another man.³⁶ That defence was trotted out, most scandalously, as a shocking, eleventh hour 'hail mary' in the 1999 case of *State of Wyoming v Aaron James McKinney* by another Wyoming boy. He was much like Jack and Ennis in condition, class background outlook, even *orientation*; if, that is, journalist and activist Stephen Jimenez's recent debunking efforts in *The Book of Matt* (Jimenez 2013) are to be believed. But whether he was a meth-fuelled, bisexual 'rent boy', prowling for a 'trick' to roll, or a small town homophobe bragging to his girlfriend about looking for a 'queer' to bash, one fact is incontrovertible: on the evening of 6 October 1998, Aaron McKinney, accompanied by his sidekick Russell Henderson, approached in a Laramie gay bar, offered a lift to, and left with their intended victim University of Wyoming student, Matthew Shepard. Found tied to a fence, scarecrow (or crucifixion?) -style, some eighteen hours later by a passing cyclist, a badly beaten Shepard was largely unconscious from his multiple injuries, and near dead – which, indeed, he would be several days later (Murderpedia: 'Aaron James McKinney').

The case, and the sordid nature of its facts, electrified America, and sparked global interest, all eyes squarely focused on Laramie for the trial. On the stand, McKinney, ultimately, pleaded guilty, the court dismissing his 'gay panic defence'. Especially, after his girlfriend, Kirsten Price and her friend, Chastity Pasley, the girlfriend of accomplice-turned-prosecution witness Russell Henderson, testified that, far from an effect of any psychic 'panic' on McKinney's part, his assault on Matthew Shepard was a straightforward burglary, expressly premeditated and strategically plotted (Murderpedia: 'Aaron James McKinney'). Despite panic's absence here, however, I would argue that its murderous hatred, even psychotic derangement – it is, after all, a derivation of the insanity defence – is alive and well, not just in Laramie, but in a host of jurisdictions, including my own adoptive country and Penny Peter's country of origin, Australia. For the courts Down Under have been, until only lately,³⁷ all too willing to exculpate grisly violence against gay men on that flimsy basis;³⁸ nowhere more

so than in two recent Queensland cases.³⁹ Surely, such violence is graphically, indeed gruesomely screened in the grotesque death of Jack Twist, whose demise is all too soberly related telephonically to Ennis by a detached, even hardened Lureen as the result of an exploding tire (*BM* 2006: sc 17). The veracity of which the film flatly contradicts by presenting, visually, another scene; that is, one in which Jack is, Matthew Shepard-like, brutally beaten to death by two men, doubtless intent on shaking down their well-to-do mark, as well as teaching a 'cruisin' queer' a lesson (*BM* 2006: sc 17). This death, however, is not the most appalling in *Brokeback Mountain* because, of course, Ennis, earlier in the film, had shared a horrifying childhood trauma with Jack; specifically, being forced by his father to *look* at, in all its ghastliness, an exposed, broken and mutilated corpse, the result of a particularly vicious town lynching. I refer, of course, to the fate of Earl, the partner of Rich, one of two old ranchers literally 'shacked up' together and who, once 'outed', was castrated, tortured and brutally killed by his outraged vigilante neighbours, including, in all likelihood, Ennis's own father (*BM* 2006: sc 12). With such grim memories haunting him, no wonder Ennis is so wary. He has every right to be, and his anxious concern turns out to be chillingly prophetic when he warns Jack: 'this thing, it grabs a hold of us again ... at the wrong place ... at the wrong time', then 'we're dead' (*BM* 2006: sc 12).

So Earl and Rich in the '50s, Jack in the '80s and, of course, Matthew Shepard in the '90s: all of whom evidence a paradox that *Brokeback Mountain* so clearly registers in its depiction of a rampaging homophobia that only *intensifies* as the film's homophile story-line of same sex desire languorously and lovingly unfolds. This is a narrative double-move with a strong 'reality referential' in that it mirrors the very real escalating violence against gay men that marks contemporaneity, at the very moment of their greatest social, political and *legal* acceptance. For it seems as if, presently, every TV sitcom has a gay character (think of the hilarious antics of characters 'Cam' and 'Mitch' in *Modern Family* (2009-)); every political party a platform amenable to gays (consider the Log Cabin Republicans, comprised of American gay conservatives); and every court a ruling, at some level – be it state or federal, national

or international – acknowledging or extending gay rights. Or perhaps such current acceptance is fragile, and easily breakable. After all, cases like *Lawrence* only de-criminalised homosexuality in the United States, situating it within, or rather *consigning* it to private places, such as the bedroom. In short, gay men and lesbians are free under *Lawrence* to do what they want in the ‘domestic’ sphere (Franke 2004); however, as to public spaces, and the rights of recognition these spaces imply, *Lawrence* remains silent. In fact, *Lawrence* might very well argue that it is best for those with same-sex desires to stay within their respective bedrooms, their non-normativity safe from a gaze that still plagues gay men and lesbians, queers and bisexuals, the transgendered and the intersex: the ‘look’ that literally kills, that of homophobia’s (and transphobia’s) glare. Nowhere is that fierce, full-on stare more fully realised than in character of Joe Aguirre (played to dyspeptic perfection by Randy Quaid), the ranch foreman who first engages Ennis and Jack as ‘hands’ for his herd and who, of course, spies upon, and suspects the true nature of their telescoped horseplay as ‘stem[ming] the rose’ (*BM* 2006: sc 8), the elaborate metaphor he deploys for anal sex.

4 Looks That Can Kill: ‘Stem[ming] the Rose’, the Homophobic Gaze and the Politics of the Closet in *Brokeback Mountain*

‘Stem[ming] the rose’ (*BM* 2006: sc 8), that curious but nonetheless evocative expression brings us full circle and back to where this paper opened: to an analysis of the scene of ‘bareback mounting’, or anal sex between Ennis and Jack, and all the high anxieties such an act arouses, socially, politically and, above all, juridically. It is precisely the angst this act occasions that underwrites, according to critical race scholar and queer theorist Kendall Thomas (1993a; 1993b), the regulation of sodomy and, in particular, judgments such as *Bowers*. In its blind support for and validation of the Georgia sodomy laws, repeatedly, even compulsively insisting that buggery had always been against the laws of man,⁴⁰ nature,⁴¹ and God,⁴² the *Bowers* court evinced – as Thomas (1993a; 1993b) implies – a paranoid fear of being penetrated from behind. The ensuing emasculation of which would render the

bench collectively not only a penetrated woman, but a particularly abjected kind of penetrated woman: specifically, the rape victim.⁴³ This fear of becoming ‘the victimised feminine’ – the passive, the dominated, the raped – may very well drive the court’s homophobia here. Equally, though, this fear may also screen a secret, Schreber-like *desire*; that is, the desire to be taken *like a woman* (Schreber 2000): yet with a difference, the violated orifice here being the sphincter rather than the vagina. Such a desire – to be taken from behind – can only be enacted if met, according to the peculiar logic of (rape) fantasy operative here, with aggressive *resistance*.⁴⁴ It is *this* intermingling of rape and resistance, aggression and desire that activates, so I would like to suggest, the profound ambivalences of attraction and repulsion, love and hate that, traditionally, homosexuality has aroused, and which this paper has attempted to detail, both on screen and in court.

This, of course, explains not only why *Bowers*’s judicial conservatism crashes so quickly into homophobia’s brick wall, but equally, why *Lawrence*’s liberal legal tolerance reaches its limits all too quickly, confining gay relationships to the bedroom, itself a highly circumscribed extension of the ‘closet’. According to Eve Kosofsky Sedgwick (1990) and others (Howard, 2007; Harris, 2011), the closet is a metaphor of long standing in connection with homosexuality, and the politics of ‘queerness’. Surely, it is no surprise that *Brokeback Mountain* (2006) ends with the image of the closet, and all of its resonances of desire denied, love interdicted. It is in this closet, safe from prying eyes, that Ennis keeps Jack’s shirt, as one of the two mementoes of their relationship. The other is a postcard of *Brokeback Mountain* itself, blue-tacked to Ennis’s inner closet door, its brightly coloured scenery a bold contrast to the stark landscape beyond Ennis’ cramped, caravan quarters. For the limitless vistas espied here function as an affective metaphor for the vacuity, the emptiness that Ennis can only partially give voice to in a strangulated confession of love that stops short of full articulation, ending abruptly and mid-sentence, ‘Jack, I swear ...’ (*BM* 2006: sc 19). This is exactly why I find the close of *Brokeback Mountain* not only so touching, but also *troublesome*. Troublesome, because it consigns gay sexuality – hitherto the most upfront and in-your-face of ‘identity

politics' – to the netherworld of maudlin '30s, '40s and '50s screen romance, with their sentimental stories of not only loving self-sacrifice, but mourning and melancholy. Why 'ask for the moon', queries Bette Davis, famously, in *Now, Voyager* (1942) to Paul Henreid, when 'we have the stars?' In short, why not settle for less, as they seem to do in every other transgressive love story?

That appears to be the *not* so consoling note upon which *Brokeback Mountain* ends, one which I would love to rewrite, taking my cue from the very controversial poster used quite self-consciously by production house Focus Features as an advertising gimmick to promote the film:⁴⁵ the chiselled profiles of Ennis and Jack, conjoined yet reverse, recalling a Gemini-like *bas-relief*. This near-sculptural positioning provides a visual clue to, and indeed puns upon yet another pair of celebrated screen lovers, though, in their case, heterosexual: specifically, *Titanic's* Rose (played by Kate Winslet) and yet another Jack (this one, played by Leonardo di Caprio) (*Titanic* 1997). It is their earlier movie poster *placement* that *Brokeback* replicates, with Ennis and Jack's tilted headshots mimicking Kate and Jack's interlinked cranial repose, one head resting on another's neck, the eyes of each romantically downcast. Only in the case of *Titanic's* lovers, their story ends – oddly enough for a 'disaster epic' – not with love foresworn, but a life renewed. With the sinking of the great ship, Rose is liberated from the constraints of her 'high society' context and its overriding imperative for young ladies, the good match. This (very) 'reluctant debutante' is now free to reshape her destiny so that it includes professional fulfilment, as well as personal love – if not, alas, with Jack. Why not then the same sort of new life story for Ennis, himself bereft of *his* Jack as much as Rose was of hers, but, like her, recovering? Of course, Rose's emancipatory, proto-feminist story was as emblematic as the *Titanic* itself, the grandiose vessel's wreckage a metaphor for the oppressive class, race and gender hierarchies of the 'long nineteenth century's' *ancien regime*, soon to be capsized by World War I. Though *Brokeback Mountain* eschews this kind of explicit historical resonance, nonetheless its narrative occurs against a context of change – the 1960s, 1970s and 1980s – just as epoch-making as that of *Titanic* (1997). In light of this contextual

backdrop, does not Ennis's filmic odyssey cry out for a different post-scriptural ending? One in which he moved on to another sort of life: for instance, to San Francisco, this period's countercultural capital of alternative lifestyles and new social movements, including *Milk*-style 'gay liberation' (*Milk* 2008).

Of course, that would mean leaving Brokeback Mountain behind, and all it connotes – as a welcome space of refuge, yet also of lonely isolation – embracing instead the possibility of a social and sexual tie in the here and now. This could, incidentally, serve as a warning to all the triumphalist euphoria amongst some gay and lesbian activists following the 2015 decision in *Obergefell v Hodges*, the recent Supreme Court ruling legalising same-sex marriage across the United States. In sounding such a cautionary note, I refer not just to all the micro-resistances against the decision springing up around the country (USA Today Network 2015), a backlash kick-started by a Kentucky County Clerk's refusal on religious grounds to issue same-sex marriage licenses (AP The Big Story 2015). Rather, I reference the very prescient reservations aired some time back by literary critic, DA Miller. Writing not long after the film's original release, Miller read *Brokeback Mountain* as a formal and thematic staging of an assimilationist liberal fantasy intent on neutralising same-sex desire, reducing its 'sexual excitement', recycling its 'sexual waste' (Miller 2007: 55). By allowing the film's audience to weep over dead or abandoned homosexuals, yet console themselves with the promise of gays' future acceptance, liberalism may very well supply (post)modernity with the ultimate juridico-political 'alibi' (Miller 2007: 55) for its persistent systemic discrimination against the LGBTIQ coalition: namely, an (il)liberal toleration that excludes 'others' at the very moment it includes *some*.

Nowhere is this more the case, according to Miller, than in the liberal agenda's co-optation of 'gay marrieds with children' (Miller 2007: 55) mainstreaming hereafter, by and through the Law, what hitherto been the most marginal of familial networks. Left out of the liberal legal equation, so Miller implies, is the wonderful 'polymorphous perversity' that had long characterised the queer community's sexuality

of difference, and had endowed it with such a potent seductive charm. To name a few – the culture of ‘cruising’, the world of ‘drag’, the ‘leather’ scene, the ‘trans’ movement: none of these well-established sites of sexual difference figure much in liberal legality’s fantasy space of marriage equality, and may, in fact, be barred from it as embarrassingly, even dangerously *outré*. Which when translated back into filmic terms might mean that the price to be paid for the Symbolic Law’s equal recognition of same-sex desire is Brokeback’s *ban*, liberal legality forever proscribing access to its exhilarating, rapturous *jouissance* of the Real: what Jack so achingly calls its ‘high altitude fucks’ (*BM* 2006: sc 16). The suggestion here is that the passionately orgiastic, even epiphanic ‘enjoyment’ of Brokeback Mountain might very well be *lost* in bringing Ennis, and others like him, back down to earth. And down with a thump at that, because waiting for him could be some sort of wedded ‘compulsory happiness’ (Love 2002). Which raises this bleak, anhedonic possibility: that same-sex domesticity *a venir* may turn out to be, once the honeymoon is over, just as humdrum, just as stifling, just as passionless as its heteronormative counterpart: a replication of, rather than a departure from the sham Alma/Lureen relationships. Indeed, one might be tempted to say here, as the old adage goes for straight couples, so too *now* for same-sex: that while gay matches may be made in the heaven of Brokeback Mountain, gay marriages are most definitely made on Earth.

Notes

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- 1 I would like to thank this journal issue’s editors, Professor Joseph Pugliese (Macquarie) and Ms Jillian Kramer (Macquarie), for their support, feedback and, above all, patience in what turned out to be, for this article, a somewhat protracted period of revision. I am also grateful to the anonymous reviewers of *Law Text Culture* for their very constructive and helpful criticism. This article was trialled first as a lecture in my Griffith Law School elective, *Legal Fictions: Representations of Law in Cinema, Philosophy and Literature*, and I am very appreciative of the students in that subject and, of course, the bracing intellectual environment of the

Griffith Law School, Australia's leading centre of critical and cultural legal studies. The article was further developed and subsequently delivered as a paper at *Law and Literary Studies Colloquium: The Legal Case*, Faculty of Law, University of Hong Kong, Hong Kong (2010). My thanks for this generous invitation and welcome opportunity to organiser, Dr Marco Wan, and to my former HKU colleague, Professor Elaine Ho. I appreciated the comments and feedback from many of the Colloquium attendees, including Professor Paul Raffield (Warwick), Dr Maria Aristodemou (Birkbeck), Professor Scott Veitch (Hong Kong), Professor Douglas Kerr (Hong Kong) and Professor Chris Hutton (Hong Kong). As well, I am grateful to my Griffith colleague, Professor Herman van Eyken who invited me to deliver a version of this article as an orientation lecture on film genre to the incoming students of Griffith's prestigious Film School. I thoroughly enjoyed the experience and want to thank, collectively, the film students present that evening for a very lively and vigorous post-lecture discussion (Griffith Film School, 2013). Finally, this article took on close to its present form when delivered as a closing plenary paper at *Troubling Waters: Speaking (of) Forbidden (Legal) Subjects Symposium in Honour of Penny Pether*, Legal Intersections Research Centre, School of Law University of Wollongong, New South Wales, Australia (2014). My thanks to the Centre's Director and principal organiser, Professor Nan Seuffert (Wollongong), and to my charming interlocutor and inter-institutional colleague, Dr Cassandra Sharp (Wollongong). With Griffith Law School, Wollongong's School of Law is one of the leading critical and cultural legal centres in Australia and, indeed, the common law world; and I want to thank its outstanding faculty members for their continued hospitality and on-going support, especially Associate Professor Marett Leiboff, Professor Elena Marchetti, Professor Luke McNamara, Dr Luis Gómez Romero, Dr Trish Mundy, Dr Julie Quilter and Dean Warwick Gullett. It was an honour to be invited to speak at the Symposium and I was especially pleased to be able to meet with the mother of my dear, departed friend, Professor Penny Pether: the erudite and elegant Mrs Betty Pether. To her I dedicate this article with much admiration and affection.

- 2 According to the website, *The Numbers: Where Data and the Movie Business Meet*, Brokeback Mountain was made for US\$13,900,000.

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- 3 On the *IMDb* website ('*Brokeback Mountain* (2005) Awards'), *Brokeback Mountain* is listed as having won, *inter alia*, three Oscars (Best Achievement in Directing; Best Writing, Adapted Screenplay; and Best Achievement in Music for Motion Picture Original Score), four Golden Globes (Best Motion Picture-Drama; Best Director-Motion Picture; Best Screenplay-Motion Picture; and Best Original Song-Motion Picture) and three BAFTAs (Best Film, Best Screenplay, Best Performance by an Actor in a Supporting Role). Not to mention a host of other awards from a range of different academies, institutes, festivals and professional bodies, including: AFI Awards USA, Australian Film Institute, GLAAD Media Awards, London Critics Circle Film Awards, New York Film Critics Circle Awards USA, and Venice Film Festival.
- 4 For example, Sandra Hall of the *The Sydney Morning Herald* wrote that Ang Lee had, in *Brokeback Mountain*, 'tapped into Proulx's story and gathered up it without missing a single, sad, delicate nuance' (Hall 2006). Peter Bradshaw of *The Guardian* found the film 'extremely moving, even tragic' (Bradshaw 2006). Rick Groen of Toronto's *Globe and Mail* maintained that, in *Brokeback Mountain*, Ang Lee had transformed a 'taboo into a romantic totem' (Groen 2005). In *The New York Times*, Stephen Holden wrote that *Brokeback Mountain* was a 'landmark film' (Holden 2005).
- 5 On the *IMDb* website (*Brokeback Mountain* (2005): Box Office/Business) – and in Wikipedia (Wikipedia Entry, '*Brokeback Mountain*') – *Brokeback Mountain* is listed as having grossed nationally, over its 133 days of theatrical release, US\$83, 043, 761 and, internationally, US\$95, 018, 998, for a grand total of \$US178, 062, 759. *The Numbers* gives even a higher figure: all told, *Brokeback Mountain* took in US\$177,012,173, with domestic takings at US\$83, 043,761 and international, slightly higher at US\$93,968,412 (see *The Numbers* entry '*Brokeback Mountain*').
- 6 All further references in this article to *Brokeback Mountain* will be to the DVD edition (2006) of the film.
- 7 Whether or not *Brokeback Mountain* is a 'Western' has provoked heated debate in academic, journalistic and digital circles. Historian Richard White, for example, argues that *Brokeback Mountain* is 'conventionally, even reverentially' a Western (White, 2006), while one archconservative reviewer maintains stoutly that the film is a 'rape' of the genre, thereby grafting a 'self destructive lifestyle' onto a 'revered symbol, personified in the Marlboro Man' (Kupelian 2005). Revisionists have countered that

Brokeback Mountain is a 'post-Western' (Meyer 2009), reflective of the 'New Western History' (Briley 2006) engaging 'Others': women, Latinos/as, First Nations, and so forth. *Cineastes*, sensitive to the nuances of a range of filmic genres, have argued that *Brokeback Mountain* may not even be a Western at all, but a species of 'tragedy' (Wood 2007), or 'melodrama' (Hoberman 2005; MacDowell 2006; Kitses 2007; Koziak 2009; Dale 2011; McCabe 2011).

- 8 I use this noun 'cowboy' cautiously and for good reason, Ennis and Jack being, of course, ranch hands – and, more specifically sheep herders – rather than cowboys. Annie Proulx, herself, has stated categorically that neither of them is a cowboy: 'They would like to be cowboys because they live in the West', says Proulx, 'but they're not' (Silverblatt 2011). As to the adjectival modifier, 'gay': whether or not Ennis and Jack are 'gay' or, indeed, if *Brokeback Mountain* is a 'gay' film has been hotly debated in the press, on the internet and in the journal literature. Most famously, *The Advocate's* Ryan Kind argued that *Brokeback* was, decidedly, 'not a gay movie' (Kind 2005), while in the *New York Review of Book*, Daniel Mendelsohn countered that *Brokeback's* narrative, with its theme of the closet, was 'distinctively gay' (Mendelsohn 2006; 2011) – a distinction which the film's marketing tried to dilute by 'universalising' its love story. Producer Jim Schamus, in turn, responded to Mendelsohn, maintaining that the very act of 'outing' – here of Ennis and Jack's story, but also elsewhere – might serve, effectively, to de-specify, and thereby, universalise, what had hitherto been an highly specific identic formation, 'gayness'. Since then most reviewers and critics have lined up, either in one camp or the other, reading *Brokeback* as pro- (Clinton 2005; Sullivan 2006; Johnson 2010; Li 2007) or con- (Clinton 2005; Lane 2005; Leavitt 2005, 2011; Lang 2005; Mars-Jones 2005; Ebert 2006; Alleva 2006; Arellano 2007; Cobb 2007) 'gayness'. Complicating this split is the fact that the 'con' camp is, *itself*, divided into two factions. There are those (Lane 2005; Ebert 2006; Alleva 2006) who think *not* being a gay film is a good thing precisely because it universalises the story; then, those (Leavitt 2005; Mars-Jones 2005; Arellano 2007) who think it a bad thing largely because it sidelines, silences and otherwise heteronormalises same-sex desire. Finally – and inevitably – this highly polarized and polemicized critical field has witnessed the emergence of a 'third way' (Rich 2005; Lee 2006; Howard 2007; Perez 2007; Needham 2010; Halberstam 2011) that sidesteps this debate by 'queering' the film. That is, by arguing for an alternative reading of *Brokeback Mountain* that

goes beyond the static dualities of pro and con, gay and straight, and which, instead, takes seriously the thematic of what it means to desire differently.

- 9 Following on from the passage of the federal Defense of Marriage Act (*DOMA* 1997), the United States became a patchwork of competing jurisdictions, with wildly varying laws *vis-a-vis* same-sex relationships. Some recognized same-sex marriage (eg Connecticut, DC, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont); some banned it (eg Alaska, Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, Utah); and a few did both (eg Hawaii, California) (Pew Research Center entry 'Same Sex Marriage, State by State' 2015). With, however, the 2015 Supreme Court ruling in *Obergefell v Hodges* invalidating bans on same-sex marriage, this confused, nigh incoherent state of affairs has been (seemingly) regularised, with same-sex marriage now a (notional) right in the republic 'from sea to shining sea'.
- 10 Beginning with The Netherlands in 2000, same-sex marriage has been legalised around the globe at a rate that has been as steady as it is astonishing. To give some examples, illustrating the international reach of this legislative juggernaut: South Africa legalised same-sex marriage in 2006, Uruguay in 2013, Greenland in 2015, not to mention a raft of Western European countries (Belgium, 2003; Spain, 2005; Norway 2009; Sweden, 2009; Portugal, 2010; France, 2013; England & Wales, 2013; Scotland, 2014; Luxembourg, 2015; Ireland, 2015), other 'dominions' from the Commonwealth of Nations (Canada, 2005; New Zealand, 2013), and select Latin American nations (Argentina, 2010; Brazil, 2013) (Pew Research Centre entry, 'Same Sex Marriage Around the World' 2015).
- 11 In spite of the 2015 decision in *Obergefell v Hodges*, and, indeed, precisely because of it, some American jurisdictions are fighting, in the wake of the Supreme Court's ruling, rear-guard actions against same-sex marriage. Alabama's State Supreme Court has issued a writ of mandamus suspending same-sex marriages for twenty-five days, buying time for those 'interested parties' intent on filing motions challenging the ruling. Louisiana and Texas have adopted stalling strategies, the former giving county clerks a twenty-five day grace period before issuing a license to an LGBTIQ couple, while the latter has impliedly exempted county clerks who have religious objections to gay marriage from issuing said licenses (McLaughlin 2015).

- 12 Significant here is Australia's silence which, despite its reputation as a LGBTIQ-friendly country – where else is the Gay Pride parade a nationally broadcast event like Sydney's celebrated Mardi Gras? – has yet to legalise same-sex marriage. A significant impediment here is 2004's *Marriage Act*, enacted by the Liberal Howard government and mandating, federally, that marriage is between a man and a woman. States, on the other hand, have proved more receptive; and, in 2012, the Australian Capital Territory (ACT) legalised same-sex marriage. That law, however, was subsequently invalidated by the High Court (*The Commonwealth of Australia v The Australian Capital Territory* 2013) as being *ultra vires* state authority, and in contravention of existing federal legislation – which was upheld. Skirting the semantic conundrums 'marriage' seems to raise, the ACT has, in response to this ruling, legalised civil unions for same-sex couples, thereby effecting in substance what it cannot do so in name. In a similar vein, a range of Australian states – New South Wales, Tasmania, Queensland, Victoria – have established domestic partner registries, inclusive of same-sex couples. With such a hodgepodge of rulings, bans and enactments, Australia looks set to follow the American example; only here, as at least one commentator has recently observed (Johnson 2015), there is no constitutionally entrenched Bill of Rights authorising a judicial solution to the political deadlock around this issue.
- 13 For a more critico-legal, yet nonetheless resolutely 'queer' reading of *Brokeback Mountain*, see Chapter 2, "The Imagined Power": The Specter of Hate Crime in *Brokeback Mountain*' in Charles Casey's *Gender in Law, Culture and Society* (Casey 2012).
- 14 For treatments of the seemingly endless parodies of *Brokeback Mountain*, see: Ruby B Rich on 'Brokering Brokeback: Jokes, Backlashes and Other Anxieties' (Rich, 2007); Corey Creekmur's '*Brokeback*: The Parody' (2007); David Weiss on 'Making Sense of the *Brokeback* Paraphenomenon' (Weiss 2011), and John Ibson's 'Lessons Learned on *Brokeback Mountain*: Expanding the Possibilities of American Manhood' (Ibson 2007).
- 15 'Not since the fisting scene in *Cruising*', opines reviewer John Howard, 'has a major motion picture depicted such a hot queer sex act' (Howard 2007).

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- 16 For which Gustavo Santaolallo won the Oscar for 'Best Achievement in Music for Motion Pictures, Original Score'; and with former Elton John collaborator, Bernie Taupin, a Golden Globe for Best Original Song (IMDB Entry 'Brokeback Mountain (2005)', 'Awards' 2005).
- 17 See Michael Blouin's article, 'Auditory Ambivalence: Music in the Western from *High Noon* to *Brokeback Mountain*' on how, for structural and thematic purposes, this string leitmotif is deployed and counterpointed throughout the film against much more traditional 'country and western' music (Blouin 2010).
- 18 For the trail-blazing treatment of – and rehabilitation of what had been, until then, a much maligned genre – see Molly Hasketh's now classic *From Reverence to Rape: The Treatment of Women in the Movies* (1987). For a more recent study, but with a similar historical sweep, see Jeanine Basinger's *A Woman's View: How Hollywood Spoke to Women, 1930–1960* (1994). For a more period-minded and genre-specific study of the woman's film from an equally powerful feminist perspective, see Mary Ann Doane's *The Desire to Desire: The Woman's Film of the 1940s* (Doane 1987). Mapping the transition from the woman's film to the contemporary 'chick film', see Karen Hollinger's lively and astute chapter, 'Women and Genre Films; From the Woman's Film to Chick Flicks' in her *Feminist Film Studies* (2012).
- 19 Which, for example, cineaste Jim Kitses makes explicit in a *Film Quarterly* article about *Brokeback*, 'All That *Brokeback* Allows', the title of which that references one of the masterpieces, *All That Heaven Allows*, of the Sirk oeuvre (Kitses 2007).
- 20 For the standard critical text on this genre, see Paul Alpers's now classic *What is the Pastoral?* (1996). For an excellent – and blessedly brief – overview of this genre, see Peter Marinelli's *The Pastoral* (1971).
- 21 For a sustained exploration of this theme, amorous or otherwise, see Stella Hockenbull's 'Horse Power: Equine Alliances in the Western' (2013).
- 22 Investigating this typology of female characters in the Western is Helen Lewis's 'Virgins, Widows and Whores: The Bride Pool of the John Wayne Westerns' (2013).
- 23 Only in this case, the pun is not one of mine, but that of *New Statesmen* reviewer, Peter Swaab. See his 'Homos on the Range' piece in that periodical (2005).

- 24 See the group's official website, *Official Village People: The Kings of Disco*.
- 25 Along a similar line, Hoberman in the *Village Voice* writes that the Western is the 'most idyllically homosocial of modes' (2005), with *Sight and Sound's* Eric Buscombe concurring that the 'cowboy flicks were always a tad gay, or at very least homosocial' (2006: 30). In the *Washington Post*, Steve Hunter's article, 'Out in the West: Re-examining a Genre Saddled with Subtext' (Hunter 2005) gives a capacious overview of homoerotic subtext in Westerns, ranging from *The Wild Bunch* (1969) to *The Man from Laramie* (1955) to *Bend of the River* (1952).
- 26 For Butler's path-breaking notion of 'gender as performance' see her now germinal *Gender Trouble; Feminism and the Subversion of Identity* (2006).
- 27 For an excellent overview of these debates and the practical policies and theoretical positions informing them, see Jane Schacter's excellent article, 'The Other Same-Sex Marriage Debate' (2009).
- 28 And, in the process, boldly repudiating the 'politics of difference' that Robson (1990), Warner (1999), and Franke (2004), cited previously.
- 29 Italicise 'presumed' because it was never clear from the facts of judgment, as Katherine Franke quite correctly points out, the exact nature of the relationship between the men in question and whether, indeed, they had sex of any kind (Franke 2004). Subsequently, Dale Carpenter in his expose, *Flagrant Conduct: The Story of 'Lawrence v. Texas': How a Bedroom Arrest Decriminalised Gay Americans* would suggest that John Geddes Lawrence and Tyron Garner were neither partners nor had sex (2012).
- 30 Other European Union cases cited here include: *PG & JH v United Kingdom*; *Modinos v Cyprus*; *Norris v Ireland*.
- 31 See *infra*, notes 9, 10.
- 32 Nearly forty-years ago, in December of 1973, the American Psychiatric Association voted to remove homosexuality from its professional *Diagnostic and Statistical Manual of Mental Disorders* (Becker 2013).
- 33 See, for example, the American Psychological Association's 'Practice Guidelines for LGB Clients: Guidelines for Psychological Practice with Lesbian, Gay and Bisexual Clients'.
- 34 For a comprehensive overview of this defence in an American context, see Cynthia's Lee's thoroughly and meticulously researched 'The Gay Panic Defence' (2008).

- 35 For a treatment of the 'Guardsman's defence – or, alternatively, the 'Portsmouth defence', see Helen Power's 'Provocation and Culture' (2006).
- 36 Which is precisely how the Australians nominate it: as the 'homosexual advance defence'. For an overview of that defence within an Australian context, see Kent Blore's recent and excellent, 'The Homosexual Advance Defence and the Campaign to Abolish It in Queensland: The Activist's Dilemma and the Politician's Paradox' (2012).
- 37 With the announcement by Queensland Attorney-General, Yvette D'Ath that the state's Labor government will soon amend the state's criminal code to abolish the 'homosexual advance defence', it will have all but disappeared, thankfully, in Australia. Tasmania and Victoria have repealed the defence of provocation, while New South Wales, the Australian Capital Territory and the Northern Territory have excluded non-violent homosexual advances (Prain 2015).
- 38 For one of the all-time lows in Australian jurisprudence, see: *Green v. R* (1997). For theoretically sophisticated critical commentary on Green, see Bronwyn Statham's 'The Homosexual Advance Defence: "Yeah, I killed him, but he did worse to me", *Green v. R*' (1999) and Ben Golder's 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004).
- 39 See the following two cases, both from Maryborough, Queensland and each in their own ghastly way responsible for 2015 Queensland push to repeal the homosexual advance defence: *R v Meerdink and Pearce and R v Peterson and Smith*.
- 40 The court holds, for example: 'Proscriptions against the conduct have ancient roots' (Bowers: 192).
- 41 "[A] disgrace" according Burger CJ, quoting Blackstone, "to human nature" (Bowers: 186).
- 42 'To hold that the act of homosexual sodomy is somehow protected as a fundamental right is to cast aside millennia of moral teaching' (Bowers: 197).
- 43 In fact, according to the court – at least, Burger CJ, again citing Blackstone – sodomy is something far worse: 'Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape' (Bowers: 186).

44 Which is doubtless why the language of resistance is woven into the very warp and woof of the judgment's text here, the Bowers court exhibiting 'great resistance' to any expansion of 'the substantive reach of the Due Process Clauses of the Fifth and Fourteenth Amendments' (Bowers: 195), and repeatedly using phrases to that effect: 'This case does not require ... We first register our disagreement' (Bowers: 190), 'This we are quite unwilling to do', (Bowers: 191), 'It is obvious to us that neither of these formulations' (Bowers:192), 'Nor are we inclined to' (Bowers: 194), 'We are unwilling to start down that road' (Bowers: 195). For a tour-de-force critical legal/queer analysis of this decision's self-subverting rhetoric and its wildly oppositional, and deconstructing tropes and types, see Kendall Thomas's 'The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick' (Thomas 1993b).

'If you look at our poster' says Focus Features' James Schamus, 'you can see the traces of our inspiration, *Titanic*' (Towie 2005).

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