1-1-1993

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Recommended Citation

79 Va. L. Rev. 1551

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LITIGATING FOR LESBIAN AND GAY RIGHTS: A LEGAL HISTORY

Patricia A. Cain*

INTRODUCTION

GAY rights cases have never been at the forefront of the legal academy. For example, prior to the Supreme Court's decision in *Bowers v. Hardwick*,¹ the constitutional rights of gay men and lesbians were typically omitted from coverage in constitutional law classes. Even today, some constitutional law teachers continue to omit coverage of lesbian and gay rights issues.

The rights of lesbians and gay men were not totally ignored by pre-*Hardwick* legal scholars, however. Several constitutional scholars discussed the potential equal protection and due process claims of lesbian and gay litigants.² Rarely, however, did these legal scholars make lesbians and gay men the primary focal point of their work.³

* Professor of Law, University of Iowa. I would like to thank my friends at Lambda Legal Defense and the Gay and Lesbian Rights Project of the American Civil Liberties Union for their ongoing conversations regarding lesbian and gay rights litigation. For comments on an earlier draft of this Article, I thank Nan Hunter, Mary Anne Case, and especially Jean Love. An even earlier draft of this Article was presented to a faculty seminar at the University of Nebraska Law School, and I thank those participants. Research assistance was provided by Jill Altman and Paul Dietsch.

¹ 478 U.S. 186 (1986).

² See, e.g., John H. Ely, *Democracy and Distrust* 162-64 (1980) (discussing equal protection analysis); Laurence H. Tribe, *American Constitutional Law* 944-45 (1978) (discussing equal protection analysis); Paul Brest, *The Substance of Process*, 42 Ohio St. L.J. 131, 135 (1981) (questioning the constitutionality of sodomy laws pursuant to an equal protection analysis); Kenneth L. Karst, *Freedom of Intimate Association*, 89 Yale L.J. 624, 658, 682-86 (1980); Kenneth L. Karst, *The Supreme Court 1976 Term, Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 62 (1977) (criticizing summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976)); J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyle*, 62 Cornell L. Rev. 563, 587-600 (1977).

³ A few legal scholars are notable exceptions to this statement. The most notable are Rhonda Rivera, Josh Dressler, and David Richards. See Rhonda R. Rivera, *Book Review*, 132 U. Pa. L. Rev. 391 (1984) (reviewing John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (1983)); Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 Drake L. Rev. 311 (1980-81); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (1979); Joshua Dressler, *Judicial Homophobia: Gay*

Once *Hardwick* was being litigated, lesbian and gay legal scholarship increased significantly.⁴

Thus, to many in the legal academy, gay rights litigation appears to have begun with *Hardwick*. Yet that perception is not consistent with reality. A major purpose of this Article is to describe the broader history of gay rights litigation so that *Hardwick* can be seen in its proper context.

Legal scholars are not alone in their misperceptions. Outside of the legal academy, there is a strong perception that the gay rights movement began with the Stonewall Riots in 1969. Although that event was certainly a turning point, a significant gay rights movement existed before that time. Thus, this Article will also cover the legal and social history that preceded Stonewall.

This Article is primarily a legal history of gay rights litigation and the gay rights movement. Relying on the work of other scholars, in particular gay historians Jonathan Katz,⁵ Martin Duberman,⁶ Lillian

Rights Biggest Roadblock, *Civ. Liberties Rev.*, Jan.-Feb. 1979, at 19; Joshua Dressler, Study of Law Student Attitudes Regarding the Rights of Gay People to Be Teachers, 4 *J. Homosexuality* 315 (1979); Joshua Dressler, Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession, 9 *Rut.-Cam. L.J.* 399 (1978); David A.J. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 *Hastings L.J.* 957 (1979); David A.J. Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 *Fordham L. Rev.* 1281 (1977).

Family law scholars also wrote about lesbian and gay issues pre-*Hardwick*, in particular about lesbian custody. See, e.g., Donna Hitchens & Barbara Price, Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony, 9 *Golden Gate U. L. Rev.* 451 (1978-79).

⁴ See generally the publications noted as lesbian- and gay-related in Professor Arthur Leonard's monthly newsletter, *Lesbian/Gay Law Notes*. The Association of American Law Schools Section on Gay and Lesbian Legal Issues publishes in its newsletter a partial bibliography from Professor Leonard's files. The May to October 1991 Bibliography listed 68 books and articles and 49 student notes and comments. See AALS Section on Gay and Lesbian Legal Issues, Newsletter 6-8 (Fall 1991). In addition, there is now a student-edited law journal that focus on lesbian and gay issues: *Law and Sexuality*, published by students at Tulane Law School. Similar student-edited journals are in the planning stages at other law schools.

⁵ Jonathon Katz, *Gay American History* (rev. ed. 1992).

⁶ Martin Duberman, *Stonewall* (1993).

Faderman,⁷ Barry Adam,⁸ Randy Shilts,⁹ Eric Marcus,¹⁰ and John D'Emilio,¹¹ I have attempted to contextualize some of the more famous pre-*Hardwick* gay rights cases by describing the social and legal conditions existing at the time. I have chosen to focus on litigation that affects public sphere rights as opposed to litigation about private relationships and family issues, because *Hardwick*, as a practical matter, more directly affects public sphere rights such as employment and citizenship.¹²

Although this Article is primarily intended as a legal history of pre-*Hardwick* litigation, I conclude in the last Part with some observations regarding post-*Hardwick* litigation strategies. I focus primarily on public-employment cases in which litigators have stressed equal protection arguments to remedy cases of class-based discrimination. Many of these cases rely on what I consider to be an artificial bifurcation of status and conduct. In the last Part of this Article, I critique the status versus conduct distinction and argue that, despite *Hardwick*, litigators should continue making substantive due process arguments that focus on lesbian and gay conduct. I believe such arguments are necessary to challenge the *Hardwick* holding, and furthermore, that such arguments more accurately reflect the reality of lesbian and gay lives.

⁷ Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth Century America* (1991).

⁸ Barry D Adam, *The Rise of a Gay and Lesbian Movement* (1987).

⁹ Randy Shilts, *Conduct Unbecoming: Lesbians and Gays in the U.S. Military, Vietnam to the Persian Gulf* (1993).

¹⁰ Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945-1990* (1992).

¹¹ John D'Emilio, *Sexual Politics, Sexual Communities* (1983) [hereinafter D'Emilio, *Sexual Politics*]; John D'Emilio, *Making Trouble* (1992) [hereinafter D'Emilio, *Making Trouble*].

¹² This is not to say that *Hardwick* has no effect on private sphere rights. The sodomy statutes left standing by the Court's due process holding in *Hardwick* have been used to deny custody to gay and lesbian parents. See, e.g., *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985), cited with approval in a recent lesbian mother case, *Bottoms v. Bottoms*, decided by the Henrico County, Virginia, Circuit Court in September, 1993. See *Lesbian Loses Custody of Her Son to Her Mother*, N.Y. Times, Sept. 8, 1993, at A17. The Times quotes Judge Buford M. Parsons, Jr., as follows: "The [lesbian] mother's conduct is illegal and immoral and renders her an unfit parent." *Id.*

Despite *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that custody decisions based on racial prejudice are unconstitutional), family law cases are rarely argued in constitutional terms. By contrast, state decisions regarding government employment and other public sphere rights pose clear constitutional issues similar to the issues in *Hardwick*.

I. GAY RIGHTS BEFORE STONEWALL

A. Early Beginnings and the Conspiracy of Silence

The first authentically pro-gay civil rights organization was formed in Germany in 1897.¹³ The goals of the Scientific-Humanitarian Committee (Wissenschaftlich-Humanitäres Komitee) were to fight for repeal of anti-gay provisions in the German penal code, to promote public education about homosexuality, and to encourage homosexuals to organize for their rights.¹⁴ Underlying the group's political philosophy was the theory that homosexuals were a "third sex"¹⁵ determined at birth.¹⁶ Although support for this theory was not universal among members of the German movement, many thought it would strengthen their arguments against persecution if they could present their homosexuality as a characteristic determined at birth rather than as a choice.¹⁷ The "third sex" perspective was endorsed by a small number of German medical doctors, thereby lending credence to the claim.

The German organization's influence made its way across the Atlantic to the United States. As early as 1906, members of the Scientific-Humanitarian Committee lectured in New York.¹⁸ In 1907, a member of the Committee, Dr. Georg Merzbach, reported on his lecture to the New York Society of Medical Jurisprudence by writing to a colleague back in Germany: "I had expected . . . a courteous but cool reception because of the subject matter; and now we have had this singular success in the very country where bigotry and prudish-

¹³ Adam, *supra* note 8, at 17; Marcus, *supra* note 10 at 1.

¹⁴ Marcus, *supra* note 10, at 1. For an historical explanation of why this organization was able to campaign successfully despite the fact that male homosexuality was illegal, see David F. Greenberg, *The Construction of Homosexuality* 410 (1988). Of prime importance was the fact that gay bars were tolerated, thereby creating space for socialization and political mobilization. Gay bars have played a significant role in gay political mobilization in the United States as well. See *infra* note 108 and accompanying text.

¹⁵ The phrase "third sex" can be traced to Karl Heinrich Ulrichs, who argued that homosexuality was a congenital condition. Greenberg, *supra* note 14, at 408.

¹⁶ See Adam, *supra* note 8, at 18.

¹⁷ The same debate over the innateness of homosexuality continues today. The debate often breaks down along gender lines with lesbians supporting the notion of choice and gay men supporting innateness. In turn of the century Germany, the opposition to the congenital "third sex" theory came primarily from antifeminist gay men who viewed homosexuality as an expression of male superiority. Greenberg, *supra* note 14 at 410.

¹⁸ See Katz, *supra* note 5, at 381-82 (reproducing accounts of the presentations).

ness are truly at home.”¹⁹ Unlike the medical community in Germany, however, American doctors more readily embraced the “degeneracy” theory of homosexuality.²⁰ Although degeneracy theory, like the German theories, was based on the notion that homosexuality could be inherited, the theory also emphasized the depravity of the condition and the fact that homosexuality could remain latent until triggered. This “disease” theory led medical doctors to support such treatment as aversion therapy, castration, and other radical “cures,” rather than decriminalization.²¹

The first American to speak publicly in support of same-sex love was Emma Goldman, the famous anarchist and feminist.²² Although Goldman is better known as a defender of free speech, birth control, pacifism, and the rights of workers, her position on same-sex love was an integral part of her general philosophy of free love.²³ In addition to her public speeches on the topic, Goldman also wrote about the plight of homosexuals, relying on the accounts of lesbians she met in prison, as well as the writings of Magnus Hirschfeld and others.²⁴ As a consequence of her more radical beliefs, Emma Goldman was denaturalized and deported during the “Red Scare” of 1919-1920.²⁵

The first known gay rights organization in the United States was the Society for Human Rights (“SHR”), founded in Chicago in 1924

¹⁹ Letter from George Merzbach to Magnus Hirschfeld, *reprinted in* Katz, *supra* note 5, at 382.

²⁰ See D’Emilio, *Sexual Politics*, *supra* note 11, at 15.

²¹ For information about the medicalization of homosexuality, see D’Emilio, *Sexual Politics*, *supra* note 11, at 15; Greenberg, *supra* note 14, at 397-433; Katz, *supra* note 5, at 129-207.

²² Dr. Magnus Hirschfeld, head of the Scientific-Humanitarian Committee, identified Emma Goldman as the first American “to take up the defense of homosexual love before the general public.” Katz, *supra* note 5, at 378.

²³ See Emma Goldman, *Living My Life*, 555-56 (AMS Press 1970) (1934) (discussing her lectures).

²⁴ Adam, *supra* note 8, at 41. Lesbian historian Lillian Faderman provides several excerpts from erotic letters Goldman received from a female friend with whom she vacationed. Despite this evidence of an erotic relationship with another woman, Goldman did not identify as a lesbian and distanced herself from other lesbians, whom she described as manhaters. Faderman, *supra* note 7, at 33-34 (quoting *Nowhere at Home: Letters from Exile of Emma Goldman and Alexander Berkman* 86 (Richard and Anna Maria Drinnan eds., 1975)).

²⁵ Adam, *supra* note 8, at 43; Samuel Walker, *In Defense of American Liberties* 44 (1990). J. Edgar Hoover is reported to have personally masterminded the case against Goldman and her lover, Alexander Berkman, who was deported with her. See Nancy Caldwell Sorel, *J. Edgar Hoover & Emma Goldman*, *The Atlantic Monthly*, Jan. 1993, at 105.

by Henry Gerber, a German-American.²⁶ The organization was formed for the following purposes:

[T]o promote and to protect the interests of people who by reasons of mental and physical abnormalities are abused and hindered in the legal pursuit of happiness which is guaranteed them by the Declaration of Independence, and to combat the public prejudices against them by dissemination of facts according to modern science among intellectuals of mature age.²⁷

The organization was short-lived.²⁸ It published two issues of a publication entitled *Friendship and Freedom*, but was unable to continue. Part of the problem stemmed from the fact that it was difficult to "get men of good reputation to back up the Society."²⁹ Gerber attributes this difficulty to the reluctance of reputable persons to associate with presumed criminals such as homosexuals.³⁰ The organization fell apart when the wife of one of the members reported the group to the Chicago police. Several of the members, including Gerber, were arrested and jailed. The specific charges were never made clear to the defendants and the case was ultimately dismissed on the grounds that no warrant had ever been issued. From Gerber's perspective, they had been charged solely with the crime of being homosexual.³¹ The tenor of the times is illustrated by the *Chicago Examiner* headline: "Strange Sex Cult Exposed."³²

The short life of this first American gay-rights organization should come as no surprise. Repression was standard practice at the end of World War I.³³ Although the "Red Scare" (which occurred roughly in 1919-20) focused on union and communist sympathizers, many others were caught up in this effort to repress anything perceived as

²⁶ Warren J. Blumenfeld & Diane Raymond, *Looking at Gay and Lesbian Life* 288 (1988); Katz, *supra* note 5, at 385-89.

²⁷ See Katz, *supra* note 5, at 387 (reproducing the Charter of Society for Human Rights).

²⁸ A detailed account of the organization's history, written by Gerber, was published in a 1962 issue of "One" magazine. See Henry Gerber, *The Society for Human Rights—1925*, *One Mag.*, Sept. 1962, at 5, reprinted in Katz, *supra* note 5, at 388-93.

²⁹ *Id.* at 389.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 391.

³³ The ACLU, founded on January 19, 1920, as a spin-off of Roger Baldwin's National Civil Liberties Bureau, stated in its first annual report: "Never before in American history were the forces of reaction so completely in control of our political and economic life." Walker, *supra* note 25, at 47, 51-52.

"un-American."³⁴ Emma Goldman, branded as a "red," was deported, along with other "reds," to the Soviet Union.³⁵ Henry Gerber, the founder of SHR, was dismissed by the federal government from his job with the United States Post Office.³⁶ Foreign books, containing "dangerous ideas," were banned by the Treasury Department, the "dangerous ideas" including sex and sexuality. In fact, the most famous lesbian novel in the English language, *The Well of Loneliness*,³⁷ was one of the 739 books on the U.S. Customs list of banned books.³⁸

The post-World War I era in America was thus a time of censorship, especially with respect to the topic of sex.³⁹ Although lesbian

³⁴ See generally Donald Johnson, *The Challenge to American Freedoms* 119-45 (1963) (discussing the breadth of deportation activities during the Red Scare). The association of sexual perversion and communism was prevalent in the McCarthy era as well. See D'Emilio, *Sexual Politics*, supra note 11, at 41-49; infra notes 88-97 and accompanying text.

³⁵ See Walker, supra note 25, at 44.

³⁶ Gerber, supra note 28, reprinted in Katz, supra note 5, at 392.

³⁷ Radclyffe Hall, *The Well of Loneliness* (1928). The novel was believed by many to be obscene. Alfred Knopf declined to publish it in the United States after receiving legal advice that he might be prosecuted. Convici-Friede of New York published the book instead. Katz, supra note 5, at 398. Shortly thereafter, Friede was prosecuted. See *People v. Friede*, 233 N.Y.S. 565, 568 (N.Y. Magis. Ct. 1929), applying the English test for obscenity set forth in *Regina v. Hicklin*, 3 L.R.-Q.B. 360, 371 (1868), which asked whether the material tended to corrupt the morally weak. In refusing to dismiss the complaint the court stated:

The book can have no moral value, since it seeks to justify the right of a pervert to prey upon normal members of a community, and to uphold such relationships as noble and lofty. Although it pleads for tolerance on the part of society of those possessed of and inflicted with perverted traits and tendencies, it does not argue for repression or moderation of insidious impulses.

Friede, 233 N.Y.S. at 567.

Two months later a three judge panel in Special Sessions reversed the Magistrate's finding on obscenity and dismissed the charges against Friede. There is no official legal report of this opinion, but it is noted in the *New York Times*. See "Well of Loneliness" Cleared in Court Here, *N.Y. Times*, Apr. 20, 1929, at 20 reprinted in Katz, supra note 5, at 399. See also *People v. London*, 63 N.Y.S.2d 227, 230 (1946) (observing that the Court of Special Sessions reversed the Magistrate's decision on the *Well of Loneliness*).

³⁸ Walker, supra note 25, at 59.

³⁹ See generally Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741, 768-82 (1992) (describing censorship during the 1920s in the print media and in film). The Motion Pictures Production Code, set up in the early 1930s, contributed to the censorship of expressions of sexuality in film. The openly lesbian camp of actors such as Marlene Dietrich and Mae West began to disappear from the screen in the 1930s. See Lewis Beale, *Guys vs. Hollywood: 'Basic Instinct' Fuels the Old Debate on Stereotypes*, Chi. Trib., Mar. 29, 1992, § 13, at 10-11. See generally Stephen Vaughn, *Morality*

and gay subcultures existed during this period,⁴⁰ hostility toward "difference" prevented the formation of any widespread gay or lesbian movement against anti-gay discrimination.⁴¹

B. The Homophile Movement: Becoming Visible

After World War II, a number of homophile⁴² organizations began to spring up around the country. The Mattachine Society⁴³ was formed in Los Angeles around 1950.⁴⁴ Its principal organizers were Harry Hay, Chuck Rowland, Bob Hull, Rudi Gernreich, and Dale Jennings.⁴⁵ The repressive climate of the early 1950s, especially the attacks on communists and other radicals, led these organizers to opt for secrecy in their organizing tactics.⁴⁶ But they never kept the mission of their organization secret: to liberate the homosexual minority

and Entertainment: The Origins of the Motion Picture Production Code, 77 J. Am. Hist. 39 (1990) (discussing the origins of the Production Code and its eventual decline).

⁴⁰ D'Emilio, *Sexual Politics*, supra note 11, at 11-13.

⁴¹ The stock market crash of 1929 and prohibition also contributed to the decline of gay and lesbian subcultures, particularly that of the Harlem Renaissance. See Eric Garber, *A Spectacle in Color: The Lesbian and Gay Subculture of Jazz Age Harlem*, in *Hidden from History: Reclaiming the Gay and Lesbian Past* 319 (Martin Duberman, Martha Vicinus, & George Chouney, Jr., eds., 1989).

⁴² Harry Hay, a co-founder of the Mattachine Society, claims that he embraced "homophile" as the movement's descriptive adjective of choice because straight society had loaded so much negative baggage on the word "homosexual." "Homophile" means lover of same. See Andrea Weiss & Greta Schiller, *Before Stonewall: The Making of a Gay and Lesbian Community* 40-41 (1988).

⁴³ The name of "Mattachine" was borrowed from secret medieval societies of unmarried men who, while wearing masks, conducted rituals during the Feast of Fools, often as protests against oppression. Harry Hay suggested the name to signify that gay people in the 1950s were masked and unknown figures, fighting for social change. See Katz, supra note 5, at 412-13 (reproducing an interview with Harry Hay).

⁴⁴ A complete history of the formation of the Mattachine Society is reported by John D'Emilio. See D'Emilio, *Making Trouble*, supra note 11, at 17-56; see also Katz, supra note 5, at 406-20 (reproducing Henry Hay's account of the founding of the Mattachine Society). The five founders met in November 1950. Two more founders joined them in early 1951 and an outline of the organization's goals and purposes was reduced to writing in April 1951; the society was incorporated shortly thereafter. See D'Emilio, *Making Trouble*, supra note 11, at 28; Katz, supra note 5, at 411-12; Marcus, supra note 10, at 54-58 (reproducing an interview with Herb Selwyn).

⁴⁵ Marcus, supra note 10, at 32 (reproducing an interview with Chuck Rowland). These five original founders invited James Gruber and Konrad Stevens to join them in early 1951. Gruber and Stevens helped draft the original founding documents. D'Emilio, *Making Trouble*, supra note 11, at 28.

⁴⁶ D'Emilio, *Making Trouble*, supra note 11, at 18. Of the five original founders, at least three had been members of the Communist Party. *Id.* at 18.

from the oppression of the majority and to call on other minorities to fight with them against oppression.⁴⁷

The first legal case backed by Mattachine involved one of its founders, Dale Jennings, who had been arrested for lewd behavior in a Los Angeles public park. The charges arose from an incident fairly described as entrapment.⁴⁸ The trial, which began in June of 1952, was historically significant because it was one of the first times that a gay man had been willing to stand up in court and say, "Yes, I am gay, but I nonetheless have legal rights." The trial ended in a hung jury, which, given the attitudes of the times, was a clear victory for gay rights.⁴⁹ Shortly thereafter, the District Attorney dropped all charges.⁵⁰

Members of the Mattachine Society put out a magazine entitled "One,"⁵¹ the publication of which was subsequently taken over by an independent organization called One, Inc. Jim Kepner, a journalist who wrote for "One," reports that early editions contained such items as a lesbian-authored poem entitled "Proud and Unashamed," an essay of his entitled "The Importance of Being Honest," and news reports of gay witch-hunts in Britain and Miami.⁵² The magazine's stated purpose was to deal with homosexuality from a scientific, historical, and critical point of view. Nonetheless, the Post Office confiscated the October 1954 issue of the magazine and refused to mail it on grounds that it was obscene. Jim Kepner hypothesizes that the October issue was confiscated on directions from J. Edgar Hoover because Hoover had been accused in the prior issue of "One" of sleeping with Clyde Tolson, his driver and bodyguard.⁵³ In response to the confiscation, One, Inc., brought suit in federal court, claiming First Amendment protection for its published speech, an abuse of discretion by the postmaster of Los Angeles, violation of equal protection, and a deprivation of property without due process. The magazine lost

⁴⁷ Katz, *supra* note 5, at 412.

⁴⁸ D'Emilio, *Making Trouble*, *supra* note 11, at 30-31.

⁴⁹ *Id.* at 33.

⁵⁰ *Id.*

⁵¹ *Id.* at 34-35. The name is derived from a Thomas Carlyle line: "A mystic bond of brotherhood makes all men one." *Id.*

⁵² Marcus, *supra* note 10, at 47, 50 (reproducing an interview with Jim Kepner).

⁵³ Marcus, *supra* note 10, at 52 (reproducing an interview with Jim Kepner).

at both the trial and appellate levels.⁵⁴ But the case was reversed by the Supreme Court in a brief 1958 per curiam opinion, *One, Inc. v. Olesen*,⁵⁵ that merely cited *Roth v. United States*.⁵⁶

The per curiam opinion in *One, Inc.* left open for debate whether a finding of obscenity should be treated as a question of fact or as an independently reviewable question of law.⁵⁷ The Supreme Court finally answered this question in *New York Times v. Sullivan*,⁵⁸ citing *One, Inc.* and noting that independent review by appellate courts was appropriate when First Amendment rights were implicated.⁵⁹

⁵⁴ *One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957) (holding that the magazine contained obscene material), rev'd per curiam, 355 U.S. 371 (1958). The supposedly obscene material included a lesbian story entitled "Sapho Remembered" in which a 20-year-old woman struggles to choose between a life with her lesbian lover and married life with her childhood sweetheart and a poem about Lord Montagu, the content of which is described as vulgar although no specific quotes are given. *Id.* at 777.

⁵⁵ 355 U.S. 371 (1958) (per curiam). In reversing, the Court stated the following: "The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Roth v. United States*, 354 U.S. 476." *Id.*

⁵⁶ 354 U.S. 476 (1957). *Roth* did not involve homosexual material and the convictions in *Roth* were upheld. Nonetheless, *Roth* is a watershed case for First Amendment law because it announced a clear abandonment of the *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868), test for obscenity. See *Roth*, 354 U.S. at 488-90; *supra* note 37.

Under *Roth*, material was to be classified as obscene (and thus lose its First Amendment protection) only if an average person, applying contemporary community standards, would find that the dominant theme of the material, taken as a whole, appeals to prurient interests. *Roth*, 354 U.S. at 489. The *Roth* test departed from the old English test in three major ways: (1) the focus was shifted to the material's effect on average readers rather than the "morally weak"; (2) evaluation was to be made according to contemporary standards rather than obsolete moral standards; (3) the entire work was to be considered, rather than isolated portions of the work.

⁵⁷ See, e.g., *United States v. Darnell*, 316 F.2d 813 (2d Cir. 1962) (Moore, J., dissenting) (questioning majority opinion upholding conviction resulting from truly private mail correspondence and citing to reversal in *One, Inc.* as evidence that the Supreme Court had ruled on the merits of homosexual expression), cert. denied, 375 U.S. 916 (1963); *Ackerman v. United States*, 293 F.2d 449, 452 (9th Cir. 1961) (maintaining that *One, Inc.* was only about the legal test for obscenity, but nonetheless distinguishing the *Ackerman* facts from the facts in *One, Inc.*); *Big Table, Inc. v. Schroeder*, 186 F. Supp. 254, 261 (N.D. Ill. 1960) (reversing as a "matter of law" a post office official's determination that an article by gay writer William S. Burroughs entitled "Ten Episodes from Naked Lunch" was obscene).

⁵⁸ 376 U.S. 254 (1964).

⁵⁹ *Id.* at 285. *Sullivan* held that allegedly libelous statements are subject to certain First Amendment protections. *Id.* at 292.

Although the founding members of the Mattachine Society were all men, a few women became members over the years.⁶⁰ Apparently, the San Francisco branch was more successful than Los Angeles in attracting women.⁶¹ In 1955, Del Martin and Phyllis Lyon formed the first lesbian organization, the Daughters of Bilitis ("DOB"), in San Francisco.⁶² At the time, they knew nothing of the Mattachine Society's existence,⁶³ despite its relative success in attracting San Francisco women and the fact that Hal Call of San Francisco had taken control of the organization in 1953.⁶⁴

Chapters of Mattachine and DOB sprang up around the country during the late 1950s and early 1960s.⁶⁵ Neither organization was particularly radical during this era. When Hal Call took over Mattachine in 1953, he rejected the philosophy of its more radical founders.⁶⁶ Rather than participate in public protests over the injustices perpetrated against homosexuals, Call preferred to cooperate with educators and researchers to prove that homosexuals were no different from other people.⁶⁷ DOB's agenda was similar. The organization began as a social group to provide meeting spaces away from bars, but it also held educational events at which lawyers and psychiatrists would speak to the members.⁶⁸

In 1961, the homophile movement took a turn toward militant activism when Frank Kameny formed the Mattachine Society of Washington, D.C., as a last recourse in his legal battle to keep his job with the federal government, a job he lost solely because he was gay.⁶⁹ By that time, the Mattachine Society's national structure had col-

⁶⁰ Faderman, *supra* note 7, at 190; see also Marcus, *supra* note 10, at 47 (noting that Jim Kepner reported that a lesbian friend took him to his first Mattachine Society meeting in 1952).

⁶¹ See Faderman, *supra* note 7, at 190. But see Marcus, *supra* note 10, at 61 (reproducing an interview with Hal Call who claims that, in the early days, "the women weren't in it").

⁶² Faderman, *supra* note 7, at 190.

⁶³ *Id.*

⁶⁴ Marcus, *supra* note 10, at 59.

⁶⁵ For information about the formation of Mattachine chapters in New York, Boston, Denver, Philadelphia, Detroit, Chicago, and Washington, D.C., and of DOB chapters in New York, Los Angeles, and Chicago, see D'Emilio, *Sexual Politics*, *supra* note 11, at 115-18.

⁶⁶ Marcus, *supra* note 10, at 62 (reproducing an interview with Hal Call).

⁶⁷ *Id.* at 63.

⁶⁸ Faderman, *supra* note 7, at 190-91.

⁶⁹ See Marcus, *supra* note 10, at 93-103 (reproducing an interview with Frank Kameny); *infra* notes 141-45 and accompanying text.

lapsed,⁷⁰ leaving local groups free to make their own policy decisions. Some chapters, including those in Boston and Denver, folded when they lost the support of a national organization.⁷¹ However, the more militant east coast groups, influenced in large part by Kameny's activism, thrived. Frank Kameny's decision to stand up to the federal government and fight for his rights forever changed the focus of homophile organizations.⁷²

Kameny's militant stand in favor of the right of homosexuals to keep their jobs attracted the attention of Barbara Gittings, founder and president of the New York chapter of DOB.⁷³ They worked together in the East Coast Homophile Organizations ("ECHO"), an umbrella group made up of the New York DOB chapter and the Mattachine groups from New York, Washington, D.C., and Philadelphia.⁷⁴

In the mid 1960s, Kameny, Gittings, and other militants took the position that ECHO members should engage in picketing activities calling for recognition of gay rights. DOB's national board rejected this position and directed the New York chapter to withdraw from ECHO.⁷⁵ ECHO members, led by Frank Kameny, demonstrated in front of the White House, the men conservatively attired in suits and

⁷⁰ Hal Call persuaded a majority of the board to disband the national organization in March 1961, primarily in response to the heated rivalry between the San Francisco and New York chapters. D'Emilio, *Sexual Politics*, supra note 11, at 123. Kameny formed the Washington, D.C., group the following November. *Id.* at 152.

⁷¹ *Id.* at 123.

⁷² See Shilts, supra note 9, at 194 (describing Kameny's early political activity, and enumerating his goals for the Washington, D.C., chapter of the Mattachine Society). D'Emilio reports that Kameny was instrumental in forming East Coast Homophile Organizations ("ECHO"), a coalition of east coast organizations, which helped to solidify the more militant wing of the movement. D'Emilio, *Sexual Politics*, supra note 11, at 161. In 1966, the North American Conference of Homophile Organizations ("NACHO") was formed. *Id.* at 197. Through NACHO, organizations formed a national legal fund to help finance court cases. *Id.*

⁷³ D'Emilio, *Sexual Politics*, supra note 11, at 169-70.

⁷⁴ See Duberman, supra note 6, at 102. The Philadelphia Mattachine Society had renamed itself the Janus Society after the national Mattachine organization disintegrated. The "branches" of Mattachine that existed around the country at that time became independent organizations as a result of the collapse of Mattachine's national structure. *Id.* DOB, however, remained a national organization in which the national board retained some control over policy decisions made by local chapters. See D'Emilio, *Sexual Politics*, supra note 11, at 171.

⁷⁵ D'Emilio, *Sexual Politics*, supra note 11, at 171-72.

the women in skirts.⁷⁶ Kameny's militancy, which so angered the old guard lesbians and gay men, was nonetheless tempered by his demand for respectability.⁷⁷ Kameny's main contribution to the movement was to shift efforts away from education and pleas for tolerance and understanding in favor of strategies that boldly asserted the worth of homosexual people as citizens.

While Frank Kameny and his East Coast coalition of militant homophile organizations were becoming more aggressive in their fight for equal rights, a new group was being formed on the West Coast, with similarly militant inclinations. The Society for Individual Rights ("SIR") was formed in San Francisco in 1964 and quickly became the largest pre-Stonewall gay rights organization in the country.⁷⁸ Martin Duberman reports that the membership of SIR had reached 1000 by 1966.⁷⁹ SIR was more political than the San Francisco Mattachine Society. For example, in its early days SIR attempted to hold candidate forums to illustrate the power of gay voters, although most candidates were unwilling to participate.⁸⁰ SIR's first major legal battle resulted from police arrests made at the New Year's Day ball of January 1, 1965, an event sponsored by the Council on Religion and the Homosexual ("CRH"). The organization's lawyers were arrested,⁸¹

⁷⁶ Duberman, *supra* note 6, at 111-12. There is a photograph of the picketers in front of the White House included in the collection of photographs in the middle of the book.

⁷⁷ *Id.* On the concept of "militant respectability" and the role played by militant lesbians and gay men in the Philadelphia lesbian and gay organizations, see Mark Stein, *Sex, Politics, and the Lesbian/Gay Movement: Cooperation and Conflict in 1960's Philadelphia*, (paper presented on a panel entitled "Gay Politics in the 1960s" at a conference, "Toward a History of the 1960s" in Madison, Wisconsin, May 1, 1993) (on file with the Virginia Law Review Association). Stein describes the Philadelphia organizations of the 1960s, Janus and Mattachine, as adhering to gender norms and adopting accommodationist strategies that effected the exclusion of gender crossers. Public cooperation between lesbians and gay men was thought to create an image of respectability that could not have been attained by sex segregated strategies. *Id.*

⁷⁸ D'Emilio, *Sexual Politics*, *supra* note 11, at 190-91.

⁷⁹ Duberman, *supra* note 6, at 99.

⁸⁰ Marcus, *supra* note 10, at 140 (reproducing an interview with Nancy May, one of the founders of SIR). In its early days, Mattachine had also interjected itself into political campaigns by sending questionnaires to candidates. It was this activity that caught the attention of journalist Paul Coates and led to public questioning of Mattachine's secret organizational structure, a questioning that ultimately led to the democratization and deradicalization of Mattachine. See D'Emilio, *Making Trouble*, *supra* note 11, at 38-45.

⁸¹ The two principal lawyers were Herbert Donaldson and Evander Smith. Donaldson was later appointed by Governor Jerry Brown as the first openly gay municipal court judge in

along with Nancy May,⁸² on grounds that they obstructed the police from entering the premises. The charges were ultimately dismissed at trial on the technical grounds that the police had in fact entered the premises before making the arrests, but, more importantly, the resulting publicity of the event and the new willingness of people to stand up in support of lesbian and gay rights created a turning point for gay rights organizations on the West Coast.⁸³

All of these pre-Stonewall organizations were grass-roots organizations of gay men and lesbians. Although some homophile organizations focused more on civil rights issues than others, none of them were specifically legal organizations. In addition, those organizations that did focus on civil rights issues nonetheless adopted assimilationist arguments and accommodationist tactics. They were reluctant to challenge gender roles or to assert the right to a public sexual identity different from the gender norms of the times.

C. The Legal Condition of Gay People: Pre-Stonewall

It has never been illegal to be gay.⁸⁴ But, in the pre-Stonewall era, the legal consequences of choosing a gay lifestyle were sufficiently severe to make lesbians and gay men think of themselves as criminals just for being who they were.

Various sorts of laws have been used to harass gay people. Charges, mostly against gay men, have been brought under vagrancy statutes for loitering or for wearing a disguise (e.g., dressing in "drag").⁸⁵ In

California. See Marcus, *supra* note 10, at 147-65 (reproducing interviews with Donaldson and Smith).

⁸² Nancy May was a non-gay woman who was one of the original organizers of SIR. *Id.* at 142-45 (reproducing an interview with May).

⁸³ See *id.* at 144-45 (reproducing an interview with Nancy May); *id.* at 161-62 (reproducing an interview with Herb Donaldson).

⁸⁴ See *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976) ("While Virginia law proscribes the practice of certain forms of homosexuality, Va.Code s 18.2-361, Virginia law does not make it a crime to *be* a homosexual. Indeed, a statute criminalizing such status and prescribing punishment therefor would be invalid. See *Robinson v. California*, 370 U.S. 660 (1962).").

⁸⁵ See, e.g., *People v. Gillespi*, 202 N.E.2d 565, 565 (N.Y. 1964) (upholding the conviction of a man dressed as a woman under the New York vagrancy statute, which defined a vagrant as "a person, who having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway."). Two judges dissented, pointing out that the statute was never intended to apply to cross-dressing situations. *Id.* (Fuld & Bergan, JJ., dissenting); see also *People v. Archibald*,

the pre-Stonewall era, policemen raided gay bars and arrested patrons for engaging in "lewd acts."⁸⁶ Often the patrons were too frightened of publicity to demand a jury trial to challenge the charges.⁸⁷

The 1950s marked the arrival of McCarthyism and a heightened concern with homosexuals. "Sexual perverts" were equated with communists as security risks.⁸⁸ On June 7, 1950, Senate Resolution 280 directed the Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Department "to make an investigation into the employment by the Government of homosexuals and

260 N.E.2d 871 (N.Y. 1970) (upholding conviction under same statute of man who dressed as a woman and stood on subway platform).

The New York statute used against gay men and lesbians forbade wearing a disguise except in cases of masquerade parties or by special permission. N.Y. Code Crim. Proc. § 887(7) (McKinney 1955). Martin Duberman reports that local police manuals established a further rule to be applied in cases of cross-dressing: if the defendant is wearing too few garments appropriate to his or her gender, the law is violated. Duberman, *supra* note 6, at 299 n.39. No doubt it was this police manual rule that accounts for the understanding among gay men and lesbians in the 1950s and 1960s that they were subject to arrest unless they had on three garments appropriate to their gender. I have heard personally from several "butch" lesbians who report that in the 1960s they knew they were safe from arrest if they had on at least three items of female clothing. See also Faderman, *supra* note 7, at 185, for one such report from a 60-year-old lesbian in San Francisco. Joan Nestle also reports that she was advised in the 1950s in New York by older lesbians to "[a]lways wear three pieces of women's clothing . . . so the vice squad can't bust you for transvestism." Marjorie Garber, *Vested Interests: Cross Dressing and Cultural Anxiety* 141 (1992) (quoting Jan Nestle).

I have been unable to track down any state law in the United States that specifically forbade women to dress in men's clothing, subject to a safe-harbor "three garment rule." Nor have I found any reported case of a prosecution of a lesbian for cross-dressing. But see Faderman, *supra* note 7, at 335 n.11 (reporting on a case in 1957 San Francisco in which two women students were arrested in a gay bar and charged with wearing men's clothing). That there was a widespread understanding that the law prohibited women from wearing men's clothing does suggest that legal authority was used to harass lesbians, as well as gay men, who cross-dressed.

Prohibitions against cross-dressing can be found in city or other local ordinances. See, e.g., *City of Columbus v. Zanders*, 266 N.E.2d 602, 606 (Mun. Ct. Ohio 1970) (holding that Columbus, Ohio's ordinance banning persons from dressing in clothes of the opposite sex should not be applied to a "true transsexual" who was a prime candidate for transsexual surgery); see also *City of Chicago v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978) (holding that Chicago's ordinance against cross-dressing is unconstitutional as applied to transsexuals awaiting sex reassignment surgery).

⁸⁶ Evander Smith, a gay attorney in San Francisco, reports that the police would accuse "men of fondling each other. The police would lie." Marcus, *supra* note 10, at 149 (reproducing an interview with Smith and Herb Donaldson).

⁸⁷ *Id.* at 148.

⁸⁸ See Adam, *supra* note 8, at 56-59; D'Emilio, *Sexual Politics*, *supra* note 11, at 48-49; Faderman, *supra* note 7, at 140-41.

other sex perverts.”⁸⁹ The Subcommittee concluded that homosexuals were not “proper persons to be employed in Government for two reasons; first, they are generally unsuitable, and second, they constitute security risks.”⁹⁰ General unsuitability existed because overt acts of homosexuality constituted a crime under state and federal law.⁹¹ As further evidence of unsuitability, the Subcommittee stated:

[I]t is generally believed that those who engage in overt acts of perversion lack the emotional stability of normal persons. In addition there is an abundance of evidence to sustain the conclusion that indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.⁹²

The “unsuitability” and “security risk” arguments were related in the sense that the criminality and immorality of the conduct forced homosexuals to hide their behavior; they were thus thought to be vulnerable to blackmail.⁹³ Senator Kenneth Wherry less concretely worried: “You can’t hardly separate homosexuals from subversives. . . . Mind you, I don’t say every homosexual is a subversive, and I don’t say every subversive is a homosexual. But [people] of low morality are a menace in the government, whatever [they are], and they are all tied up together.”⁹⁴

The Senate Subcommittee recommended that homosexuals be dismissed as unfit from all government service.⁹⁵ As a result homosexuals were purged from government service at a higher rate than ever before and broader screening techniques were used to keep additional “perverts” from being hired. Shortly after his inauguration in 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were “sex perverts.”⁹⁶

The Subcommittee’s report also served to step up the military’s purge of lesbians and gay men. At the same time, public pronounce-

⁸⁹ Employment of Homosexuals and Other Sex Perverts in Government, Interim Report by the Subcomm. for Comm. on Expenditure in the Exec. Dep’ts, S. Doc. 241, 81st Cong., 2d Sess. 1 (1950) [hereinafter Interim Report].

⁹⁰ Id. at 3.

⁹¹ Id.

⁹² Id. at 4. No cites to the “abundance of evidence” are included in the report.

⁹³ Id. at 3.

⁹⁴ As quoted in Faderman, *supra* note 7, at 143.

⁹⁵ Interim Report, *supra* note 89, at 19.

⁹⁶ Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953), reprinted in *Codification of Presidential Proclamations and Executive Orders 47-53* (1989).

ments that gays were unfit and of weak moral fiber encouraged local policemen to increase their harassment of lesbian and gay bars.⁹⁷

Despite the repressive social and political climate, lesbians and gay men began to win some protections in court. The remainder of this Section will focus on two areas in which lesbians and gay men gained some small degree of legal protection during the pre-Stonewall era. First, litigation over the closing of gay bars will be discussed. Second, litigation over the loss of federal employment will be addressed.

1. *The Gay Bar Cases*

The first successful American "gay rights" case was probably *Stoumen v. Reilly*,⁹⁸ decided by the California Supreme Court in 1951. The case involved a dispute over whether the California Board of Equalization could suspend the liquor license of the Black Cat restaurant solely because it catered to known homosexuals. The state's justification for the suspension was a provision in the Alcoholic Beverage Control Act prohibiting a licensee from running a "disorderly house."⁹⁹ The court made two important points. First, relying on the Unruh Civil Rights Act,¹⁰⁰ the court noted that proprietors were required to make their premises available to all classes of persons, including homosexuals.¹⁰¹ Thus, the court reasoned, the proprietor could not be held in violation of the "disorderly house" statute solely because it made its premises available to homosexuals.¹⁰² As a result

⁹⁷ D'Emilio, *Sexual Politics*, supra note 11, at 44-45, 49-51. These public statements regarding homosexuality led to other widespread purges as well, such as the one spearheaded by Florida Senator Charley Johns in 1958 against students and faculty at the University of Florida in Gainesville. Adam, supra note 8, at 59; D'Emilio, *Sexual Politics*, supra note 11, at 47-48.

⁹⁸ 234 P.2d 969 (Cal. 1951).

⁹⁹ The Alcoholic Beverage Control Act provided:

Every licensee or agent or employee of any licensee who keeps or permits to be used or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience or safety shall be guilty of a misdemeanor.

Cal. Code § 58 (Deering 1944) (current version at Cal. Bus. & Prof. Code § 24200 (West 1985)).

¹⁰⁰ 1905 Cal. Stat. 553 (codified as amended at Cal. Civ. Code §§ 51, 52 (West 1982)).

¹⁰¹ *Stoumen*, 234 P.2d at 971.

¹⁰² *Id.*

of this reasoning, *Stoumen* has been cited as authority for recognizing homosexuals as a protected class under Unruh.¹⁰³

Second, in response to the board's claim that it had the constitutional authority to revoke a license when necessary to protect "public welfare and morals,"¹⁰⁴ the court stated that the board had acted arbitrarily in determining that the mere presence of homosexuals in a public bar was a threat to the public welfare and morals.¹⁰⁵ Thus, *Stoumen* also stood for the principle that it was unconstitutional under the California Constitution to revoke a gay bar's liquor license solely because the bar catered to known homosexuals.¹⁰⁶ At the core of the decision was the court's recognition that the state had conflated homosexual status and conduct. Demonstrating a common sense rare considering the time and the topic, the court stated:

The fact that the Black Cat was reputed to be a "hangout" for homosexuals indicates merely that it was a meeting place for such persons. . . . Unlike evidence that an establishment is reputed to be a house of prostitution, which means a place where prostitution is practiced and thus necessarily implies the doing of illegal or immoral acts on the premises, testimony that a restaurant and bar is reputed to be a meeting place for a certain class of persons contains no such implication. Even habitual or regular meetings may be for purely social and harmless purposes, such as the consumption of food and drink, and it is to be presumed that a person is innocent of crime or wrong and that the law has been obeyed.¹⁰⁷

Despite this early victory supporting the right of gay men and lesbians to socialize in gay bars,¹⁰⁸ state authorities in California and else-

¹⁰³ See *Curran v. Mount Diablo Council of Boy Scouts*, 195 Cal. Rptr. 325, 338 (Cal. Ct. App. 1983), appeal dismissed, 468 U.S. 1205 (1984); *Hubert v. Williams*, 184 Cal. Rptr. 161, 163 (Cal. App. Dep't Super. Ct. 1982).

¹⁰⁴ *Stoumen*, 234 P.2d at 971. The California Constitution provided that the State Board of Equalization "shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." Cal. Const. art. XX, § 22 (amended in 1957 to change the ruling body from the State Board of Equalization to the Department of Alcoholic Beverage Control).

¹⁰⁵ *Stoumen*, 234 P.2d at 971.

¹⁰⁶ *Id.* Note that the constitutional rights at stake were those of the bar owners who could not be arbitrarily and capriciously denied their property rights in their liquor license. No constitutional rights of homosexuals were recognized in the case. *Id.* at 969.

¹⁰⁷ *Id.* at 971.

¹⁰⁸ This was not an insignificant right. Lesbians and gay men who grew up in the 1950s and 1960s had very few opportunities to meet other lesbians and gay men. The "bar scene" was

where continued to harass patrons in gay bars¹⁰⁹ and, at times, to close the bars down. In California, the harassment was carried out pursuant to subdivision (e) of section 24200 of the Business and Professions Code,¹¹⁰ enacted by the legislature after the *Stoumen* case. This provision authorized revocation of a liquor license if the premises were a "resort for illegal possessors or users of narcotics, prostitutes, pimps, panderers, or sexual perverts."¹¹¹ On its face, the new California statute was clearly unconstitutional under *Stoumen*.¹¹² Nonetheless, it was used against gay bars¹¹³ until 1959, when it was finally declared unconstitutional by the California Supreme Court in *Vallegra v. Department of Alcoholic Beverage Control*.¹¹⁴

Vallegra, however, was not a total victory for gay rights. Maintaining the distinction between status and conduct, the court reiterated the *Stoumen* holding that catering to homosexuals was not sufficient "good cause" for the revocation of a license. "Something more" than the status of the patrons would be required to demonstrate good

central to the formation of lesbian and gay community. See D'Emilio, *Sexual Politics*, supra note 11, at 12-13 (mentioning the role of gay bars in the formation of gay community in the first half of the century); Faderman, supra note 7, at 79-80 (describing the importance of lesbian bars); see also Madeline Davis & Elizabeth Lapovsky Kennedy, *Boots of Leather, Slippers of Gold* (1993) (describing lesbian life in Buffalo from 1940-1960 and the role of lesbian bars in the formation of a lesbian community).

¹⁰⁹ John D'Emilio reports that the 1959 mayoral election in San Francisco created a particularly difficult time for gay bars. Mayor George Christopher was up for reelection. His opponent charged him with providing too much support for the homosexual community and with turning San Francisco into a gay mecca. Although Christopher denied the charges and won the election, the pro-gay charges caused him to institute a crack-down on gay bars, presumably to demonstrate his toughness toward sexual perversion. D'Emilio, *Sexual Politics*, supra note 11, at 182.

¹¹⁰ 1953 Cal. Stat. 986 (codified at Cal. Bus. & Prof. Code § 24200 and repealed 1963).

¹¹¹ *Id.*

¹¹² But see *Kershaw v. Department of Alcoholic Beverage Control*, 318 P.2d 494, 498 (Cal. Dist. Ct. App. 1957) (theorizing that the legislature did not mean to enact an unconstitutional statute and thus must have meant to limit the statute's coverage to cases in which immoral or illegal, as opposed to "harmless," behavior occurred on the premises).

¹¹³ See *id.*; *Nickola v. Munro*, 328 P.2d 271, 276 (Cal. Dist. Ct. App. 1958) (holding that § 24200(e) could be applied in cases in which sexual perverts used the premises as a resort for improper, immoral, or illegal conduct); cf. *Morell v. Department of Alcoholic Beverage Control*, 22 Cal.Rptr. 405 (Cal. Dist. Ct. App. 1962) (dismissing count based on § 24200(e) after the section had been declared unconstitutional, but upholding count based on § 25601, prohibiting the keeping of a "disorderly house").

¹¹⁴ 347 P.2d 909 (Cal. 1959). The *Vallegra* decision cut short Mayor Christopher's crack-down against San Francisco's gay bars. See supra note 109.

cause.¹¹⁵ The "something more," of course, could be the conduct of the patrons. Exactly what conduct would be sufficient to constitute "good cause" for revocation of a license was a question not definitively answered by the supreme court, however, because the lower court impermissibly relied solely on the status of the patrons as a justification for the license revocation.¹¹⁶

Nonetheless, the court's tone indicated how it might rule on the issue in the future when it said:

Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals . . . may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges. This is not to say that homosexuals might properly be held to a higher degree of moral conduct than are heterosexuals. But any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society.¹¹⁷

What conduct manifests the sexual urges of homosexuals? Holding hands? Kissing? Flirting? No doubt the California Supreme Court in 1959 would have found all of these activities suspect. After reviewing the evidence of conduct that had been available to the trial court (even though the trial court had not relied on this evidence), the supreme court concluded (in dicta) that the evidence was sufficient to have supported a lower court ruling (if it had been made) that the conduct was "contrary to public welfare or morals."¹¹⁸ The evidence of immoral conduct consisted of the following:

1. Female patrons were dressed in mannish attire and patrons paired off male to male and female to female.
2. Women danced together and kissed each other.
3. A female patron in mannish attire told an undercover police-woman that she was "a cute little butch."
4. The female patron kissed the policewoman and the bartender came over and warned them that if they wanted to continue that behavior they would have to go to the restroom.

¹¹⁵ *Vallegra*, 347 P.2d at 912.

¹¹⁶ *Id.* at 913 (noting that evidence as to specific conduct "was not relied upon by the finder of fact in arriving at the conclusion that continuance of the license would be contrary to public welfare or morals").

¹¹⁷ *Id.* at 912.

¹¹⁸ *Id.* at 913.

5. A policewoman thought a man was using the woman's room, but then determined that the person was a woman dressed as a man.

6. Two male patrons embraced each other, engaged in a short tête-à-tête, kissed, and announced that they were "going steady."¹¹⁹

Post-*Vallegra* cases in California continued to revoke liquor licenses on the grounds that homosexual conduct on the premises was an offense to public morals,¹²⁰ or, alternatively, that the premises were being operated as a "disorderly house."¹²¹ Although police witnesses report some behavior bordering on public lewdness,¹²² much of the evidence cited in these cases sounds as harmless as the evidence cited by the *Vallegra* court, i.e., cross-dressing, same-sex dancing, and kissing.¹²³

The conduct/status distinction was also central to litigation in other states in which the liquor licenses of gay bars were being revoked. New York and New Jersey courts struggled with the issue during the 1950s and 1960s.¹²⁴ By 1967, the highest courts in both states had ruled definitively that a license could not be revoked solely on the grounds that the establishment catered to known homosexuals.¹²⁵ Despite these rulings, one year later the New York Court of Appeals observed (in dicta) in a liquor license case involving a Wood-

¹¹⁹ Id. at 912-13.

¹²⁰ See *supra* note 104 for the language of the California constitution empowering such revocations by the Department of Alcoholic Beverage Control.

¹²¹ Section 25601 provides that "every licensee, or agent or employee of a licensee" is guilty of a misdemeanor "who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety." Cal. Bus. & Prof. Code § 25601 (West 1985).

¹²² See, e.g., *Kershaw v. Department of Alcoholic Beverage Control*, 318 P.2d 494, 496 (Cal. Dist. Ct. App. 1957) (reporting men fondling each others' genitals). But see the statement of Evander Smith, *supra* note 86, claiming that the police often lied about seeing this conduct.

¹²³ See, e.g., *Kershaw*, 318 P.2d at 496 (males dancing cheek to cheek in close embrace, male couples kissing, dancing with legs intertwined, and "[i]n November one male couple declared that they had been married some three months and displayed their wedding rings").

¹²⁴ For a discussion of the New York and New Jersey cases on point see Rhonda R. Rivera, *Our Straight-Laced Judges*, *supra* note 3, at 914-18, 922-24 (1979).

¹²⁵ See *Kerma Restaurant Corp. v. State Liquor Auth.*, 233 N.E.2d 833, 834-35 (N.Y. 1967) (holding that mere congregation of homosexuals does not make the place disorderly); *One Eleven Wine and Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12, 18 (N.J. 1967) (citing *Robinson v. California*, 370 U.S. 660 (1962), for the proposition that one's status cannot be criminalized).

stock restaurant that, although one could not presume "beatniks" to be disorderly or criminal (despite the fact that they were known to use marijuana), "[a] different result might be indicated if the restaurant were patronized by a concentration of homosexuals, drug users, or recidivists, a concentration of clientele which might, even without overt activity, permit inference of violations or likelihood of violations of law."¹²⁶

The connection between a concentration of homosexuals and the likelihood of criminal activity was made explicit by a Florida appellate court in 1967. The City of Miami had passed an ordinance that prohibited liquor licensees from employing a known homosexual, from selling liquor to a known homosexual, and from allowing two or more homosexuals to congregate on the premises. The Florida court upheld the ordinance as a rational exercise of legislative power to protect the public health, morals, and safety of the citizens of Miami.¹²⁷ "The object of the ordinance," said the court, "is to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal."¹²⁸

These gay bar cases present a theme that continues in gay rights litigation to the present day. Even when the law may not be used to punish homosexual status, homosexual conduct is a different matter. And, of course, sometimes homosexual conduct can be inferred from the fact of homosexual status.

2. *Government Employees*

On January 22, 1952, Fannie Mae Clackum was discharged by the United States Air Force "under conditions other than honorable."¹²⁹ She was not the first (or the last) member of the armed services to be

¹²⁶ *Sled Hill Cafe, Inc. v. Hostetter*, 241 N.E.2d 714, 716 (N.Y. 1968).

¹²⁷ *Inman v. City of Miami*, 197 So.2d 50, 51 (1967), cert. denied, 201 So.2d 895 (Fla. 1967), and cert. denied, 389 U.S. 1048 (1968).

¹²⁸ *Id.* at 52.

¹²⁹ *Clackum v. United States*, 296 F.2d 226 (Cl. Ct. 1960) (quoting the Air Force).

tainted by allegations of homosexuality.¹³⁰ Important conditions attach to dishonorable discharges such as hers. For example, most veteran's rights will be denied under both state and federal law and the discharged serviceperson is warned that she or he will be likely "to encounter substantial prejudice in civilian life" in the event the military discharge papers are reviewed by employers or others.¹³¹

As for procedural fairness, Clackum was never informed of the specific charges against her. When asked to resign, she refused and requested a trial by court-martial so that she might be informed of the specific charges against her and defend against them. The request was denied. Air Force Regulations provided that if there was insufficient evidence to indicate that conviction by a general court-martial was likely, then Clackum could be administratively discharged, with the type of discharge determined by the Secretary of the Air Force.¹³² Acting under this regulation, the Secretary informed her of her discharge "under conditions other than honorable."¹³³ An administrative post-discharge review hearing was held at which the only evidence presented supported Clackum's denial of lesbian activity.¹³⁴ Nonetheless the discharge was upheld on the basis of evidence available to the review board but never presented to Clackum or her attorney.¹³⁵ No judicial review of administrative discharges was available at that time.

However, after the 1958 Supreme Court decision in *Harmon v. Brucker*¹³⁶ sanctioned judicial review of administrative discharges, Clackum filed suit in the Court of Claims. The *Clackum* court derided the Air Force for the obvious lack of due process in its discharge procedures and held the discharge invalid. Citing *Brucker*, the Court of Claims said:

¹³⁰ From 1980 to 1990, approximately 17,000 servicemen and women were separated from the services under charges of homosexuality. GAO Report, Defense Force Management, DOD's Policy on Homosexuality, B-247235, at 32 (1992).

Clackum was discharged during the Korean War when discharges for homosexuality were at a low. Randy Shilts reports that the Navy discharged 483 homosexuals in 1950, a number that increased to 1353 as soon as the armistice was signed in 1953. Shilts, *supra* note 9, at 70.

¹³¹ *Clackum*, 296 F.2d at 227.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 228-29.

¹³⁵ *Id.*

¹³⁶ 355 U.S. 579, 582-83 (1958) (holding that the Secretary of the Army exceeded his authority by classifying two discharges as dishonorable on the basis of pre-induction activity).

The Government defends this remarkable arrangement^[137], and its operation in the instant case, on the ground that it is necessary in the interest of an efficient military establishment for our national defense. We see nothing in this argument. The plaintiff being a member of the Air Force Reserve, on active duty, the Air Force had the undoubted right to discharge her whenever it pleased, for any reason or for no reason, and by so doing preserve the Air Force from even the slightest suspicion of harboring undesirable characters. But it is unthinkable that it should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties. It is late in the day to argue that everything that the executives of the armed forces do in connection with the discharge of soldiers is beyond the reach of judicial scrutiny.¹³⁸

Clackum tells us that persons accused of homosexuality, even by the military in time of national defense, are nonetheless entitled to procedural due process. Of course, *Clackum* consistently denied the charges (whatever they were).¹³⁹ In this sense, the case hardly stands as a major gay rights victory. Furthermore, in extending *Brucker* to accused homosexuals, the case should have resulted in the curtailment of homosexual discharges based solely on rumor or on the coerced statements of other service members, but history shows that it did not.¹⁴⁰

In 1957, Frank Kameny was fired from the U.S. Army Map Service because someone had reported that he was a homosexual.¹⁴¹ Kameny challenged the dismissal all the way to the Supreme Court and lost.¹⁴²

¹³⁷ The "remarkable arrangement" refers to the procedure whereby the Air Force could dismiss her without a full trial if it thought conviction at a full trial unlikely, together with the fact that the only "due process" hearing accorded her specifically did not allow for her to confront her accusers or even to know what the evidence against her was. *Clackum*, 296 F.2d at 228.

¹³⁸ *Id.*

¹³⁹ The opinion never specifies the charges or the evidence, but does allude to a number of affidavits available to the Discharge of Review Board, which, "if believed, were extremely damaging to the plaintiff." *Id.* at 229.

¹⁴⁰ Despite the legal victory in *Clackum*, military witch-hunts continued to drum lesbians and gay men out of the service. The nature of interrogations did not change. Shilts, *supra* note 9, at 124. And sometimes the interrogations went beyond the law. *Id.* at 127-28. Coerced statements of guilt and the coerced naming of other homosexuals was common. *Id.* at 88-89, 127-28, 145. Unlike *Clackum*, most of those accused did not fight back. See *id.* at 51.

¹⁴¹ For a full account of Kameny's story in his own words, see Marcus, *supra* note 10, at 93-103.

¹⁴² *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960) (upholding the dismissal), cert. denied, 365 U.S. 843 (1961).

Kameny not only lost his current job, but, as a government scientist, he found himself barred from any meaningful alternative employment. Kameny responded to the individual loss in his own case by deciding that collective action was necessary. He began forming the Washington, D.C., Mattachine Society just months after the Supreme Court denied certiorari in his case.¹⁴³ Mattachine members lobbied politicians for an end to gay discrimination in government jobs¹⁴⁴ and the organization became involved in some of the individual employment discrimination cases brought by civil service employees.¹⁴⁵

Civil service employees are not employed at will. Rather, they enjoy a certain degree of job security in that they can be fired only for cause. The applicable civil service regulations of the early 1960s provided that an employee can be removed whose "conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service."¹⁴⁶ The regulations further provided that one ground for disqualification was "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct."¹⁴⁷ Consensual homosexual sodomy was a crime in most states¹⁴⁸ and in the District of Columbia.¹⁴⁹ Thus, proof of the specific act of sodomy would satisfy the "criminal conduct" portion of the regulations. Employees, however, were rarely dismissed as a result of criminal convictions. Federal agencies customarily dismissed employees for engaging in any sort of homosexual conduct,¹⁵⁰ because homosexual conduct was viewed as evidence of immorality. Relying on these regulations, the federal government dismissed civil service employees for unspecified

¹⁴³ Marcus, *supra* note 10, at 96. See *supra* notes 69-77 and accompanying text for more on Kameny's involvement with the Mattachine Society and other gay rights organizations.

¹⁴⁴ D'Emilio, *Sexual Politics*, *supra* note 11, at 154-55.

¹⁴⁵ The first legal victory for gay rights in federal employment came in a case that the ACLU Washington, D.C., affiliate brought on behalf of Bruce Scott, the secretary of the Mattachine Society. *Id.*; see *Scott v. Macy*, 349 F.2d 182, 185 (D.C. Cir. 1965) (holding that unspecified homosexual conduct is insufficient grounds for job termination). Frank Kameny and the Mattachine Society also acted as advisers in *Richardson v. Hampton*, 345 F. Supp. 600, 603-04 (D.D.C. 1972) and *Wentworth v. Laird*, 348 F. Supp. 1153, 1155 (D.D.C. 1972).

¹⁴⁶ 5 C.F.R. § 9.101 (1961) (no longer in effect).

¹⁴⁷ 5 C.F.R. § 2.106(a)(3) (1961) (no longer in effect).

¹⁴⁸ For an example of one such statute see Md. Crim. Law Code Ann. §§ 553, 554 (Michie Supp. 1992) (effective in early 1960s).

¹⁴⁹ D.C. Code Ann. § 22-3502 (West 1992) (effective 1948; repealed 1993).

¹⁵⁰ See, e.g., *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969) (discussing how NASA official decided to dismiss gay employee after being informed by superiors that dismissal for any homosexual conduct was customary within the agency).

homosexual acts¹⁵¹ as well as for acts committed prior to government employment.¹⁵² Courts usually upheld the dismissals,¹⁵³ but some victories occurred. In *Scott v. Macy*,¹⁵⁴ the Court of Appeals for the District of Columbia ruled that the dismissal of an employee for engaging in "unspecified homosexual conduct" was improper.¹⁵⁵ The court ruled such allegations too vague because different persons might understand the phrase differently.¹⁵⁶ In a second round in the same case, the same court set forth important guidelines as to a federal employee's right to remain silent when questioned about such things as homosexual conduct.¹⁵⁷

Finally, in *Norton v. Macy*,¹⁵⁸ the D.C. Circuit Court of Appeals refused to accept the longstanding custom of the Civil Service Commission that required dismissal of any employee found to have engaged in any sort of homosexual conduct.¹⁵⁹ Citing to the government's own regulations, the court pointed out that the employee could be dismissed only upon a showing of "such cause as will pro-

¹⁵¹ See, e.g., *Scott v. Macy*, 349 F.2d 182, 183-85 (D.C. Cir. 1965) (reversing the decision of the Civil Service Commission that had excluded an applicant from the civil service solely on the basis that he was a "homosexual" and had engaged in "homosexual conduct," even though no specific conduct was alleged).

¹⁵² See *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), cert. dismissed per stipulation, 379 U.S. 951 (1964). The facts in *Dew* are particularly disturbing. See *id.* at 583. Dew served in the Air Force from 1951-1955. He then obtained a position with the CIA and was asked to undergo a lie detector test in order to obtain a "secret" security clearance. In response to questions, he admitted that he had engaged in homosexual acts at the age of 18. The CIA offered to let him resign his position and he did so. He was then hired by the Civil Aeronautics Authority, subject to a one-year probationary period and investigation. After 20 months of employment and with a satisfactory performance rating, the agency obtained the CIA investigative information and proposed to remove him. The district court and court of appeals ruled for the government. Fortunately for Dew, when certiorari was granted, the government abandoned the case and reinstated him.

¹⁵³ See, e.g., *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968), cert. denied, 393 U.S. 1041 (1969); *Williams v. Brown*, 384 F.2d 981 (D.C. Cir. 1967); *Taylor v. United States Civil Service Commission*, 374 F.2d 466 (9th Cir. 1967); *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969).

¹⁵⁴ 349 F.2d 182 (D.C. Cir. 1965).

¹⁵⁵ *Id.* at 184-85.

¹⁵⁶ *Id.*

¹⁵⁷ *Scott v. Macy*, 402 F.2d 644, 648 (D.C. Cir. 1968) (announcing that an applicant for federal employment does not forfeit "all rights of privacy" and that there must be a rational basis for requiring applicants to answer particular questions).

¹⁵⁸ 417 F.2d 1161 (D.C. Cir. 1969).

¹⁵⁹ *Id.* at 1168.

mote the efficiency of the service.”¹⁶⁰ The government argued that homosexuality alone was sufficient cause because homosexuality was immoral.¹⁶¹ Furthermore, the government maintained that there was evidence of particular immoral conduct in this case because the employee had been accused of making a sexual advance toward another man.¹⁶² Although the conduct at issue occurred away from the job site in the privacy of the employee’s car, and even though the incident led to no sexual activity because the advances were rebuffed, the government maintained that the conduct was so “immoral, indecent, and disgraceful”¹⁶³ as to make the employee unfit.

The court, however, demanded proof of some causal connection between the homosexual conduct at issue and unfitness for service.¹⁶⁴ *Norton* was an important decision in this regard, establishing the “rational nexus test” for all dismissals of government employees terminated for off-duty immoral conduct.¹⁶⁵ Homosexuality and homo-

¹⁶⁰ Id. at 1162.

¹⁶¹ Id. at 1164.

¹⁶² The following facts are detailed id. at 1162-63: Norton, a NASA employee, had been driving around Lafayette Square (a regular hangout for gay men) in the late evening. He picked up another man and they drove around the square once. Norton then let the other man out of the car. The events were witnessed by police stakeouts who arrested both men. The man Norton had picked up accused Norton of touching his leg. No further sexual conduct was alleged. Norton was interrogated by the police for two hours, but he steadfastly denied making homosexual advances and was given a traffic summons. The Security Chief of NASA was called by the police and witnessed the interrogation. After the police had finished, the NASA Security Chief commenced a separate interrogation, lasting until 6:00 a.m. Finally Norton admitted to minimal homosexual conduct during high school and college, and claimed to have had blackouts during his adult life that might have accompanied homosexual acts.

¹⁶³ Id. at 1163.

¹⁶⁴ Id. at 1164-65. In particular, the court required the government to demonstrate an “ascertainable deleterious effect on the efficiency of the service” before terminating an employee for an immoral act. Id. at 1165.

¹⁶⁵ The nexus requirement was codified in the Civil Service Reform Act of 1978. Pub. L. No. 95-454, § 907, 92 Stat. 1111, 1227. Prior to the adoption of this statute, the *Norton* holding was relied upon as authority in numerous cases involving the dismissal of government employees for various types of immoral off-duty conduct. See *Major v. Hampton*, 413 F. Supp. 66, 71-72 (E.D. La. 1976) (holding that IRS agent could not be dismissed from service solely on grounds of off-duty private heterosexual activity absent showing that off-duty “trysts” affected job performance). Norton continues to be cited in cases involving public employees who are not covered by the federal statute. State and local government employment cases have also relied on *Norton*. See, e.g., *Erb v. Iowa State Bd. of Public Instruction*, 216 N.W.2d 339, 343 (Iowa 1974) (teacher’s act of adultery not sufficient ground for revocation of teaching certificate in absence of evidence that isolated occurrence in an otherwise unblemished past would have an adverse effect on fitness to teach); *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 393 (Cal. 1969) (holding that a teacher who engages in private consensual

sexual conduct were no longer per se justifications for dismissal. Nonetheless, the *Norton* court acknowledged that homosexual conduct might at times be relevant to job performance and thus serve as a rational basis for termination of employment. Such conduct might, for example, invite blackmail, or evidence an unstable personality.¹⁶⁶ Alternatively, if the conduct occurred on the job, or was sufficiently notorious, it might affect the employee's working relations with other employees or the public.¹⁶⁷

Because post-*Norton* cases were willing to adopt the "nexus test," the battle shifted to a focus on what sorts of conduct were sufficient to justify job termination. Thus, for example, the Eighth Circuit Court of Appeals in *McConnell v. Anderson*¹⁶⁸ upheld the denial of a university librarianship to an otherwise qualified candidate solely because he applied for a license to marry another male, an event surrounded by a certain degree of local publicity.¹⁶⁹ Although the District Court had relied on *Norton* to reverse the university's decision, the Court of Appeals held that the university's decision was warranted, explaining that:

homosexual act is not necessarily unfit to teach absent some further showing of nexus between the conduct and the unfitness). But see *Gaylord v. Tacoma Sch. Dist.* No. 10, 535 P.2d 804, 805-06 (Wash. 1975), appeal after remand, 559 P.2d 1340 (Wash. 1977), cert. denied, 434 U.S. 879 (1977) (upholding school board's dismissal of extremely talented teacher solely because, when asked, he admitted he was gay).

Because *Norton* was decided under the due process clause, *id.* at 1164, decisions that follow its holding must find that the employee's job rights constitute "property."

¹⁶⁶ These justifications echo the "findings" in the 1950 Interim Report of the Senate Subcommittee. For a discussion of this report, see *supra* notes 89-95 and accompanying text.

¹⁶⁷ This suggested "causal showing" would give effect to the prejudices of the public and of fellow employees. A lesbian or gay employee would be advised under the *Norton* court's rationale to stay closeted at work to ensure that his or her "gayness" does not impair job performance by creating an affront to others. But see *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992) (relying on *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), to say that private prejudice is not a sufficient justification for refusing to hire someone).

¹⁶⁸ 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972).

¹⁶⁹ *Id.* at 195-96. Although *McConnell* went through a marriage ceremony with his partner, Richard Baker, the Supreme Court of Minnesota refused to recognize the legality of the marriage under state law and rejected the couple's constitutional claims regarding same-sex marriage. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). See also *McConnell v. Nooner*, 547 F.2d 54, 55 (8th Cir. 1976) (citing Minnesota opinion as binding authority on federal court regarding question of whether *McConnell* and Baker could be treated as spouses for purposes of federal veterans' benefits).

[I]t is at once apparent that this is not a case involving were homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is, instead, . . . a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning.¹⁷⁰

The lesson of *McConnell* and other post-*Norton* cases was that secret homosexual conduct might not be sufficient grounds for job termination. The more public the conduct, however, the more likely an employer would be found justified in terminating the employee.¹⁷¹

D. Summary

After World War II, gays and lesbians became more visible than their predecessors. They formed homophile organizations in major cities and produced publications that presented a positive view of gay and lesbian life. The Supreme Court's formulation of obscenity doctrine in the 1950s and 1960s ensured gay and lesbian publications of greater First Amendment protections. Court decisions pronouncing the right of homosexuals to be served in bars provided safer social environments and federal employees challenged their dismissal for homosexuality with some degree of success. Nonetheless, early legal victories also set the stage for the conduct/status distinction that dominates gay and lesbian litigation today. Discrimination on the basis of status and totally private conduct found a certain degree of protection in the courts. But once conduct crossed from the private into the public sphere, legal protections diminished.

¹⁷⁰ *McConnell*, 451 F.2d at 196.

¹⁷¹ *McLaughlin v. Board of Medical Examiners*, 111 Cal. Rptr. 353, 357 (Cal. Ct. App. 1973) ("The distinction between a private, noncriminal act . . . and a criminal act committed in a public place is obvious."); see also *Moser v. State Bd. of Educ.*, 101 Cal. Rptr. 86, 88 (Cal. Ct. App. 1972) ("[H]omosexual behavior in a public place constituted sufficient proof of unfitness for service in the public school system.").

II. STONEWALL, GRISWOLD, AND GAY LIBERATION

A. *The Significance of Stonewall*

Most lesbian and gay rights activists cite June 27, 1969, as the beginning of the modern gay liberation movement. On that evening, when the New York police raided the Stonewall Inn, a gay bar in Greenwich Village, something unusual happened. The patrons, mostly gay men, resisted police harassment, thereby sparking three days of riots known as the Stonewall riots (or, the Stonewall Rebellion). Gay solidarity throughout the country generated many similar demonstrations of gay pride.¹⁷²

The Stonewall riots did not create the modern gay liberation movement. The movement's origins, as demonstrated in the previous Part, can be traced to the formation of the Mattachine Society in Los Angeles in the early 1950s, the concentrated litigation efforts in Washington, D.C. against the federal government, and the growing resistance to police raids of gay bars and gay social events in San Francisco in the 1950s and 1960s.

Nor can the gay liberation movement be viewed in isolation from the other radical movements of the 1960s. Martin Luther King preached nonviolent opposition to the racist power structure and led civil rights marches to protest the inequality between black and white Americans. Student radicals in Berkeley challenged the authorities in charge of the University of California by claiming their free speech rights. Students exercised these rights by protesting the war in Viet Nam. Students for a Democratic Society was formed in the early 1960s in Michigan and launched a new left political movement. The second wave of feminism began in the early 1960s, and by the late 1960s had spawned several radical organizations.¹⁷³ In 1968, protesters at the Democratic convention in Chicago were beaten by police officers. It was within this broader context of resistance and public challenges to governmental authority that the Stonewall riots began.

¹⁷² See, e.g., D'Emilio, *Sexual Politics*, supra note 11, at 233-37 (noting how gay radicals demonstrated at Berkeley the following fall and gay liberation front members appeared at demonstrations and events sponsored by other political groups); Duberman, supra note 6, at 209-11 (describing how the spirit of Stonewall affected the Independence Hall demonstration in Philadelphia that July 4th).

¹⁷³ NOW was formed in 1965, but dissatisfaction with NOW's conservatism led to the creation of more radical groups. Redstockings was formed in early 1969. See Duberman, supra note 6, at 173.

The Stonewall riots provided a symbolic radical shift in lesbian and gay arguments for civil rights. No longer would the movement be primarily about obtaining the right, so long as lesbians and gay men looked and acted like heterosexuals, to be treated just like heterosexuals in public.¹⁷⁴ The symbolic power of Stonewall lay in the fact that it was the drag queens and the nellys—the most unassimilated—who were the most visible and the most vocal.¹⁷⁵ They were demanding respect and they were demanding the right to be different.¹⁷⁶

Just four years earlier, the Supreme Court had made its own contribution to this new gay and lesbian movement. The Court's decision in *Griswold v. Connecticut*¹⁷⁷ recognized a right to privacy in the context of marital sex¹⁷⁸ and gave lawyers the necessary foothold to begin challenging the criminalization of homosexual conduct. Historian John D'Emilio cites this moment as an important turnaround for the ACLU in regard to its position on homosexuality.¹⁷⁹ Despite the hope of *Griswold* and the legal challenges that it inspired, however, Stonewall has proven to be the more important event of the late 1960's for lesbians and gay men.

B. Social and Political Organizations

Stonewall was quickly followed by the formation of new gay liberation organizations.¹⁸⁰ Inspired by the radical politics of the 1960s, these new groups broke rank with the older homophile organizations

¹⁷⁴ This assimilationist claim to rights is exactly what the founders of Mattachine did not want and why they criticized the conservative takeover in 1954. See D'Emilio, *Making Trouble*, supra note 11, at 17-56.

It is also interesting that the New York City Mattachine Society was perturbed by the Stonewall riots and pled with the gay community to stop the rioting and to maintain peace and quiet in the Village. Duberman, supra note 6, at 207.

¹⁷⁵ See generally Duberman, supra note 6, at 181-202 (giving a detailed description of the Stonewall riot and its participants).

¹⁷⁶ Duberman, supra note 6, at 211-12.

¹⁷⁷ 381 U.S. 479 (1965).

¹⁷⁸ Id. at 483-86 (finding a constitutional right to privacy and striking down a Connecticut statute that made it a criminal offense to use contraceptives).

¹⁷⁹ See D'Emilio, *Sexual Politics*, supra note 11, at 212 (citing to ACLU correspondence in which Alan Reitman, then associate director of the national office, said of *Griswold*: "Once we have the high court's opinion in this area, we will be in a position to determine our policy on the civil liberties aspect of a variety of sexual practices, including homosexuality.").

¹⁸⁰ Duberman, supra note 6, at 212, 221-33.

and their leaders.¹⁸¹ Gay liberation in the post-Stonewall days was not a civil rights movement to gain equality for homosexuals. Rather, it was a movement focused on the sexual oppression of all people, with the goal of liberating the "homosexuality" in everyone.¹⁸² In this regard, gay liberation resembled the more radical forces in the women's liberation movement.

The new gay liberation groups did not turn immediately to the courts, but rather turned out into the streets. Two of the most active groups were the Gay Liberation Front and the Gay Activists Alliance. In addition to demonstrating against anti-gay policies and homophobic employers, gay activists showed up at political forums to question candidates about their position on gay issues. The silence of the closet was broken by this new visibility as the ranks of persons willing to stand up and be counted as lesbian and gay swelled significantly.¹⁸³

Perhaps the most successful challenge by these new activists was the assault mounted against the American Psychiatric Association to remove homosexuality from its list of mental disorders. The official vote of the Association's Board of Trustees occurred in late 1973.¹⁸⁴ Some members of the Association, irate at the action, demanded a vote of the general membership on the issue. The original action of the Board was endorsed by fifty-eight percent of the membership.¹⁸⁵ Most historians of this event credit the new gay liberation movement for this outcome.¹⁸⁶ Because the medical profession's definitions of

¹⁸¹ See Duberman, *supra* note 6, at 227-28 (describing the debate between older homophiles and young turks at the ECHO convention in November 1969); see also Adam, *supra* note 8, at 79 (describing a confrontation between the old guard and the new radicals at a NACHO meeting in San Francisco in 1970).

¹⁸² Adam, *supra* note 8, at 78; see also Stephen Epstein, *Politics, Ethnic Identity: The Limits of Social Constructionism in Forms of Desire* 239, 252-53 (Edward Stein, ed. 1990).

¹⁸³ John D'Emilio estimates that the total membership in lesbian and gay organizations before Stonewall approximated 5000. One year after the Stonewall riots, in June 1970, well over 5000 men and women in New York City alone marched in the first gay pride event to commemorate Stonewall. See D'Emilio, *Sexual Politics*, *supra* note 11, at 219, 237-38.

¹⁸⁴ Greenberg, *supra* note 14, at 429.

¹⁸⁵ Marcus, *supra* note 10, at 254.

¹⁸⁶ See, e.g., Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (1981). Judd Marmor, a Los Angeles psychiatrist, disagrees with Bayer's assertion that psychiatrists were pressured by gay activists to change their opinion about homosexuality, referring to earlier efforts of his own and others to combat the notion that homosexuality was an illness. See Marcus, *supra* note 10, at 253-54. Nonetheless some commentators insist that

illness can have meaningful legal consequences,¹⁸⁷ this victory within the American Psychiatric Association was equivalent to winning an important test case in the courts.

By the early 1970s, the movement began to split into radical and conservative camps, a not uncommon event in the life of social and political movements. The Gay Activists Alliance had become more structured and separated itself from the more radical Gay Liberation Front. Eventually the Alliance dissolved and began anew in 1973 as the National Gay Task Force (now the National Gay and Lesbian Task Force).¹⁸⁸ Overall, the defining characteristics of the gay movement in the immediate post-Stonewall years were its increasing visibility and the vitality of its more radical demands for the freedom to be different.

C. Legal Organizations

1. The American Civil Liberties Union

During the 1950s the American Civil Liberties Union ("ACLU") was periodically asked to provide legal assistance to gay people who had suffered discrimination. Drawing a line between speech and belief, which were constitutionally protected, and sexual conduct, which was not constitutionally protected, the ACLU generally refused to handle gay rights cases. In 1957, the ACLU issued its first national policy statement on the rights of homosexuals, sustaining the constitutionality of sodomy statutes and admitting that homosexuality was a valid issue for security clearances.¹⁸⁹ The organization did step in, however, to protect the due process rights of gay people. The ACLU thus opposed entrapment and proposals for the compulsory registration of homosexuals.¹⁹⁰

Several ACLU affiliates, notably Southern California and Washington, D.C., fought to reverse the national office position. In 1964, gay

because the vote was taken under pressure, psychiatrists have not truly changed their opinion about homosexuality. See Greenberg, *supra* note 14, at 429-30.

¹⁸⁷ For example, in the right to die case, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 266-67 (1990), the Supreme Court cited a Missouri statute that provided: "For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice."

¹⁸⁸ See generally Adam, *supra* note 8, at 80-82 (discussing changes within the movement).

¹⁸⁹ See D'Emilio, *Sexual Politics*, *supra* note 11, at 156.

¹⁹⁰ Walker, *supra* note 25, at 312.

rights was on the agenda at the national convention. Harriet Pilpel argued that privacy rights should cover homosexual conduct.¹⁹¹ Although the resolution that emerged from the national convention was in favor of decriminalization, apparently the national office continued to consider homosexuality a valid concern for security clearances. Thus, the ACLU was unwilling to join in Frank Kameny's fight against the ban on homosexuals in government employment.¹⁹²

The ACLU has been criticized for its reluctance to step in and endorse gay rights as a civil liberties issue.¹⁹³ The reluctance should not be surprising. In the 1950s and 1960s, there was no gay rights movement and ACLU staff and board members were likely to include persons who had stereotypical views of homosexuals. Yet, shortly after *Griswold* was decided, several Board members pushed for the inclusion of gay rights cases as part of the ACLU agenda. Harriet Pilpel in particular spoke out in favor of an agenda that would include challenges to sodomy statutes. Finally, in 1967, the ACLU took the position that all private consensual conduct, heterosexual as well as homosexual, ought to be protected by the privacy right recognized in *Griswold*.¹⁹⁴ Five years later, in 1973, the ACLU created the Sexual Privacy Project to work on privacy challenges to government regulation of sexuality. In 1984, Nan Hunter left the Reproductive Freedom Project to become the first executive director of the ACLU's Gay and Lesbian Rights Project.¹⁹⁵

2. *Lambda Legal Defense and Education Fund*

In 1973 a new gay liberation organization was formed, a public interest law firm to be run by lesbians and gay men to serve the lesbian and gay community. The Lambda Legal Defense and Education Fund was first conceived in early 1972. Bill Thom and several other gay lawyers decided to incorporate the organization as a public interest law firm under New York law. New York law at the time forbade

¹⁹¹ D'Emilio, *Sexual Politics*, supra note 11, at 156; Walker, supra note 25, at 312.

¹⁹² Gay activist attorney Tom Stoddard reports that he has a copy of a 1967 letter from Allan Reitman, associate director of the ACLU, to the Mattachine Society saying that the ACLU was not interested in Mattachine's issues. Telephone Interview with Tom Stoddard (Nov. 1992).

¹⁹³ Vern L. Bullough, *Lesbianism, Homosexuality, and the American Civil Liberties Union*, 13 J. Homosexuality 23, 24 (1986).

¹⁹⁴ D'Emilio, *Sexual Politics*, supra note 11, at 213.

¹⁹⁵ Walker, supra note 25, at 312-13.

the practice of law by a corporation or association unless the organization was "organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy."¹⁹⁶ Basing its charter and petition on that of the recently approved Puerto Rican Defense Fund, Thom applied to the Appellate Division of the New York Supreme Court for approval. The application was rejected unanimously.¹⁹⁷

Lambda's purposes, as stated in its application to the court, were:

The attorneys employed by the Corporation will render, provide and carry out the practice of law activities of the Corporation as set forth in this paragraph. These activities include providing without charge legal services in those situations which give rise to legal issues having a substantial effect on the legal rights of homosexuals; to promote the availability of legal services to homosexuals by encouraging and attracting homosexuals into the legal profession; to disseminate to homosexuals general information concerning their legal rights and obligations, and to render technical assistance to any legal services corporation or agency in regard to legal issues affecting homosexuals.¹⁹⁸

The Appellate Division proclaimed that "[t]he stated purposes are on their face neither benevolent nor charitable . . . , nor, in any event, is there a demonstrated need for this corporation."¹⁹⁹ The difference between Lambda and the Puerto Rican Legal Defense and Education Fund, said the court, was that the Puerto Rican community was poor and thus could not otherwise afford legal assistance.²⁰⁰ Admitting that the gay community suffered from discrimination, the court nonetheless reasoned that there had been no proof offered to show that the discrimination prevented gay and lesbian clients from obtaining adequate legal representation.²⁰¹ In other words, "charity" does not include attempts to remedy discrimination unless it can be shown that the victims of discrimination are also poor.

¹⁹⁶ N.Y. Jud. Law § 495(5) (McKinney 1983) (specific language cited was repealed in 1979).

¹⁹⁷ *In re Thom*, 337 N.Y.S.2d 588 (N.Y. App. Div. 1972) (per curiam), rev'd, 301 N.E.2d 542 (N.Y. 1973).

¹⁹⁸ *Id.* at 589.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

The New York Court of Appeals reversed the lower court's denial of Lambda's application.²⁰² Finally on October 18, 1973, the lower court approved Thom's application and Lambda Legal Defense and Education Fund was officially incorporated and authorized to practice law.²⁰³

This year, 1993, Lambda celebrates its twentieth anniversary. Together with the ACLU, Lambda has helped to shape gay rights litigation across the country. In 1977, the two organizations joined together to challenge the New York State sodomy statute,²⁰⁴ the constitutionality of which was before the New York Court of Appeals in *People v. Rice*.²⁰⁵ Focusing on the right to privacy, the organizations continued to mount challenges to sodomy statutes.²⁰⁶ In addition, on November 20, 1983, the two organizations hosted a national meeting

²⁰² 301 N.E.2d 542 (N.Y. 1973) (per curiam).

²⁰³ Application of Thom, 350 N.Y.S.2d 1, 2 (N.Y. App. Div. 1973) (per curiam). It appears that the Appellate Division was not completely happy with the instruction from the highest court to approve Lambda's application. Reasserting its discretionary power to review the specifics of corporate charters, the court mandated the removal of one purpose from Lambda's charter before granting full approval. The removed purpose was "to promote legal education among homosexuals by recruiting and encouraging potential law students who are homosexuals and by providing assistance to such students after admission to law school." *Id.*

²⁰⁴ N.Y. Penal Law § 130.38 (McKinney 1987).

²⁰⁵ 363 N.E.2d 1371 (N.Y. 1977). Lambda and the New York Civil Liberties Union filed a joint brief when the case was before the New York Court of Appeals. See Lambda News, (Lambda Legal Defense and Education Fund, New York, N.Y.), Apr. 1977, at 1.

The plaintiffs presented a constitutional challenge to the consensual sodomy statute, which forbade unmarried couples from engaging in "deviate sexual intercourse." N.Y. Penal Law § 130.38. The case was before the court on defendants' motion to dismiss the criminal information that had been issued against them. The trial court held the statute in violation of the equal protection clause, finding no rational basis for distinguishing between married and unmarried couples. *People v. Rice*, 363 N.Y.S.2d 484, 488 (N.Y. Dist. Ct. 1975). That decision was reversed on appeal. *People v. Melir*, 383 N.Y.S.2d 798, 799 (N.Y. App. Term. 1976) (holding that marital privacy interests recognized under *Griswold* supported the marital/nonmarital distinction). The New York Court of Appeals ultimately avoided the constitutional questions, refusing to rule on so difficult an issue "without a trial record and solely on the informations filed." *Rice*, 363 N.E.2d at 1371. Thus, the court denied the defendants' motion to dismiss, without prejudice, and reserved review of the constitutional issues in the event the defendants were actually convicted. *Id.* at 1372.

The New York statute was ultimately ruled unconstitutional in *People v. Onofre*, 415 N.E.2d 936, 939-41 (N.Y. 1980), cert. denied, 451 U.S. 987 (1981).

²⁰⁶ In addition to *Onofre*, 415 N.E.2d at 937, see *New York v. Uplinger*, 467 U.S. 246 (1984), which was argued before the Supreme Court by Lambda Board member Bill Gardner. An ACLU amicus brief was also filed in *Uplinger*. *Id.*

of gay and lesbian legal organizations to develop a national strategy for eradicating sodomy laws across the country.²⁰⁷

D. Why Challenge Sodomy Statutes?

Mainstream lawyers and activists have not always understood why gay and lesbian legal organizations focus their attention on sodomy laws. After all, sodomy laws are rarely enforced against consenting adults in private. Surely fear of prosecution is not the main concern of most gay men and lesbians. Was the focus on sodomy challenges determined by the fact that, in light of *Griswold* and *Roe*,²⁰⁸ such challenges seemed the most promising for setting constitutional precedent?

In answer to these questions, which came both from without and within the gay and lesbian community, Lambda's legal director, Abby Rubenfeld,²⁰⁹ stressed the fact that "sodomy laws are the bedrock of legal discrimination against gay men and lesbians."²¹⁰ Associating homosexuals with sodomy and thus with criminal activity had been at the core of earlier governmental action against gay men and lesbians. Raids on gay bars were often justified on grounds that criminal activity might result where gay persons congregate.²¹¹ The 1950 Senate Subcommittee report recommending that all homosexuals be dismissed from government service relied in large part on the fact that same-sex sexual conduct was both criminal and immoral.²¹² Persons who engaged in such conduct were presumed to be morally weak and thus unfit for employment in responsible positions. So long as consensual same-sex sodomy remained a crime, these justifications for discrimination against gay people were more difficult to attack.

The role played by sodomy laws in anti-gay discrimination in the 1980s was much the same as in earlier decades. It was not the risk of

²⁰⁷ Lambda Update (Lambda Legal Defense and Education Fund, New York, N.Y.), Feb. 1984, at 3.

²⁰⁸ *Roe v. Wade*, 410 U.S. 113 (1973) (extending the right to privacy to encompass a woman's decision of whether to terminate a pregnancy).

²⁰⁹ Rubenfeld was the Legal Director of Lambda Legal Defense and Education Fund from 1983-1988 and a co-convenor of the sodomy task force. In 1988, Paula Ettelbrick became the legal director.

²¹⁰ Lambda Update, *supra* note 207, at 3.

²¹¹ See *supra* notes 98-128 and accompanying text.

²¹² See Interim Report, *supra* note 89, at 3-6. For a fuller discussion of the report, see *supra* notes 89-95 and accompanying text.

prosecution for sodomy that concerned gay men and lesbians. Rather, it was the risk of being branded as a criminal once one's sexual orientation became known.²¹³ So long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers could argue that they should not be forced to hire criminals and landlords could argue that they should not be forced to rent to criminals.²¹⁴

Within the gay and lesbian community, sodomy challenges were often perceived as a male issue.²¹⁵ Lesbians were more concerned with family issues such as custody and domestic partner benefits. Lambda's Rubinfeld spoke to lesbian activists about the importance of sodomy challenges to lesbian issues.²¹⁶ To illustrate her point, she described a Tennessee custody case in which her lesbian client was branded as a criminal²¹⁷ in open court by counsel for the husband. The effect of this claim was to diminish the positive impact of expert testimony as to the mother's fitness. Nor should lesbians assume that sodomy statutes are not enforced against private lesbian sexual conduct. Rubinfeld represented a woman who was given a five-year sentence for private consensual conduct. The woman served over two years before she was eligible for parole.²¹⁸

²¹³ Consider Henry Gerber's explanation for why no reputable persons would associate with his organization in 1924 and the Senate Subcommittee's Interim Report that concluded that engaging in criminal behavior made all homosexuals unfit for government service. See text accompanying notes 28-32; Interim Report, *supra* note 89, at 3-4.

²¹⁴ See, e.g., *Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) (noting how homosexuals "suffer discrimination in housing, employment and other areas"), appeal dismissed, 743 F.2d 236 (5th Cir. 1984), *rev'd on reh'g*, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986).

²¹⁵ Many lesbians identified sodomy statutes as a concern primarily of gay men because the statutes were most often applied to gay men arrested for engaging in gay sex in semi-public places such as rest stops.

²¹⁶ In 1985-1986, before the Supreme Court handed down its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), Rubinfeld addressed various lesbian groups across the country on the importance of the *Hardwick* case to lesbians. I was present at a speech she gave in Austin, Texas in the spring of 1986.

²¹⁷ Consensual same-sex sodomy is still a crime in Tennessee. See Tenn. Code Ann. § 39-13-510 (1991).

²¹⁸ The case Rubinfeld handled is not reported. Rubinfeld entered the case to help the woman get out on parole. Rubinfeld told me that the woman "got on the wrong side of the sheriff" in a small town. The sheriff "got a search warrant and came out and arrested" the woman under the state's "crime against nature" statute. Telephone interview with Abby Rubinfeld, former Legal Director of the Lambda Legal Defense and Education Fund (Apr. 19, 1993).

For a reported case involving a conviction and prison sentence for lesbian consensual sex, see *People v. Livermore*, 155 N.W.2d 711, 712 (Mich. Ct. App. 1967) (involving two women

The campaign to erase sodomy statutes from the books was consistent with the impulses of gay liberation. Gay liberation was always about sexual freedom and the breaking down of stereotypes. So long as state laws criminalizing lesbians and gay men for engaging in intimate sexual behavior remained on the books, the state's repressive power was legitimated. This state power to define good and bad sex was a barrier for those gay and lesbian individuals who sought to redefine themselves publicly as good, moral, and noncriminal.

III. THE SODOMY CASES AND THEIR CONSEQUENCES

A. Before Hardwick

1. Challenges to Sodomy Statutes

In 1973, the Supreme Court ruled in a habeas corpus proceeding brought by Florida prisoners that the Florida sodomy statute, which prohibited the "abominable and detestable crime against nature," was not unconstitutionally vague because the Florida courts had specified the content of the crime by construing the statute to prohibit oral and anal sex.²¹⁹ No other constitutional challenges to the Florida statute were pursued in that case.²²⁰

Two years later a federal district court in Virginia was asked to rule on the constitutionality of that state's sodomy statute. In *Doe v. Commonwealth's Attorney*,²²¹ several gay male plaintiffs asserted that they

engaged in sexual conduct inside their tent on public camping grounds; Livermore was sentenced to a term of one-and-a-half to five years).

²¹⁹ *Wainwright v. Stone*, 414 U.S. 21, 21-22 (1973) (per curiam).

²²⁰ *Id.* The Florida Supreme Court had ruled, in *Franklin v. State*, 257 So.2d 21, 24 (Fla. 1971), that the sodomy statute was void for vagueness. *Franklin* was to be applied prospectively only, *id.*, and thus was not available to the already convicted parties in *Wainwright*. The United States Supreme Court saw no difficulty in the Florida court's decision to apply *Franklin* prospectively, denying relief to the already convicted parties in *Wainwright*. *Wainwright*, 414 U.S. at 23-24.

²²¹ 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). No national gay rights organizations were involved at the beginning of this case. Lambda did file an amicus brief after the Supreme Court's summary affirmance asking for the Court to reconsider, a request that the Court denied. 425 U.S. 985. Randy Shilts reports that the case began after gay activist Bruce Voeller and others had discussed the possibility of such a challenge in an open forum with Justice William O. Douglas. Shilts, *supra* note 9, at 283. According to Shilts:

The case seemed ill-fated from the start. Scheduling problems precluded appointment of a normal federal appeals court panel in Richmond. Instead two elderly judges were brought out of retirement to sit on the three-member panel hearing the case. Both voted in favor of the statute in the two-to-one ruling.

regularly engaged in consensual homosexual sodomy in private and feared arrest under the sodomy statute.²²² Relying primarily on *Griswold*,²²³ they argued that the statute, as applied to such private consensual homosexual conduct, violated their right to privacy under the First and Ninth Amendments, their due process rights under the Fifth and Fourteenth Amendments, their First Amendment right to freedom of expression, and the Eighth Amendment's prohibition of cruel and unusual punishment.²²⁴ The court rejected these claims, citing language in Justice Arthur J. Goldberg's concurrence in *Griswold* which differentiated homosexuality and adultery on the one hand from marital intimacy on the other.²²⁵

Doe was summarily affirmed by the United States Supreme Court,²²⁶ and for the next ten years, until the Court revisited the issue in *Hardwick*, gay rights litigation was affected by conflicting opinions regarding the precedential value of *Doe*.²²⁷ For example, the Court of

Shilts, *supra* note 9, at 284. Judge Robert R. Merhige was the dissenting judge. For another gay rights case involving activist Bruce Voeller, see *United States v. Various Articles of Obscene Merchandise*, 514 F. Supp. 463 (S.D.N.Y. 1981).

²²² *Id.* at 1200.

²²³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²²⁴ *Doe*, 403 F. Supp. at 1200.

²²⁵ *Doe*, 403 F. Supp. at 1201 (quoting *Griswold*, 381 U.S. at 499, (Goldberg, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting))). Justice John Harlan's passage is as follows:

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.

Poe, 367 U.S. at 553. But see Judge Merhige's dissent in *Doe*, 403 F. Supp. at 1204, pointing out that *Griswold* had already been extended beyond marital intimacy by *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and that therefore the Goldberg/Harlan language was not a valid indication of the limits of the right of privacy.

²²⁶ 425 U.S. 901 (1976). *Doe* went to the Supreme Court by right of appeal. Thus, absent any finding of a procedural defect, the Court had no choice but to hear the case. Summary affirmances, without the benefit of oral argument and with no statement of the rationale, are typical in right of appeal cases. See Charles Alan Wright, *Federal Courts* 755-57 (4th ed. 1983).

Justices William Brennan, Thurgood Marshall, and John Paul Stevens voted to hear oral arguments in the case. *Doe*, 425 U.S. at 901.

²²⁷ Summary affirmances are decisions made on the merits and thus they bind lower courts. Nonetheless their precedential value is unclear because there is no rationale for the affirmance. See *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (stating that lower courts are bound "until such time as the Court informs [them] that [they] are not") (quoting *Doe v. Hodgson*, 478 F.2d 537, 539, cert. denied, 414 U.S. 1096 (1973)); see also Note, *The Precedential Effect of*

Appeals of New York and the Supreme Court of Pennsylvania both ruled that their state sodomy statutes violated the federal constitution despite the summary affirmance in *Doe*.²²⁸ Other state courts relied on the authority of *Doe* to uphold their own sodomy statutes against similar federal constitutional challenges.²²⁹

2. *The Consequences of Doe*

The Supreme Court's affirmance of *Doe* presaged *Hardwick* in more ways than one. In addition to denying gay men and lesbians constitutional protection for their most intimate expressions of relationship (i.e., engaging in sexual conduct that has been criminalized

Summary Affirmances and Dismissals, 64 Va. L. Rev. 117 (1978) (discussing the problems in determining the precedential meaning of summary affirmances).

²²⁸ See *People v. Onofre*, 415 N.E.2d 936, 939-41 (N.Y. 1980) (finding New York's sodomy statute unconstitutional), cert. denied, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 415 A.2d 47, 51-52 (Pa. 1980) (finding Pennsylvania's statute unconstitutional). The Iowa Supreme Court ignored the recently-affirmed *Doe* when it declared the Iowa sodomy statute unconstitutional in a case involving heterosexual sodomy. See *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976).

The denial of certiorari in *Onofre* was cited by gay rights litigators and some courts to support the position that the *Doe* affirmance should not be read as refusing to extend *Griswold* to same-sex sodomy. See, e.g., *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228 (10th Cir. 1984). Although it is true that certiorari denials have no precedential value, the denial in *Onofre* certainly added confusion to what the Supreme Court had intended in summarily affirming *Doe*. Perhaps this was a sign that the affirmance said nothing about the application of *Griswold* to same-sex sodomy. Some have argued that the plaintiffs in *Doe* lacked standing and perhaps the Court meant to affirm on those grounds. See *Dronenburg v. Zech*, 741 F.2d 1388, 1392 (D.C. Cir. 1984) (discussing the standing argument). The response to this argument was that if standing was an issue in *Doe*, the Court should have said so.

On the same day that *Doe* was summarily affirmed, the Court also denied certiorari to a North Carolina sodomy challenge in which the state court upheld the sodomy statute. See *State v. Enslin*, 214 S.E.2d 318 (N.C. Ct. App.), cert. denied, 217 S.E.2d 669 (N.C. 1975), and cert. denied, 425 U.S. 903 (1976). In 1977, the Court denied certiorari in a case that upheld the dismissal of a gay teacher. See *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1975), cert. denied, 434 U.S. 879 (1977). In 1978, it denied certiorari in a case that required recognition of a gay student group, *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978). This reluctance to rule on gay rights issues led Bruce Ennis of the ACLU to comment "that the Supreme Court was not about to expand gay rights, that they didn't even want to have to deal with anything as controversial if they didn't have to, and that it was probably a waste of time to take gay rights cases to the court." Martin Mintz, *The Supreme Court: Remaining Silent on Homosexual Rights*, Wash. Post, Dec. 11, 1979, at A3.

²²⁹ See, e.g., *People v. Masten*, 292 N.W.2d 171, 174 (Mich. Ct. App. 1980), rev'd per curiam, 322 N.W.2d 547 (Mich. 1982); see also *Kelly v. State*, 412 A.2d 1274, 1275 (Md. Ct. Spec. App. 1980) (involving heterosexual sodomy), aff'd sub nom. *Neville v. State*, 430 A.2d 570 (Md. 1981).

by the state), *Doe* was cited by lower courts to support other instances of anti-gay discrimination. The conflation of gay sexual conduct and gay status, a problem that had arisen in early litigation involving gay bars, became even more evident and more problematic in these post-*Doe* cases.

Contributing to the conflation of conduct and status was the courts' tendency to refer to "homosexual conduct"²³⁰ or "homosexual activity"²³¹ instead of giving specific descriptions of the conduct at issue. Rules and regulations banning "homosexuality" were validated by courts with no explanation as to whether the thing being banned was status or conduct.²³² Despite the fact that most cases did involve evidence of specific homosexual *sexual* acts,²³³ the broader references to "conduct" and "activity" made these cases appear to stand for a negative judgment against all things homosexual. In the following discussion, I will focus on the exact conduct emphasized by the courts in making their decisions.

²³⁰ See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984) ("On April 21, 1981, the United States Navy discharged James L. Dronenburg for *homosexual conduct*." (emphasis added)); *Berg v. Claytor*, 436 F. Supp. 76, 79 (D.D.C. 1977) ("[A]n individual's right to privacy does not extend to *homosexual conduct* even where it occurs in private between consenting adults." (emphasis added), vacated and remanded, 591 F.2d 849 (D.C. Cir. 1978).

²³¹ See, e.g., *Beller v. Middendorf*, 632 F.2d 788, 793 (9th Cir. 1980) (describing the facts of Mary Saal's discharge by referring to "homosexual relations" and "homosexual activity" without ever further specifying what Saal actually did), cert.denied, 452 U.S. 905 (1981); *Berg*, 436 F. Supp. at 79 ("The dismissal of plaintiff due to his *homosexual activity* places no restriction on his right to associate with whomever he chooses and clearly does not contravene the First Amendment.") (emphasis added).

²³² See, e.g., *Berg*, 436 F. Supp. at 79, quoting the then applicable Navy regulations, SECNAVIST 1900.9A, which provided that "[t]he basic policy of the Navy towards homosexuals is [that] . . . [m]embers involved in homosexuality are military liabilities who cannot be tolerated in a military organization." The opinion fails to clarify what it means to be "involved in homosexuality."

²³³ Judge Gerhard A. Gesell provides one of the more specific descriptions in the *Matlovich* case:

He concedes that he has engaged in homosexual acts in Florida, Louisiana, Virginia and Washington, D.C. These acts have included mutual masturbation, anal intercourse and fellatio. His partners have all been persons of his age or slightly younger, never younger than twenty-one, to his knowledge. His partners have included doctors, dentists, lawyers and without exception respectable citizens. He has met these people in private, off base and off duty, in hotel rooms or other places of abode. Other persons have never been present.

Matlovich v. Secretary of the Air Force, 13 Empl. Prac. Dec. (CCH) ¶ 11,325, at 6089 (D.D.C. Aug. 25, 1976), vacated, 591 F.2d 852 (D.C. Cir. 1978).

a. *Immigration and Naturalization*

The Immigration and Naturalization Service ("INS") has been notorious for conflating homosexual status and conduct. Prior to the American Psychological Association's decision to remove homosexuality from its list of mental disorders, the INS deported homosexual aliens on grounds that they were "afflicted with psychopathic personality." This interpretation of "psychopathic personality" was upheld by the Supreme Court in *Boutellier v. INS*.²³⁴

Aliens can be deported if they commit a "crime of moral turpitude,"²³⁵ a category that normally includes crimes of a sexual nature. Crimes of moral turpitude also become relevant when petitioning for naturalization because the alien must prove good moral character for the five years preceding the petition.²³⁶ Despite the fact that she had never been convicted of a crime, in 1968 a New York court denied Olga Schmidt's petition for naturalization on the basis that she had engaged in sexual behavior with a woman in the privacy of their home.²³⁷ In a petition by another alien just two years later, on similar facts, the federal district court for the southern district of New York disagreed with the result in *Schmidt*.²³⁸

Doe, however, produced a negative impact in a later immigration case. In 1980, Judge Oran R. Lewis, one of the three judges on the *Doe* panel, denied the naturalization petition of Horst Nemetz because he admitted having sexual relations with (and only with) his male "roommate" for the ten-year period preceding the petition.²³⁹ The petition was opposed by the INS on grounds that Nemetz had failed to prove he was a "person of good moral character" because he "admitted that he had committed a crime."²⁴⁰ The court, citing *Doe*, noted that the crime at issue, sodomy, as defined by Virginia law, was "a crime involving moral turpitude."²⁴¹

²³⁴ 387 U.S. 118, 120-23 (1967). *Boutellier* was one of the early gay cases supported by the ACLU. *Id.* at 118.

²³⁵ 8 U.S.C. § 1101(f)(3) (1988).

²³⁶ 8 U.S.C. § 1427 (1988).

²³⁷ *In re Schmidt*, 289 N.Y.S.2d 89, 92 (N.Y. Sup. Ct. 1968).

²³⁸ *In re Labady*, 326 F. Supp. 924, 928-30 (S.D.N.Y. 1971).

²³⁹ *Petition of Nemetz*, 485 F. Supp. 470, 471 (E.D. Va. 1980), *rev'd sub nom. Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981).

²⁴⁰ *Id.*

²⁴¹ *Id.*

Judge Lewis concluded that Nemetz had not met his burden of proof regarding good moral character and denied his petition for naturalization.²⁴² In summarizing the evidence upon which he based his conclusion, Judge Lewis stated:

The petitioner concedes having actively engaged in sexual relations with his male roommate, more or less continuously, since 1967. It was further conceded that these sexual relations took place in private between consenting adults. He was never asked whether he had ever engaged in sexual acts constituting sodomy, proscribed by § 18.2-361 of the Code of Virginia.²⁴³

Despite the absence of direct evidence that specific illegal acts occurred, the Court found that an admission of sexual relations was sufficient evidence to raise a presumption of illegal sodomy. Silence on the part of the petitioner was insufficient to rebut the presumption.²⁴⁴

The logic in this case can be summarized as follows:

1. Nemetz engaged in monogamous, private, consensual sexual relations with another male.
2. The court will infer that this conduct constituted sodomy.
3. Sodomy is a crime of moral turpitude.
4. Thus, anyone who engages in same-sex sexual conduct is presumed to be of bad moral character.

Fortunately, the case was reversed on appeal.²⁴⁵ Recognizing that the burden of proof regarding good moral character was on the petitioner and that the trial court had (perhaps correctly) inferred that the petitioner had committed the crime of consensual sodomy, the

²⁴² *Id.*

²⁴³ *Id.* at 470.

²⁴⁴ See *Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981), which reversed Judge Lewis, and explained his reasoning as follows:

In this case, the Service Examiner recommended that Nemetz be denied naturalization because Nemetz had not sustained his burden of proof on the good moral character issue. The district court agreed, finding that Nemetz had failed to rebut the inference that he had committed sodomy in violation of Virginia law, *see*, Va.Code § 18.2-361; this inference arose from Nemetz's admission that he had had homosexual relations with his roommate. Under the district court's analysis, Nemetz's failure to rebut that inference constituted a failure to meet his burden of proof on the issue of good moral character.

Id. at 435.

²⁴⁵ *Nemetz*, 647 F.2d at 437.

Court of Appeals for the Fourth Circuit elected to attack the logic of the lower court's decision at step three above—"sodomy is a crime of moral turpitude." Reasoning that "whether a person is of good moral character for purposes of naturalization is a question of federal law," the court pointed to the lack of uniformity amongst the states regarding the criminalization of private consensual sodomy.²⁴⁶ To construct a uniform federal standard, the court concluded that private sexual conduct might be viewed as an act of "moral turpitude" if it had a public harmful effect.²⁴⁷ Because private consensual homosexual sodomy has no such effect,²⁴⁸ the petitioner was found to have met his burden regarding good moral character. Despite this positive outcome for petitioner in *Nemetz*, it is important to remember that both the trial and the appellate courts were willing to infer the commission of criminal sodomy from the admission of a sexual relationship.

b. The Military Cases

Although *Norton v. Macy*²⁴⁹ had established the principle that the government could not generally cite homosexuality as a grounds for dismissing its employees without showing some rational connection between homosexuality and job performance, that principle had never been extended to military employees. In 1975, Leonard Matlovich²⁵⁰ voluntarily revealed to the Secretary of the Air Force that he was a

²⁴⁶ Id. at 435.

²⁴⁷ Id. at 436.

²⁴⁸ Id. at 437. Private sex, even consensual homosexual sodomy, might be harmful to public interests under the court's analysis if one of the parties was married. In that case the act would constitute adultery, which has public consequences in that "extramarital intercourse . . . tends to destroy an existing marriage; which evidences disregard of marital vows and responsibilities." Id. at 436 (quoting *Wadman v. INS*, 329 F.2d 812, 817 (9th Cir. 1964)).

²⁴⁹ 417 F.2d 1161 (D.C. Cir. 1969).

²⁵⁰ Matlovich had served with honor and distinction for twelve years in the U.S. Air Force. Judge Gesell described him as follows:

Here is a man who volunteered for assignment to Viet Nam, who served in Viet Nam with distinction, who was awarded the Bronze Star while only an Airman First Class, engaged in hazardous duty on a volunteer basis on more than one occasion, wounded in a mine explosion, revolunteered, has excelled in the Service as a training officer, as a counselling officer and in the various social action programs and race-relation programs of the military, and has at all times been rated at the highest possible ratings by his superiors in all aspects of his performance, receiving in addition to the Bronze Star, the Purple Heart, two Air Force Commendation Medals and a Meritorious Service Medal. *Matlovich v. Secretary of the Air Force*, 13 Empl. Prac. Dec. (CCH) ¶ 11,325 at 6089 (D.D.C. Aug. 25, 1976), vacated, 591 F.2d 852 (D.C. Cir. 1978).

homosexual and had engaged in private consensual homosexual sexual activity while enlisted in the Air Force.²⁵¹ He requested that he not be dismissed under the Air Force's then existing rules, which generally dismissed service personnel for homosexuality.²⁵² After a four-day hearing, the Administrative Discharge Board "recommended that he be given a general discharge for unfitness, based on his homosexual acts."²⁵³ The discharge was upgraded to "honorable" by his commanding officer.²⁵⁴

Matlovich appealed the discharge in federal court. While the case was under consideration by District Court Judge Gerhard A. Gesell, the Supreme Court issued its summary affirmance in *Doe*. Citing *Doe*, Judge Gesell dismissed the constitutional arguments raised by Matlovich, finding that he had no constitutional right to engage in homosexual sodomy.²⁵⁵ He next considered whether the Air Force regulation generally requiring homosexuals to be discharged could withstand rational basis review. Without ever specifically identifying what the legitimate governmental interest was in barring homosexuals from the military, as required by *Norton*, the court concluded that the regulation was not "so irrational that it may be branded arbitrary."²⁵⁶

This case was the first to hold that, because criminal laws against homosexual sodomy were constitutional under due process analysis,

²⁵¹ The background of the *Matlovich* case is described in exquisite detail in Shilts, *supra* note 9, at 194-95, 198-200, 202-04, 207-08, 210-11, 216-17. Of particular interest is the reaction of Matlovich's military attorney, who initially reacted by saying: "Why did you write this letter? I could have gotten you out." Matlovich's response was that he didn't want to get out. He wanted to challenge the entire policy. *Id.* at 208.

For a specific description of the admitted sexual conduct, see *supra* note 233.

²⁵² The rules in force at that time were summarized by Judge Gesell as follows:

Homosexuality is not tolerated in the Air Force. There is no distinction between duty time and off-duty time as the high moral standards of the service must be maintained at all times.

It is the general policy to discharge members of the Air Force who fall within the purview of this section. Exceptions to permit retention may be authorized only where the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised.

Matlovich, 13 Empl. Prac. Dec. (CCH) at 6089.

²⁵³ The facts are explained in *Matlovich*, 591 F.2d at 854.

²⁵⁴ *Id.*

²⁵⁵ *Matlovich*, 13 Empl. Prac. Dec. (CCH) at 6088.

²⁵⁶ *Id.* at 6090. The opinion was delivered orally from the bench and thus may have lacked the detailed explanation that a written decision might have contained. Judge Gesell did refer at length to the Air Force hearings at which the rationale behind the ban was no doubt discussed. He also reinforced the notion that it was appropriate to give some deference to

governmental discrimination against homosexuals would not violate equal protection unless a plaintiff could show that the discrimination was irrational. More military cases followed *Matlovich*. The combination of low level, "rational basis" review and judicial deference to the military produced a string of litigation losses.²⁵⁷ Although some courts, despite *Doe*, were willing to recognize some sort of privacy right in consensual homosexual conduct, they nonetheless consistently held that the military's interest in regulating homosexual conduct outweighed the privacy rights of the individual servicemember.²⁵⁸ Only one pre-*Hardwick* military decision, the District Court opinion in *BenShalom v. Secretary of the Army*²⁵⁹ avoided the homosexual conduct problem posed by *Doe* by distinguishing sex-

military decisions of this sort and pled with the military to reconsider its position, noting that "this is a distressing case." *Id.* at 6090-91.

For a more fully reasoned opinion holding that the Navy regulations banning homosexuality (which were similar to the Air Force regulations in *Matlovich*) are constitutional, see Judge Gesell's initial opinion in *Berg v. Claytor*, 436 F. Supp. 76, 79-81 (1977), vacated and remanded, 591 F.2d 849, 851 (D.C. Cir. 1978), decided at about the same time.

²⁵⁷ The *Matlovich* and *Berg* cases were consolidated at the appellate level. The D.C. Circuit did not address the constitutional issues, holding instead that the Air Force and the Navy had failed to explain adequately why these two men had been dismissed under the then discretionary policy of dismissal for homosexuality. See *Berg*, 591 F.2d at 851; *Matlovich*, 591 F.2d at 855. On remand, Gesell ordered reinstatement for both men. *Matlovich v. Secretary of the Air Force*, 24 Empl. Prac. Dec. (CCH) ¶ 31,254, at 17,624 (D.D.C. 1980). To avoid reinstatement the Defense Department offered both men a cash settlement to drop the case. Shilts, *supra* note 9, at 363. Ultimately, upon the advice of their attorneys and in light of increasing hostility to gay cases in the federal courts, both men accepted the offer. *Id.* at 365-71. The decision was harder for *Matlovich* because he sincerely loved the military and wanted to stay in. *Id.*

The string of losses in military cases included *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) and *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

²⁵⁸ See, e.g., *Beller*, 632 F.2d at 809-10 (holding that the government interests outweigh whatever privacy interests may exist); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228 (10th Cir. 1984) (concluding that even if constitutionally protected interests were implicated, the Army's interests outweighed them); *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1382-83 (finding that whatever autonomy rights exist are outweighed by the importance of the military setting), cert. denied, 454 U.S. 864 (1981). These cases are also discussed in Richard B. Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenberg v. Zech*, 10 Dayton L. Rev. 767, 771 n.21 (1985). To the extent any of these cases accorded heightened scrutiny to homosexual sodomy, they have been effectively reversed by *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that homosexual sodomy is entitled to mere rational basis review).

²⁵⁹ 489 F. Supp. 964 (E.D. Wis. 1980), *aff'd* in part and vacated in part, 776 F.2d 1049 (1985) (*per curiam*).

ual preference from conduct and finding constitutional protection for the former.²⁶⁰

Of the military cases decided after *Doe* and before *Hardwick*, only two cases were litigated as pure "status" cases.²⁶¹ Miriam BenShalom identified herself as a lesbian, but did not admit to any specific sexual conduct. Nor was there any evidence of sexual conduct in her case. BenShalom won her case and was reinstated.²⁶² James Woodward also self-identified as gay in *Woodward v. Moore*.²⁶³ As reported by the District Court:

In September, 1974, after Woodward was seen in an officers' club associating with an enlisted man who was being separated from duty for homosexual activities, he admitted to his commanding officer that he had homosexual tendencies. Because of these matters plaintiff was requested to resign. He refused to do so, explaining that he wanted to finish his term of obligated service.²⁶⁴

Woodward never admitted to any sexual conduct and no evidence of sexual conduct was proffered. He was removed from active duty and the action was validated by the District Court.²⁶⁵ Although the Navy was subsequently ordered to reconsider this decision in light of the

²⁶⁰ *Id.* at 975.

²⁶¹ The two cases are *BenShalom* and *Woodward v. Moore*, 451 F. Supp. 346 (D.D.C. 1978), *aff'd* sub nom. *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). In addition, see *Lauritzen v. Secretary of the Navy*, 546 F. Supp. 1221 (C.D. Cal. 1982), *rev'd* and *remanded*, 736 F.2d 550 (9th Cir. 1984) (involving litigation over award of attorney's fees against the Navy and in favor of a woman who had been threatened with discharge after confessing lesbian tendencies to a psychiatrist; she had obtained full relief from the Board for the Correction of Naval Records, thereby removing her substantive complaint against the Navy from the district court's consideration).

²⁶² *BenShalom*, 489 F. Supp. at 977. The government dropped its appeal, but nonetheless refused to reinstate BenShalom. She brought a writ of mandamus action to require reinstatement and the Seventh Circuit ruled in her favor. *BenShalom v. Secretary of the Army*, 826 F.2d 722 (7th Cir. 1987). However, after winning this first round of litigation and earning recognition as the only lesbian to be reinstated after challenging the military regulations, she found herself faced with a second round of litigation when her enlistment expired. The army refused to allow her to reenlist, forcing her to sue again. She won at the district court level, which ordered reenlistment, but the holding was reversed by the court of appeals. *BenShalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis. 1989), *rev'd*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

²⁶³ 451 F. Supp. 346.

²⁶⁴ *Id.* at 347.

²⁶⁵ *Id.* at 349.

Matlovich and *Berg* cases,²⁶⁶ the Navy refused to reinstate him.²⁶⁷ Woodward's appeal of this decision occurred in the post-*Hardwick* years and was not concluded until 1990 when the Supreme Court ultimately denied certiorari.

The other pre-*Hardwick* military cases involved admissions of sexual activity, rarely described with much specificity,²⁶⁸ and in at least one case, proof of criminal sodomy.²⁶⁹ Because these cases were litigated in the pre-*Hardwick* era, during a time in which many litigators believed that, despite *Doe*, private consensual sexual conduct enjoyed

²⁶⁶ *Woodward v. Moore*, 25 Fair Empl. Prac. Cas. (BNA) 695, at 696 (D.D.C. Mar. 13, 1991) (reasoning that under *Matlovich* and *Berg*, the Secretary of the Navy may consider homosexuality as a grounds for removal from active duty, but must nonetheless give reasons for doing so in individual cases); see supra note 257 for a discussion of *Matlovich* and *Berg*.

At the time, the military's policy against gays allowed for the discretionary retention of some gays. That policy was changed in 1981 when the Department of Defense issued directive 1332.14 (revised and reissued in 1982), announcing a policy against retaining any homosexuals in the service. See 32 C.F.R. § 41 (1982). For a brief discussion of this history, see *Sexual Orientation and the Law* § 6.02[2] (Roberta Achtenberg & Barbara J. Gilchrist eds., 1992).

²⁶⁷ *Sec Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (upholding the Navy's decision), cert. denied, 494 U.S. 1003 (1990).

²⁶⁸ The *Matlovich* case gives the most specific description of sexual conduct. See supra note 233. As reported in the other cases, service members admitted the following conduct:

On appeal, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981), was consolidated with two other cases, *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977) and *Miller* (unreported). The conduct in the case of Mary Saal was an admission of homosexual relations and an indication "that she intended to continue her homosexual relationship." 632 F.2d at 793. No specific sexual acts were described. Plaintiff Miller "admitted that he had participated recently in homosexual acts with two Taiwanese natives while he was stationed in Taiwan." 632 F.2d at 794. The acts were not further specified. Beller admitted that he had "engaged in sex with males." *Id.* The specific type of sex is not described.

In *Berg*, the court stated that "Berg signed a statement admitting to participation in homosexual activity both before and during his service in the Navy," although the exact nature of that activity is never described. 436 F. Supp. at 78-79.

The appellant in *Dronenberg*, was found to have "repeatedly engaged in homosexual conduct in a barracks on the Navy base." 741 F.2d at 1389.

Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) was a fraudulent enlistment case based on the service member's revelation to superiors that he was gay. Rich fought the discharge, claiming that his sexual identity was not fully formed when he enlisted. He had been married and fathered a son. He made the following statement regarding sexual identity: "My earlier experience had been heterosexual followed by isolated episodes with my own sex." *Id.* at 1223. No specific sexual conduct was identified and the court relied primarily on declarations of gay identity to uphold the discharge.

²⁶⁹ *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1378 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981). Hatheway had been convicted of homosexual sodomy under the military's sodomy law.

some constitutional protection,²⁷⁰ conduct was freely admitted. Litigation strategy in military cases was to emphasize the private and consensual nature of the conduct, as well as its irrelevance to job performance.²⁷¹

c. Other Public Employment

Provided public employees could show a property or liberty interest in their jobs, *Norton v. Macy* guaranteed them some minimal degree of protection under the due process clause. Under *Norton*, even if an employee had engaged in homosexual conduct, due process required the employer to show that the conduct affected the employee's job performance before the employee could be fired.

A different due process argument was required for public employees who could not prove the requisite property or liberty interest in their jobs. For example, a job applicant whose application was refused on grounds of the applicant's homosexual conduct would not be able to show the requisite property or liberty interest in the sought-after job. The job applicant would have no more than a mere expectation in the job, and mere expectations are not property.²⁷² The job applicant's constitutional claim would have to be based on a due process theory different from that of *Norton*. In particular the job applicant would have to argue that the job denial punished constitutionally protected homosexual conduct. *Doe's* failure to protect homosexual conduct from criminal prosecution made it easier for post-*Doe* cases to deny protection to homosexuals who merely lost job opportunities as a consequence of engaging in criminal sexual conduct.

In *Childers v. Dallas Police Department*,²⁷³ a federal district court upheld the defendant's decision not to hire plaintiff, an "admitted[]

²⁷⁰ At least some courts apparently agreed. See *supra* note 258.

²⁷¹ *Matlovich*, for example, initially declined to answer questions about sexual conduct, *Shilts*, *supra* note 9, at 203, but later described the conduct as private and never with service personnel. See *supra* note 233; see also *Berg*, 591 F.2d at 850 (admitting to homosexual activity but denying alleged conduct with an enlisted sailor).

²⁷² See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (discussing how due process rights apply to property interests but not to mere expectations); *Perry v. Sinderman*, 408 U.S. 593, 599 (1972) (same).

²⁷³ 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd*, 669 F.2d 732 (5th Cir. 1982). *Childers* was a case brought by the ACLU.

homosexual,”²⁷⁴ for the the property division of the police department. Noting that “[t]he police department has no policy regarding sexual preference, only sexual practice,”²⁷⁵ the court concluded that “Childers was not hired because of his active and frequent homosexual conduct.”²⁷⁶ The court thus avoided the argument that pure status might be entitled to constitutional protection by concluding that homosexual conduct, not status, was at issue.

The plaintiff made two constitutional claims that required the court to focus on the offending conduct, a substantive due process claim and a First Amendment claim.²⁷⁷ Both claims were rejected by the court in a decision that is next to impossible to decipher because the description of the offending conduct is so horribly muddled. For example, according to the court’s own statement of the facts at the beginning of the case, the only homosexual conduct known to the police department at the time it decided not to hire Childers was his admission that he was gay, that he was a member of the Metropolitan Community Church (“MCC”),²⁷⁸ that he had a “spouse,” and that he had taken part in gay pride marches as well as other demonstrations in favor of gay rights.²⁷⁹ Furthermore, despite the fact that “Childers refused to answer interrogatories and deposition questions about his relationship with Donald Armstrong,”²⁸⁰ the court concluded that “[t]he overriding reason that the Plaintiff was not hired was because he admitted to engaging in homosexual conduct prohibited by Texas penal statutes and was thereby in violation of police department regulations.”²⁸¹ The judge did not explain how he came to this conclusion, nor when it was that plaintiff admitted to criminal consensual

²⁷⁴ Id. at 136. Childers admitted to both homosexual preference and homosexual practice. Id. Although the court does not say exactly what sex acts Childers admitted, the court does say that Childers admitted to sexual conduct that violated the Texas sodomy statute. Id. at 147 n.21.

²⁷⁵ Id. at 147 n.20.

²⁷⁶ Id.

²⁷⁷ There was also a procedural due process claim, which was rejected because the court found no property or liberty interest at stake. Id. at 143-45. An equal protection claim was rejected as well. Id. at 147 n.22.

²⁷⁸ MCC is a church whose ministry is directed to the lesbian and gay community. Id. at 137.

²⁷⁹ Id. at 137-38.

²⁸⁰ Id. at 145 n.17. Donald Armstrong was the man Childers had referred to as his “spouse.”

²⁸¹ Id. at 142-43 n.13.

sodomy. And if the revelation occurred at trial, as seems most plausible,²⁸² the judge never explained how this subsequent revelation was sufficient grounds for the department's decision not to hire Childers, which had obviously been made earlier.

Claiming that Childers was rejected because he engaged in criminal sodomy certainly made it easier for the court to deny the substantive due process claim. The court initially concluded that *Doe* was dispositive because the Court in that case had apparently determined there was no "special constitutional protection" for homosexual sodomy.²⁸³ Alternatively, the *Childers* court reasoned that even if there were special constitutional protection against criminal prosecution for homosexual conduct,²⁸⁴ the police department need only meet the lower rational basis test to support its decision not to hire Childers:

The situation here is not one where the State is seeking to use its criminal processes to coerce persons to comply with the moral judgments of the majority. Instead, this case requires only an assessment of a police departments' [sic] actions in refusing to hire into a sensitive position one whose *conduct was in flagrant violation* of police regulations. As such, this Court need only determine whether the police department's actions were rationally related to a legitimate government end. I conclude that the government's interests far outweigh any interest Childers had in constitutional protection for his homosexual behavior.²⁸⁵

If the court is referring to criminal consensual sodomy as the relevant conduct, then it is not clear how such conduct was in *flagrant* violation of the regulations. The conduct did not occur in public. Childers was never arrested for such conduct. Nor did he talk about such conduct in public. The only possible "flagrant conduct" in evidence was Childers's participation in gay rights demonstrations. The

²⁸² Childers was an activist and was represented by the ACLU in this litigation. One of their claims at trial was that the Texas sodomy statute was unconstitutional in that it violated Childers's privacy rights. To make this claim, Childers presumably was willing to admit to conduct covered by the statute.

²⁸³ *Childers*, 513 F. Supp. at 146.

²⁸⁴ Childers argued that the summary affirmance in *Doe* had not finally decided the constitutional issue regarding his right to privacy claim. He argued, as did other post-*Doe* plaintiffs, that the Court's subsequent decision in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), indicated that a plurality of the Court had not yet decided what the limits to the right of privacy were and that the right might well extend to all private consensual behavior among adults. *Id.*

²⁸⁵ *Id.* at 146 (emphasis added).

court appears to conflate status and sexual conduct by suggesting that one who is “flagrant” (i.e., conspicuously open)²⁸⁶ about one’s status is also “flagrant” about one’s sexual conduct.

This conflation of status and conduct is even more apparent in the court’s rational basis analysis:

There is legitimate concern about tension between known and active homosexuals and others who detest homosexuals. There are also legitimate doubts about a homosexual’s ability to gain the trust and respect of the personnel with whom he works. Moreover, the police department could rationally conclude that tolerance of homosexual conduct might be construed as tacit approval, rendering the police department subject to approbation [sic] and causing interference with the effective performance of its function.²⁸⁷

The first two sentences in this passage are obviously about homosexual status rather than conduct. The last sentence refers to homosexual conduct without specifying the type of conduct. It is difficult to understand how the police department could be viewed as tolerating private consensual sexual conduct of which it had no direct knowledge. Perhaps the court meant that toleration of “known homosexuals” might be construed as tacit approval of homosexual sexual conduct.

Childers was a known homosexual because he willingly revealed his sexual orientation. He also was active in the gay community and admitted to marching in two gay pride parades. These facts were known at the time he applied for the job with the police department. No specific facts were known at that time about his sexual conduct. Thus, it seems unlikely that the decision not to hire him was based on sexual conduct. The court’s due process constitutional analysis should have focused on the real reason for the governmental decision, that Childers was too open about his sexual orientation.

The court did focus on this reason for the police department’s rejection of Childers when it analyzed his First Amendment claim. In denying the claim, the court emphasized the differences between those cases in which governmental employees were too open about their

²⁸⁶ “Flagrant” means conspicuous, but it also carries a particularly negative connotation. Thus, it means being conspicuously open in a negative, rather than positive, way. See Webster’s Third New International Dictionary 862-63 (1972).

²⁸⁷ *Childers*, 513 F. Supp. at 147.

homosexuality and those cases in which they were not,²⁸⁸ and noted that only plaintiffs in the latter category won their cases. "A careful reading of [the 'winning'] cases will demonstrate . . . that in none of the cases was any substantial overt homosexual conduct involved."²⁸⁹ Losing plaintiffs, by contrast, lost because they openly and publicly flaunted their homosexuality.²⁹⁰ In particular, public flaunting seems to include gay men applying for marriage licenses.²⁹¹ One losing plaintiff once kissed another man in public.²⁹² Like Childers, other losing litigants had participated in gay rights demonstrations.²⁹³

The *Childers* court accurately summarized the difference between cases in which gay and lesbian employees won job protection and those in which they lost.²⁹⁴ To win, an employee must have remained as closeted as possible. Speaking out publicly can result in loss of employment despite the fact that such speech warrants a certain degree of First Amendment protection.²⁹⁵ Generally speaking, public employees are limited by the legitimate interests of their employers in protecting the public's image of the employer.²⁹⁶

²⁸⁸ *Id.* at 141. Plaintiffs were too open in *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1977), and *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972). Plaintiff was sufficiently discreet when hired in *Acanfora v. Board of Educ.*, 359 F. Supp. 483 (D.Md. 1973), aff'd, 491 F.2d 498 (4th Cir.), cert. denied 419 U.S. 836 (1974), and throughout in *Aumiller v. University of Del.*, 434 F. Supp. 1273 (D. Del. 1977).

²⁸⁹ *Childers*, 513 F. Supp. at 147 n.20. The court puts *Acanfora* and *Aumiller* in this category as well. *Id.* at 141 n.10.

²⁹⁰ See *Singer*, 530 F.2d at 256; *McConnell*, 451 F.2d at 196.

²⁹¹ *Singer*, 530 F.2d at 249; *McConnell*, 451 F.2d at 195.

²⁹² *Singer*, 530 F.2d at 249.

²⁹³ See *Singer* and *McConnell*. See also *Aumiller*, 434 F. Supp. at 1293 (pointing out that *Aumiller* had not engaged in comparable public conduct and was thus entitled to protection.) The *Childers* court cites *Aumiller* for this point. *Childers*, 513 F. Supp. at 141 n.10.

²⁹⁴ However, the *Childers* court may have unduly relied on *Singer*, in light of the fact that *Singer* was vacated and remanded.

The continuing vitality of *Singer* is questionable because it was vacated and remanded by the Supreme Court, based on the Solicitor General's suggestion that the action of the CSC should be reconsidered in light of recently adopted changes in the Civil Service Personnel Manual which greatly restricted the ability of the CSC to base employment decisions on considerations of homosexuality.

Aumiller, 434 F. Supp. at 1294.

²⁹⁵ *Childers*, 513 F. Supp. at 140.

²⁹⁶ Compare *Pickering v. Board of Educ.*, 391 U.S. 563, 571-74 (1968) (protecting an employee's speech if the speech is about matters of public concern) with *Connick v. Myers*, 461 U.S. 138, 153-54 (1983) (upholding employer's sanction of employee where the employee's speech was about matters of only personal interest). See generally Cynthia L. Estlund, Speech

The story of Marjorie Rowland is another case in point.²⁹⁷ Rowland, a high school guidance counselor, confided in a co-worker that she was bisexual and currently in a lesbian relationship. Shortly thereafter she was transferred to a new post. Ultimately, her contract was terminated.²⁹⁸

The trier of fact specifically found that "but for" her private expressions regarding her sexual preference, Rowland's employment would not have been terminated.²⁹⁹ On this basis, the District Court ruled in her favor, both on First Amendment and equal protection grounds.³⁰⁰ The Court of Appeals for the Sixth Circuit reversed, finding neither a violation of Rowland's free speech rights nor a violation of her equal protection rights.³⁰¹

In the court's view, Rowland was fired, at least in part, for talking about the fact that she was bisexual. And, although such talk may look a lot like "speech," this particular talk was not speech protected by the First Amendment because it was private speech unrelated to issues of public concern.³⁰² Furthermore, as to the equal protection issue, the Court of Appeals found that the jury's findings of fact did not specify whether she had been fired for being a bisexual or for talking about it.³⁰³ The court obviously presumed no equal protection

on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1 (1990) (discussing the development and implications for First Amendment law of these two cases).

²⁹⁷ See *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).

²⁹⁸ See *id.* at 446 for a discussion of the facts of the case.

²⁹⁹ *Id.* at 447-48.

³⁰⁰ *Id.* at 448.

³⁰¹ *Id.* at 451-52.

³⁰² *Id.* at 449 (relying on *Cornick v. Myers*, 461 U.S. 138 (1983)).

³⁰³ *Id.* at 450. The court also claimed that there was insufficient evidence for the fact finder to conclude that heterosexuals would have been treated differently because plaintiff failed to introduce any evidence of how heterosexuals were treated. *Id.* This was certainly careless lawyering, although one can understand how a lawyer might hesitate to put the employer on the stand and ask: "And how do you treat your heterosexual employees when they reveal their sexual orientation in private?" The reason the question sounds silly is that the heterosexual presumption relieves most heterosexuals from having to state explicitly what their sexual preference or orientation is. There are, however, countless less explicit ways in which private sexual facts about preference are revealed. For example, whenever an employee announces an engagement, a wedding, or a date with a person of the opposite sex, the person is identifying herself or himself as heterosexual. Presumably there were many employees who had made such indirect confessions of heterosexuality and were not fired as a result. One wonders why the court thought it necessary for plaintiff to prove how heterosexuals were treated.

violation would have occurred in the event she had been fired primarily for talking about it.³⁰⁴

Rowland presented an opportunity for the United States Supreme Court to clarify what its summary affirmance in *Doe* meant and to pronounce a clear rule regarding the constitutional rights of gay men and lesbians.³⁰⁵ *Rowland* was a particularly appealing case to take to the Supreme Court because it raised both equal protection and First Amendment claims, as well as questions about the dividing line between status and conduct. The privacy claim that lay at the heart of the *Doe* case was not directly implicated in *Rowland*, but it would have been appropriate for the Court to have discussed, within the context of the equal protection and First Amendment claims, whether consensual lesbian sex fell within the privacy penumbra.

The *Rowland* petition for certiorari was before the Court shortly before certiorari was granted in *Hardwick*.³⁰⁶ The Court denied the petition in *Rowland* with only Justices William J. Brennan and Thurgood Marshall dissenting.³⁰⁷ In his written dissent, Justice Brennan stated that "[w]hether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed, and which have left the lower courts in some disarray."³⁰⁸

³⁰⁴ Id. The court found other reasons to reverse the equal protection holding of the District Court. See *supra* note 303. But had it not done so, it would have remanded to determine the primary motivation for the action against Rowland. Was she fired for being gay or for talking about it? See *Rowland*, 730 F.2d at 450 (indicating that it was impossible on appeal to know whether the jury's decision was based on being gay or talking about it).

³⁰⁵ Following its summary affirmance in *Doe*, the Supreme Court had decided another privacy case, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), in which the court left open the possibility that *Griswold* might reach far enough to protect private homosexual sexual conduct. Id. at 688 n.5. State and federal courts relied on *Carey* to question the precedential authority of *Doe*. See *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228 n.8 (10th Cir. 1984) (discussing state and federal cases that consider *Carey*'s effect on *Doe*).

³⁰⁶ Certiorari was denied in *Rowland* on February 25, 1985, 470 U.S. 1009 (1985), and rehearing on the certiorari petition was denied April 22, 1985. 471 U.S. 1062 (1985). The Court of Appeals for the Eleventh Circuit decided *Hardwick* on May 21, 1985, 760 F.2d 1202 (11th Cir. 1985), and certiorari was granted on November 4, 1985. 474 U.S. 943 (1985).

³⁰⁷ *Rowland*, 470 U.S. at 1009. Justice Powell did not participate in the decision.

³⁰⁸ Id. at 1015-16.

Instead of granting certiorari to answer these important questions, the Court waited and granted certiorari in *Hardwick*,³⁰⁹ a case posing only the substantive due process question: Does *Griswold* extend to private consensual same-sex sexual conduct? The *Hardwick* Court answered no to this question, leaving the courts in continued disarray as to the First Amendment and equal protection questions.

Shortly after the Supreme Court denied certiorari in *Rowland*, it summarily affirmed a Tenth Circuit opinion dealing with the constitutionality of the regulation of public speech about homosexuality.³¹⁰ *National Gay Task Force v. Board of Education of Oklahoma City*,³¹¹ was a constitutional challenge to an Oklahoma statute that authorized dismissal of teachers for engaging in "public homosexual conduct or activity."³¹² The Court of Appeals for the Tenth Circuit upheld that portion of the statute related to public sexual conduct defined as activity,³¹³ but struck down that portion of the statute related to public homosexual conduct defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity."³¹⁴ The court found that the statute would permit a teacher to be fired for

³⁰⁹ In May 1993 new information, derived from Justice Marshall's papers, about the certiorari decision in *Hardwick* was made public. Whereas Justices Brennan and Marshall had voted to grant certiorari in the *Rowland* case (an anti-gay rights decision), only Justice Byron R. White and Chief Justice Warren Burger, in the first round of voting, favored the granting of certiorari in *Hardwick* (a pro-gay rights decision). If Justices Brennan and Marshall signed on, the vote in favor of certiorari would be four, the requisite amount. At the time, the only meaningful indication of the Justices' individual positions on gay rights issues was the per curiam opinion in *National Gay Task Force v. Board of Educ. of Okla. City*, 470 U.S. 903 (1985), in which the vote was four to four with Justice Powell not participating. Powell apparently indicated that he might be willing to side with the four other pro-gay votes in the *Hardwick* case. This possibility for a pro-gay ruling tempted both Justice Brennan and Justice Marshall to vote in favor of granting certiorari. In the end, however, Justice Brennan backed down, afraid that the ultimate decision by the Court was likely to reverse the pro-gay decision below. Then Justice Rehnquist signed on to grant certiorari and a fourth vote was needed. Justice Marshall decided to take the risk and signed on as the necessary fourth vote. The risk did not pay off as Justice Marshall had hoped because Justice Powell decided to vote with the conservatives to uphold the Georgia sodomy law. After retirement, Justice Powell publicly recanted, stating that he probably should have voted against the sodomy law. See Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. Times, May 25, 1993, at A1; Chris Bull, *A Hard Look at Hardwick*, The Advocate, June 29, 1993, at 31-32.

³¹⁰ *National Gay Task Force*, 470 U.S. 903 (per curiam), aff'g 729 F.2d 1270 (10th Cir. 1984).

³¹¹ 729 F.2d 1270.

³¹² Id. at 1272.

³¹³ Id. at 1273.

³¹⁴ Id. at 1274.

advocating changes in the law regarding private homosexual sexual activity.³¹⁵ Such a result would be contrary to First Amendment principles, despite the fact that teachers are considered to have restricted First Amendment rights.³¹⁶

Despite these holdings, the case presented no issues regarding private sexual conduct or private speech. Furthermore, because the statute was facially attacked as overbroad, it is not clear where the Tenth Circuit would draw the line on protected public speech by teachers regarding homosexuality. And because the Supreme Court rendered no opinion in the case, it is not clear what the Court's reasoned view of the matter is.

d. Recognition of Student Organizations

The one area in which *Doe* failed to have any meaningful negative impact was in litigation over university recognition of gay and lesbian student organizations. The first gay and lesbian student organization was formed in 1967 at Columbia University. It was chartered as the Student Homophile League and received sufficient media attention to encourage the formation of similar groups at Cornell, New York University, and Stanford.³¹⁷ The formation of such groups at more conservative state universities caused a certain degree of consternation for university presidents and regents who had to answer to the state's taxpayers. For example, when a student group formed the Committee on Gay Education at the University of Georgia, the university responded by changing its rules regarding the recognition of student organizations. Whereas the university had previously required student organizations to seek "recognition" and "approval," the rules were changed to require no more than "registration" of all student organizations.³¹⁸ When the university denied the student group's request to host a conference and a dance, however, the group brought suit in federal district court. *Wood v. Davison*³¹⁹ is the first reported

³¹⁵ *Id.*

³¹⁶ *Id.* (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

³¹⁷ D'Emilio, *Sexual Politics*, *supra* note 11, at 209-10.

³¹⁸ See *Wood v. Davison*, 351 F. Supp. 543, 545 (N.D. Ga. 1972).

³¹⁹ *Id.* *Wood* cites an unreported California trial court opinion in favor of a similar gay and lesbian student group. *Id.* at 546 (citing *Associated Students of Sacramento State College v. Butz* (Super. Ct. 1971)).

case recognizing the First Amendment associational rights of a gay and lesbian student group.

Other decisions followed, all ultimately ruling in favor of the gay and lesbian student group.³²⁰ *Gay Students Organization of the University of New Hampshire v. Bonner*³²¹ emphasized that official recognition alone was not sufficient protection of First Amendment associational rights.³²² The university must also support the organization's social activities, including dances.³²³ Although some university officials objected to social events sponsored by gay and lesbian student groups on the grounds that the events might lead to criminal activity (i.e., consensual sodomy),³²⁴ this objection was uniformly dismissed in decisions handed down both before and after the summary affirmance in *Doe*.³²⁵ In the student organization cases, therefore,

³²⁰ See *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 658-63 (1st Cir. 1974) (holding that university's efforts to restrict campus social functions of gay and lesbian student organization violated First Amendment protections of the right to associate); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 165-67 (4th Cir. 1976) (holding that university's refusal to register gay student organization violated First and Fourteenth Amendments); *Gay Lib v. University of Mo.*, 558 F.2d 848, 852-57 (8th Cir. 1977) (holding that First Amendment rights were violated when university refused to recognize homosexual student organization even if the organization would tend to perpetuate or expand homosexual behavior), cert. denied, 434 U.S. 1080 (1978); *Gay Activists Alliance v. Board of Regents of Univ. of Okla.*, 638 P.2d 1116, 1122-23 (Okla. 1981) (holding that student group has First Amendment right to organize and be recognized by university); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1324-33 (5th Cir. 1984) (recognizing First Amendment right of association), cert. denied, 471 U.S. 1001 (1985); *Student Services for Lesbians/Gays and Friends v. Texas Tech Univ.*, 635 F. Supp. 776, 781-82 (N.D. Tex. 1986) (holding university officials not liable for damages for initial failure to recognize gay student group because law not was sufficiently clear until Supreme Court's denial of certiorari in *Texas A & M* case).

³²¹ 509 F.2d 652.

³²² Id. at 658-59.

³²³ "Considering the important role that social events can play in individuals' efforts to associate to further their common beliefs, the prohibition of all social events must be taken to be a substantial abridgment of associational rights, even if assumed to be an indirect one." Id. at 659-60.

³²⁴ See e.g., id. at 662; *Wood*, 351 F. Supp. at 546 n.5.

³²⁵ Georgia had a statute prohibiting sodomy at the time *Wood* was decided, but the court refused to assume that a student social affair would lead to criminal activity. *Wood*, 351 F. Supp. at 548.

New Hampshire also prohibited sodomy at the time of the *Bonner* decision, but the First Circuit dismissed the university's concern about inappropriate behavior, stating:

[I]f a university chose to do so, it might well be able to regulate overt sexual behavior, short of criminal activity, which may offend the community's sense of propriety, so long as it acts in a fair and equitable manner. The point in this case is that the district court has found no improper conduct, and it does not appear that the university ever

noncriminal conduct by homosexuals such as talking about their lifestyles and socializing with others was fully protected. Nor was it assumed that where homosexuals might gather for social purposes, criminal activity was likely to follow.

The student organization cases are interesting because they occurred at a time when university employees could be fired for speaking out on gay rights issues.³²⁶ Although students have historically enjoyed fewer constitutional rights than other members of society,³²⁷ their right to form gay and lesbian organizations has been consistently upheld under the First Amendment. The gay student group cases succeeded in part because they relied on earlier cases supporting recognition of other unpopular student groups.³²⁸ University employees, by contrast, were hindered by the Supreme Court's recognition that the speech of public employees could be limited under a

concerned itself with defining or regulating such behavior. Defendants sought to cut back GSO's social activities simply because sponsored by that group. The ban was not justified by any evidence of misconduct attributable to GSO, and it was altogether too sweeping.

Bonner, 509 F.2d at 663.

Gay Alliance involved a student organization in Virginia. Citing to the Virginia statute and to *Doe*, the Fourth Circuit nonetheless found:

There is no evidence that GAS is an organization devoted to carrying out illegal, specifically proscribed sexual practices. . . .

It follows that even if affording GAS registration does increase the opportunity for homosexual contacts, that fact is insufficient to overcome the associational rights of members of GAS. Given the right to exclude individuals who are convicted of practicing proscribed forms of homosexuality, or whose homosexual conduct, although not proscribed, materially and substantially disrupts the work and discipline at VCU, the suppression of associational rights because the opportunity for homosexual contacts is increased constitutes prohibited overbreadth.

Gay Alliance, 544 F.2d at 166 (citations omitted).

³²⁶ See, e.g., *McConnell v. Anderson*, 451 F.2d 193, 194 (8th Cir. 1971) (offer of employment as university librarian withdrawn after male plaintiff and another male applied for a marriage license), cert. denied, 405 U.S. 1046 (1972).

³²⁷ Students' First Amendment rights were recognized in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 510-14 (1969), and *Healy v. James*, 408 U.S. 169, 180 (1972). See generally Charles Allen Wright, *The Constitution on Campus*, 22 Vand. L. Rev. 1027 (1969) (arguing that the Constitution, and in particular the First Amendment, should apply to college campuses).

³²⁸ See, e.g., *Healy*, 408 U.S. 169 (involving students for a Democratic Society, a left wing student group); *University of S. Miss. Chapter of MCLU v. University of S. Miss.*, 452 F.2d 564 (5th Cir. 1971) (involving university chapter of the Mississippi Civil Liberties Union, which was active in civil rights litigation); *American Civil Liberties Union of Va. v. Radford College*, 315 F. Supp. 893 (W.D.Va. 1970) (involving Radford College chapter of the American Civil Liberties Union).

balancing test that considered the employer's interest in presenting a differing viewpoint to the public.³²⁹

Despite the universal success of student groups in asserting their First Amendment associational rights, no gay student organization case has ever been endorsed by the Supreme Court.³³⁰ As with *Rowland*, these cases presented the Court with the opportunity to speak out and clarify its position on gay rights.³³¹ Nonetheless, it refused to do so. No student organization case has raised the right of association issue since the Court ruled negatively in *Hardwick*.³³²

³²⁹ See *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Estlund*, *supra* note 296, at 4-8.

³³⁰ None of the gay student organization cases has ever been cited with approval by the Supreme Court for any legal point. Of greater importance is Justice Rehnquist's dissent from the denial of certiorari in *Gay Lib v. University of Mo.*, 434 U.S. 1080 (1978) (Rehnquist, J., dissenting). See *infra* note 331 for further discussion.

³³¹ See *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978), denying cert. to *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977). Justices Rehnquist and Blackmun dissented, with Rehnquist identifying the issue as whether a group had a First Amendment right to associate for purposes of advocating change in the law despite the fact that the very act of association had been found by the trier of fact to be likely to increase criminal activity. *Id.* at 1080-81. Focusing on the proposed activity of the student organization, Rehnquist continued:

While [the students] disavow any intent to advocate present violations of state law, the organization intends to engage in far more than political discussion. Among respondent *Gay Lib*'s asserted purposes are the following:

"3. *Gay Lib* wants to provide information to the vast majority of those who really don't know what homosexuality or bi-sexual behavior really is. Too much of the same prejudice is now directed at gay people just as it is directed at ethnic minorities.

"4. *Gay Lib* does not seek to proselytize, convert, or recruit. On the other hand, people who have already established a pattern of homosexuality when they enter college must adjust to this fact.

"5. *Gay Lib* hopes to help the gay community to rid itself of its subconscious burden of guilt. Society imprints this self-image on homosexuals and makes adjustment with the straight world more difficult."

Expert psychological testimony below established the fact that the meeting together of individuals who consider themselves homosexual in an officially recognized university organization can have a distinctly different effect from the mere advocacy of repeal of the State's sodomy statute. . . .

. . . From the point of view of the University . . . the question is . . . akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined. The very act of assemblage under these circumstances undercuts a significant interest of the State which a plea for the repeal of the law would nowise do.

Id. at 1083-84.

³³² But see *Gay and Lesbian Student Ass'n v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988), decided after *Hardwick*, in which the court held that the university's failure to fund the gay

*B. Bowers v. Hardwick**1. Litigating the Case*

In 1986, the issue raised in *Doe* was finally decided in a fully reasoned opinion by the United States Supreme Court. In *Bowers v. Hardwick*,³³³ the Court, by a vote of five to four, announced that the constitutional right to privacy did not extend to private consensual homosexual sodomy.³³⁴ Justice Byron R. White, writing for the court, stated: "Proscriptions against that conduct have ancient roots."³³⁵

On August 3, 1982, Michael Hardwick was arrested by an Atlanta policeman for committing the crime of sodomy with a consenting adult male in the privacy of his own bedroom. The policeman making the arrest happened upon the event solely because he was there to issue an unrelated warrant. A slightly groggy house guest had answered the door and waved the policeman into the home. The policeman witnessed the commission of the crime through a slightly ajar bedroom door. Charges were brought as a result of the arrest and, after a hearing in the Municipal Court of Atlanta, Hardwick was bound over to the Superior Court. At that point the District Attorney's office decided not to prosecute the case further. Hardwick,³³⁶ with the help of the ACLU, decided to bring suit in federal court asking for a declaratory judgment that the Georgia statute criminalizing sodomy was unconstitutional.³³⁷

and lesbian student group violated the First Amendment because the decision was content-based. This case did not decide whether the university was under an obligation to recognize or to fund the student group. But having recognized the group, the university was required to offer it funding on the same terms as other student groups, without discrimination as to the content of the group's political beliefs.

³³³ 478 U.S. 186 (1986).

³³⁴ *Id.* at 190.

³³⁵ *Id.* at 192.

³³⁶ A married couple, the Does, joined the suit, claiming their marital privacy rights were implicated as well because the Georgia statute on its face applies to married couples as well as homosexual couples. Their claim was dismissed for lack of standing. *Hardwick v. Bowers*, 760 F.2d 1202, 1206-07 (11th Cir. 1985). By contrast the court found that Michael Hardwick had standing to challenge the statute on the basis of his "past arrest . . . combined with the continuing resolve on the part of the State to enforce the sodomy statute against homosexuals and the authenticity of Hardwick's desire to engage in the proscribed activity in the future." *Id.* at 1206.

³³⁷ The Georgia statute provided, in part:

Citing *Doe*, the District Court dismissed Hardwick's claim.³³⁸ The Court of Appeals for the Eleventh Circuit reversed, avoiding the summary affirmance in *Doe* by positing that the Supreme Court's action in that case might reflect no more than its determination that the *Doe* plaintiffs, unlike Hardwick, lacked standing.³³⁹ On July 25, 1985, Georgia Attorney General Michael Bowers petitioned the Supreme Court for discretionary review of the decision and the writ of certiorari was granted on November 4, 1985.³⁴⁰

Michael Hardwick was represented by Kathy Wilde, an ACLU affiliate attorney in Atlanta. Litigation strategy and the development of arguments in the case quickly became an agenda item for the Ad Hoc Task Force to Challenge Sodomy Laws. By 1985, the Task Force had become an official project of Lambda Legal Defense and Education Fund. National meetings of gay rights litigators included Wilde and attorneys from other ACLU affiliates in states possessing sodomy statutes.³⁴¹ Wilde credited the Lambda project with providing a "legal think tank and a central place to discuss constitutional theory and litigation strategies."³⁴²

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

...

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. § 16-6-2 (Michie 1984).

³³⁸ The District Court opinion is not reported, but is included in the Joint Appendix filed with the Supreme Court briefs in the case. The opinion states:

As to plaintiff Hardwick, his arguments are foreclosed by the Supreme Court's affirmance of a three-judge district court decision upholding the constitutionality of the Virginia sodomy statute. *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). The Virginia statute challenged in that case is quite similar to the Georgia legislation in question here, and all the constitutional arguments made by Hardwick here were rejected in *Doe*.

Hardwick v. Bowers, No. C83-273A, slip op. at 18-19 (N.D. Ga. Apr. 15, 1983).

³³⁹ *Hardwick*, 760 F.2d at 1208. In finding that *Doe* was not dispositive, the Eleventh Circuit noted that "the [Supreme] Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' . . . and we do not purport to answer that question now." *Hardwick*, 760 F.2d at 1209 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n.5 (1977) (footnote omitted) (second alteration in original)).

³⁴⁰ 474 U.S. 943 (1985).

³⁴¹ In particular, Louisiana, Arkansas, and Missouri. See Lambda Update (Lambda Legal Defense and Education Fund, New York, N.Y.), Winter 1985, at 5.

³⁴² *Id.*

Hardwick was not the only sodomy challenge in the court system at that time, nor the only case on the agenda of the Ad Hoc Task Force. Another active participant in the think tank was Jim Barber, a Dallas attorney representing Donald Baker in a suit that challenged the Texas sodomy statute. Although certiorari was granted in *Hardwick* first, the Dallas case had been in the court system longer. Two weeks after Michael Hardwick was arrested in August 1982,³⁴³ and well before he filed suit in Georgia, a federal district judge in Dallas, Texas, ruled in *Baker v. Wade*³⁴⁴ that the Texas sodomy statute was unconstitutional both under a right to privacy and equal protection analysis.³⁴⁵ Unlike *Hardwick*, *Baker* was decided after a full trial.

Baker followed a tortuous route to the Supreme Court and thus *Hardwick* landed there first.³⁴⁶ In discussing litigation strategy, the Ad Hoc Task Force discussed whether the two cases should be consolidated at the Supreme Court level. Because the cases raised different constitutional issues, privacy in *Hardwick* and equal protection

³⁴³ Hardwick was arrested on August 3, 1982. See "Statement of the Case" in Respondent's Brief at 1, *Hardwick* (No. 85-140).

³⁴⁴ 553 F. Supp. 1121 (N.D. Tex. 1982), rev'd, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986). *Baker* was decided by the District Court on August 17, 1982. 553 F. Supp. at 1121.

³⁴⁵ *Baker*, 553 F. Supp. at 1134-45.

³⁴⁶ *Baker* was filed by individual plaintiff Donald Baker against the District Attorney of Dallas County, Henry Wade (the same Wade of *Roe v. Wade* fame) and Lee Holt, Dallas City Attorney. In order to assure that any affirmative ruling would be binding against all law enforcement officers in the state of Texas, the class of defendants included all city, county, and district attorneys in the State of Texas. The State of Texas intervened via its Attorney General. All city, county and district attorneys were notified of their right to intervene and not one of them elected to do so. Thus Wade and Holt were certified as the class representatives for the defendant class. When the plaintiff won, all then existing members of the class of defendants were given notice. Danny Hill, a newly elected District Attorney of Potter County, then filed a motion to intervene. Initially the Attorney General filed notice of appeal, but then withdrew the notice. District Attorney Hill then asked the Texas Supreme Court to require the Attorney General to file an appeal. The Texas Supreme Court refused. Hill then pursued a direct appeal on his own, asking the Fifth Circuit to reverse the pro-gay decision of the District Court. The panel decision held that Hill was not a proper representative of the class and thus had no legal standing to challenge the lower court opinion. Upon reconsideration en banc, the Fifth Circuit ruled (9 to 7) that Hill was a proper party and that, on the authority of *Doe* the district court must be reversed. See *Baker*, 769 F.2d at 291-92, for a discussion of the history of the case. After the rehearing was denied, Baker filed a certiorari petition with the Supreme Court, a petition that reached the court while *Hardwick* was under consideration.

in *Baker*,³⁴⁷ it was thought preferable to keep the arguments separate.³⁴⁸ The opportunity to argue *Baker* never arose, however. The Supreme Court denied certiorari in *Baker* only a week after handing down its decision in *Hardwick*.³⁴⁹

The *Hardwick* decision has been criticized by commentators on many grounds. One major criticism is that the decision went beyond the issue before the Court. The only issue before the Court was what level of scrutiny should be applied to privacy claims regarding intimate sexual conduct between same-sex couples. The Court rejected the heightened scrutiny standard and determined that rational basis review was all that was required.³⁵⁰ Rather than remand to the lower court to determine the rationality of the statute, the Court, without the benefit of any factual determinations, and without the benefit of full briefing on the issue,³⁵¹ determined that the statute was

³⁴⁷ The Virginia sodomy statute that had been at issue in the 1976 Supreme Court affirmation of *Doe* prohibited both homosexual and heterosexual sexual conduct. See Va. Code Ann. § 18.1-212 (1950) (as amended by 1960 Va. Acts 358). The Georgia statute in *Hardwick* similarly covered heterosexual and homosexual sodomy. See Georgia Code Ann. § 16-6-2 (Michie 1984). By contrast, the particular Texas statute at issue in *Baker* applied only to "deviate sexual intercourse" between persons of the same sex. Tex. Penal Code Ann. § 21.06 (West 1974). Thus, only the Texas case squarely presented an equal protection argument that homosexuals were treated differently from heterosexuals, a difference in treatment that the state is required to justify under the Fourteenth Amendment.

³⁴⁸ By this time Professor Laurence Tribe, who had agreed to argue *Hardwick* before the Supreme Court, was an active participant in the Task Force.

³⁴⁹ *Hardwick* was decided June 30, 1986 and certiorari was denied in *Baker v. Wade* on July 7, 1986.

³⁵⁰ *Hardwick*, 478 U.S. at 191-96.

³⁵¹ Most of the briefs on behalf of Respondent *Hardwick* argued in favor of "heightened scrutiny" on the theory that intimate sexual conduct between consenting adults is a fundamental right. See, e.g., Amicus Brief for Respondent, by Lambda Legal Defense and Education Fund et al., at 4, *Hardwick* (No. 85-140) (arguing that the fundamental right to privacy includes the right of adults to choose to engage in intimate sexual relations with persons of the same sex); Amicus Brief for Respondent, by Lesbian Rights Project et al., at 8-9, *Hardwick* (No. 85-140) (arguing that the right to privacy includes the right to make personal sexual decisions). Under this test, the State of Georgia would have to provide a compelling state interest for the criminal statute and show that the means were narrowly tailored to accomplish the state interest. In his third and final argument in the brief filed for Respondent *Hardwick*, Professor Tribe does argue that the public morality goal relied upon by the State of Georgia is not substantially advanced by the criminal statute. But the argument appears to be tied to a higher justification than rational basis. And it focuses on the sorts of facts than the State of Georgia ought to be required to prove upon remand. See Respondent's Brief at 25-29, *Hardwick* (No. 85-140).

The amicus brief submitted on behalf of National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, Los Angeles Lawyers for Human Rights, and California Lawyers for

rational.³⁵² Because the case was before the Court on a motion to dismiss, there was no record below from which the Justices could reasonably infer the state's justification for the statute.³⁵³ *Baker*, by contrast, had produced a full record.³⁵⁴

The post mortems on *Hardwick* continue. Would the case have come out differently if it had been argued by an openly gay lawyer who could have made the Court see the threat to dignity and self-respect posed by the Georgia statute? Was it wrong to focus so narrowly on the privacy aspects of the case?³⁵⁵ Would things have come

Individual Rights provides the most direct attack on the legitimacy of the state interest (public morality) and the means chosen to accomplish it (enactment of a virtually unenforceable statute regulating private consensual activity). However, these two arguments are set forth in the brief only after a full argument about the importance of the individual liberty interest at stake. See Amicus Brief for Respondent by National Gay Rights Advocates et al., at 4-19, *Hardwick* (No. 85-140). The brief argues that even if the individual interests are not fundamental they are "undeniably important" and thus "entitled to a significant degree of protection from governmental intrusion." Id. at 6. Thus, although the brief argues that the means (e.g., criminalization) is irrational, it does so only after asking for some degree of heightened scrutiny, rather than attacking the Georgia statute under mere rational basis analysis.

No brief for respondent ever argues in the alternative that even if mere rational basis review is the appropriate test, this case must be remanded for a factual determination of rationality.

³⁵² *Hardwick*, 478 U.S. at 196. The old presumption that statutes are constitutional generally supports a finding of rationality. But *Hardwick* was decided just one year after *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which, after failing to find mental retardation a suspect class, nonetheless struck down a zoning action against them on rational basis grounds. *Cleburne* was an equal protection case, but its invigorated rational basis review is nonetheless important.

³⁵³ *Hardwick*, 478 U.S. at 188-89; see also Thonias B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. Chi. L. Rev. 648, 651-52 (1987) (discussing how the court overstepped the proper scope of its decision).

³⁵⁴ See *Baker*, 553 F. Supp. at 1126-34 (summarizing the evidence put forth by opposing parties). Noting that the state did "not produce a single witness, or any other evidence, to support the alleged state interests of 'morality and decency, welfare and safety, and procreation,'" and completely discounting the testimony of the one witness who testified about the "state's supposed interest in 'public health,'" the District Court concluded that the "evidence presented at trial *did not* support any of these claims. Instead, it established that the state has no 'compelling interest' to justify § 21.06—and that, indeed, this statute is not even 'rationally related' to any 'legitimate state interest.'" Id. at 1142. In *Hardwick*, by contrast, the Supreme Court, relying on bald assertions in the Attorney General's brief, found that public morality was a rational basis for the Georgia statute. See 478 U.S. at 196.

³⁵⁵ A Marshall clerk at the time of the *Hardwick* decision praises Professor Tribe for the job he did at oral argument and does not believe the focus on privacy was a mistake. Daniel Richman, now a professor of law at Fordham University, says: "You can't fault Tribe for taking what seemed to be the most likely line of attack and not trying to cater to the idiosyncratic view of a single justice." Bull, *supra* note 309, at 32.

out differently if *Baker*, with its full record, had reached the Court first?

There are, of course, no answers to these questions. The only consensus seems to be that *Hardwick* has changed the course of gay rights litigation.³⁵⁶ In the federal courts at least, litigators now avoid privacy arguments and corresponding claims that sexual conduct is constitutionally protected. The conduct/status distinction, a distinction used by only some lesbian and gay parties in the post-*Doe* years of litigation, has now become the driving force in shaping new constitutional challenges to discrimination against gays and lesbians. Relying on the conduct/status distinction, gay men and lesbians as plaintiffs have challenged governmental discrimination in employment and other public spheres, always careful to separate questions about what they do in private from who they are in public.³⁵⁷

2. Litigating Around *Hardwick*

Hardwick was a major setback in the fight to end discrimination against gay men and lesbians. As a result, gay rights litigators, in the post-*Hardwick* era, have been forced to develop constitutional arguments that circumvent the *Hardwick* holding. There are several possible ways to litigate around *Hardwick*.

The most commonly employed arguments appear to be ones in which homosexual conduct and homosexual status are bifurcated. Such arguments acknowledge the ultimate holding in *Hardwick*, that states may criminalize certain homosexual conduct with constitutional impunity. However, the argument continues, this holding is not dispositive of another question raised in gay rights litigation: Can states discriminate against homosexuals as a class in matters unrelated to homosexual *sexual* conduct?³⁵⁸

This latter question is raised most often as an equal protection claim.³⁵⁹ If homosexuals, as a class, are treated differently from other

³⁵⁶ See Nan D. Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 543-53 (discussing how *Hardwick* will affect lesbian and gay rights claims).

³⁵⁷ See especially the military cases on conduct versus status discussed *infra* text accompanying notes 377-92.

³⁵⁸ For example, can a state refuse to admit a homosexual student to its educational facilities?

³⁵⁹ By contrast, the constitutional argument pressed in *Hardwick* relied on privacy and due process arguments.

classes of persons, then the state must justify the differential treatment in the same way the state must justify classifications based on race and sex.³⁶⁰ If there is no sufficient justification, then the differential treatment must cease. Focusing on status, as distinct from conduct, litigators have argued that discrimination against lesbians and gay men should be subjected to the same strict liability scrutiny accorded racial discrimination.

The initial judicial response to this argument was, on balance, negative. Most judges responded to the equal protection claims of gay and lesbian litigants by saying that until *Hardwick* is reversed, no such claim can be recognized.³⁶¹ This response was based on the same sort of conflation of homosexual conduct and status that we saw in earlier stages of gay rights litigation.³⁶² The reasoning, constructed loosely as a syllogism, is as follows:

1. *Hardwick* held there was no constitutional protection for homosexual conduct.³⁶³

2. The category "homosexual" is defined as those who engage in homosexual conduct. (Status *is* Conduct.)

3. Therefore, there is no protection for persons who fall within the category.³⁶⁴

³⁶⁰ The strength of the required justification will, of course, depend on the level of scrutiny applied to classifications based on sexual orientation. Although gay rights litigants are pushing for heightened scrutiny, most courts are unwilling to apply anything stronger than rational basis review. See *infra* note 368.

³⁶¹ "After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm." *Woodward v. United States*, 871 F.2d 1068, 1076 Fed.Cir. 1989), cert. denied, 494 U.S. 1003 (1990). Usually the equal protection claim raises the issue of what level of scrutiny ought to be applied. *Hardwick* is treated as dispositive of this issue, thereby relegating all equal protection claims by gay men and lesbians to mere rational basis review. See also *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anoinolous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.").

³⁶² See, e.g., *supra* text accompanying notes 115-28 (discussing gay bar cases).

³⁶³ Of course, this was not the specific holding in *Hardwick*. Rather, the specific holding was that the criminal sanction survived rational basis review. *Hardwick*, 478 U.S. at 196.

³⁶⁴ If this syllogism is limited to the primary holding in *Hardwick*, then "no protection" means that discrimination against such persons is subject to no more than rational basis review. Rational basis review poses a slightly different question when the issue is whether the state can fire a homosexual employee rather than whether the state can criminalize the employee's off-duty sexual conduct. According to at least one pre-*Hardwick* decision, the legitimate state interest in the former case will normally be somewhat stronger. See *Childers*, 513 F. Supp. at 146-47.

There are three primary litigation strategies that can be pursued in response to this reasoning. First, litigators can argue that lesbians and gay men are entitled to heightened scrutiny when the claim is a denial of equal protection despite the fact that *Hardwick* requires only rational basis review for their substantive due process claims. We might call this the "bifurcation of due process and equal protection" strategy. Second, litigators can argue that status is not conduct, thereby calling into question step two of the above syllogism. In cases in which there is no evidence of sexual conduct, this strategy allows litigators to argue that self-identified lesbians and gay men (or those perceived to be so) are protected from discriminatory state denials of employment, housing, education, or other public benefits. We might call this the "bifurcation of status and conduct" strategy.

The third alternative, and the one that I prefer, is a nonbifurcation strategy. Under this alternative, litigators would combine substantive due process claims that focus on conduct with equal protection claims that focus on status. In this Part I will explain my reasons for preferring nonbifurcation. But first I will provide some elaboration on how these three strategies avoid *Hardwick* and some assessment of the current success of each strategy.

a. Strategy One: Bifurcation of Due Process and Equal Protection

Some judges have found violations of equal protection despite the negative due process ruling in *Hardwick*.³⁶⁵ In addition, several commentators have argued in favor of equal protection claims for homosexuals.³⁶⁶ Professor Cass Sunstein, in particular, has argued that the

³⁶⁵ See, e.g., *Pruitt v. Cheney*, 963 F.2d 1160, 1166-67 (9th Cir. 1991) (requiring the Army to offer a rational basis for a regulation discharging officer for her acknowledged status as a homosexual), cert. denied, 113 S. Ct. 655 (1992); see also *Watkins v. United States Army*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc) (Norris, J., concurring) (asserting that plaintiff "is entitled to relief because the Army denied him equal protection of the laws by discharging and refusing to reenlist him solely on the basis of his homosexuality"), cert. denied, 498 U.S. 957 (1990); *Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1380 (E.D. Wis. 1989) (holding that exclusion of service member for homosexual status alone "is not rationally related to any articulated legitimate government interest"), rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

³⁶⁶ See, e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915 (1989); Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161 (1988); Tracey Rich, *Note, Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 Ga. L. Rev. 773 (1988).

due process and equal protection clauses have essentially different functions. The due process clause has been used historically to protect traditional substantive rights from the short-term intrusion of elective majorities. The equal protection clause, by contrast, has been used to protect those whom history has forced to exist primarily outside of tradition, groups traditionally discriminated against, such as racial minorities.³⁶⁷ Thus, it should not be surprising that due process fails to protect nontraditional conduct while equal protection requires a heightened justification for state discrimination against those who engage in such conduct.

Despite the plausibility of Professor Sunstein's argument, most post-*Hardwick* courts have been unwilling to grant heightened scrutiny to the equal protection claims of gay men and lesbians.³⁶⁸ There have been some moments of hope, but all have turned out to be short-lived.³⁶⁹ At the current time, the greatest hope for equal protection in furthering gay and lesbian rights is that a court, in applying rational basis review, will require the state to offer proof that the discriminatory rule is indeed rational. Although this approach does not constitute heightened scrutiny of the sort accorded race and gender discrimination claims, the level of review is somewhat greater than traditional rational basis review. One might call this "rational basis with a bite."³⁷⁰

*Pruitt v. Cheney*³⁷¹ was the first case to raise the possibility of success for gay rights litigators under "rational basis with a bite" review. The case was before the court on a motion to dismiss. In *Pruitt*, The Court of Appeals for the Ninth Circuit declined to apply heightened scrutiny to the Army's ban on homosexuals.³⁷² The court remanded for further consideration of the plaintiff's equal protection claim,

³⁶⁷ Sunstein, *supra* note 366, at 1174 & nn.66-67.

³⁶⁸ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *BenShalom*, 881 F.2d at 464-65; *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Todd v. Navarro*, 698 F. Supp. 871, 874 (S.D. Fla. 1988).

³⁶⁹ See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988) (applying strict scrutiny to Army's ban on enlistment of homosexual soldiers), vacated and *aff'd* on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990); *Jantz v. Muci*, 759 F. Supp. 1543, 1550-51 (D. Kan. 1991) (applying strict scrutiny), *rev'd*, 976 F.2d 623 (10th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993).

³⁷⁰ Or, in the alternative, "active" rational basis review. See *Buttino v. FBI*, 801 F. Supp. 298, 308 (N.D. Cal. 1992).

³⁷¹ 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992).

³⁷² *Id.* at 1165.

however, holding that discriminatory policies that simply give effect to society's prejudices do not suffice under the rational basis test.³⁷³ Thus, the Army must present evidence of the rationality of its policies.³⁷⁴

A subsequent case, *Meinhold v. Department of Defense*,³⁷⁵ has applied the *Pruitt* rational basis test and found the Navy's ban on homosexual sailors unconstitutional under equal protection analysis. Citing *Pruitt*, the *Meinhold* court said:

To survive *Meinhold's* claim that the Department of Defense's policy banning gays and lesbians based merely on status, and not conduct, violates the Equal Protection clause of the Fifth Amendment, the Department of Defense must establish, through a factual record, that its policy is rationally related to its permissible goals. . . . In determining whether the policy is rationally related, the Court cannot merely defer to the "military judgment" as the rationale for the policy—the Court must consider the factual basis underlying the "military judgment."³⁷⁶

b. Strategy Two: Bifurcation of Status and Conduct

As the *Meinhold* case suggests, evidence that the discrimination occurs on the basis of status and not conduct may be a prerequisite to maintaining a successful equal protection challenge.³⁷⁷ For this reason, litigators have, whenever possible, distanced themselves from *Hardwick* by claiming that their clients have been the victims of dis-

³⁷³ Id. at 1165-66.

³⁷⁴ Id. at 1166-67; see also *Buttino*, 801 F. Supp. at 308-09 (refusing to dismiss plaintiff's equal protection claim). *Buttino* was before the court on motions for summary judgment. Citing *Pruitt*, the court held that a full trial was necessary because factual questions had been raised about the rationality of the FBI's discriminatory policy. "Among the court's questions as to the rationality of the policy is how, for example, the FBI can rationally implement a policy which (as defendants themselves describe it) requires gay employees to be simultaneously 'open' and 'discreet' as to their homosexual conduct." Id. at 308.

³⁷⁵ 808 F. Supp. 1455 (C.D. Cal. 1993).

³⁷⁶ Id. at 1457 (citation omitted).

³⁷⁷ But consider the fact that at least one court has found that the *Hardwick* Court's refusal to grant substantive protection for homosexual conduct prevents the recognition of homosexuals as a class at all, even for purposes of rational basis review under the equal protection clause. See *Doe v. Sparks*, 733 F. Supp. 227, 231 (W.D. Pa. 1990) ("It seems to us contradictory to hold that a class which is not entitled to any substantive protection under the due process clause is nevertheless entitled to status under the federal constitution as a class for equal protection purposes.").

crimination based on "status" and by arguing that "conduct" should not be presumed from status.

The military cases provide an interesting vehicle for testing the limits of the due process/equal protection dichotomy. Because the military policy bans homosexuals from serving on the basis of their status alone, gay rights litigators have been able to capitalize on the status/conduct distinction. Joseph Steffan was kicked out of the naval academy for nothing more than a verbal admission to his commanding officer that he was gay.³⁷⁸ Miriam BenShalom was barred from reenlistment in the Army Reserves solely because she admitted she was a lesbian.³⁷⁹ Dusty Pruitt was relieved of her position in the Army Reserve after her commanding officer read a story in the Los Angeles Times in which Pruitt had spoken about what it meant to be a lesbian and a minister in the Metropolitan Community Church.³⁸⁰ And Keith Meinhold "was discharged from the Navy and deprived of his career after he announced on an ABC television news program that he was gay. Meinhold was discharged not because he engaged in prohibited conduct, but because he labeled himself as gay."³⁸¹ The only conduct at issue in any of these cases was "speech." However, none of these persons was terminated for the speech itself, but rather for the knowledge conveyed by the speech: that each considered himself or herself to be homosexual.

In July 1993, President Bill Clinton announced a new policy regarding lesbians and gay men in the military, generally known as the "don't ask, don't tell, don't pursue" policy.³⁸² This policy was planned to go into effect on October 1, 1993,³⁸³ and does not appear to affect any of the cases now in litigation. The only obvious change from recent policy is that applicants for military service will no longer be asked about their sexual orientation at time of enlistment.³⁸⁴

³⁷⁸ *Steffan v. Cheney*, 920 F.2d 74, 75 (D.C. Cir. 1990).

³⁷⁹ *BenShalom v. Marsh*, 703 F. Supp. 1372, 1373 (E.D.Wis. 1989), rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

³⁸⁰ *Pruitt*, 963 F.2d at 1161.

³⁸¹ *Meinhold*, 808 F. Supp. at 1456.

³⁸² John Lancaster & Ann Devroy, Clinton Plan Bars Most Gay Conduct, *Wash. Post*, July 17, 1993, at A1.

³⁸³ Memorandum from Les Aspin, Secretary of Defense, to the Joint Chiefs of Staff, Policy on Homosexual Conduct in the Armed Forces, July 19, 1993, at 3 [hereinafter Aspin Memorandum].

³⁸⁴ *Id.* at 1.

The new policy is couched in terms of the status/conduct dichotomy.³⁸⁵ Yet it pushes the dichotomy further than any court has yet done by defining conduct to include any "statement that the [service] member is homosexual or bisexual."³⁸⁶ All of the "status" military cases now in litigation are cases in which the member has made a statement acknowledging her or his sexual orientation.³⁸⁷ In cases

³⁸⁵ There is a four page document attached to the Aspin Memorandum entitled "Policy Guidelines on Homosexual Conduct in the Armed Forces" [hereinafter Policy Guidelines]. It states: "Sexual orientation will not be a bar to service unless manifested by homosexual conduct. The military will discharge members who engage in homosexual conduct." *Id.* at 1.

³⁸⁶ *Id.* The Aspin Memorandum, read in conjunction with the Policy Guidelines, creates some confusion. Whereas the latter defines homosexual conduct to include "a statement that the member is homosexual or bisexual," the former refers to "a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts." Aspin Memorandum at 2. The memorandum then goes on to provide that "[a] statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so." *Id.* Although the member "has the opportunity to present evidence" to rebut the presumption, *id.*, it is not clear who bears the ultimate burden of proof on this issue.

This "rebuttable presumption" approach is not new. The government made a similar argument in *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990), when the plaintiff refused to answer questions about conduct. Steffan claimed he had been dismissed solely for making the statement that he was gay and the government claimed that the statement raised a presumption as to conduct, thereby making questions about conduct relevant to the proceeding. The Court of Appeals rejected the government's argument, raised only on appeal, finding no support for it in the record. *Id.* at 76 n.4. *Steffan* thus remains a "pure status" case.

The new policy's definition of "homosexual conduct" includes "a homosexual act" or a "marriage or attempted marriage to someone of the same gender." Policy Guidelines at 1. A homosexual act is defined to include "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts." Aspin Memorandum at 2. Mere handholding may be viewed as a homosexual act. See Policy Guidelines at 1. Thus, status again appears tantamount to conduct under the new policy, unless the servicemember keeps his or her homosexuality entirely secret.

³⁸⁷ By "status" cases, I mean those in which there is no evidence of conduct other than the declaration by the plaintiff identifying as lesbian or gay. Because under the old military policy (in effect until October 1, 1993), sexual orientation was sufficient for a servicemember's removal, these cases are being litigated on the basis of "status" alone. Such cases include *Pruitt*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992); *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991), appeal docketed sub nom. *Steffan v. Aspin*, No. 91-5409 (D.C. Cir. Dec. 27, 1991); *Meinhold*, 808 F. Supp. 1455; *Cammermeyer v. Cheney*, No. C92-942-Z (W.D. Wash. filed June 11, 1992) (stayed pending President Clinton's announcement of the change in policy). See Lambda Update (Lambda Legal Defense and Education Fund, New York, N.Y.), Summer 1993, at 15.

BenShalom was also a "status" case, but litigation of that case has ended. See *BenShalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (upholding the Army's refusal to allow plaintiff to reenlist), cert. denied, 494 U.S. 1004 (1990).

such as *Steffan v. Cheney*,³⁸⁸ the revelation was in honest response to a question from an investigating officer,³⁸⁹ a question which apparently would be barred under the new policy. Nonetheless, the new policy contains no provision that could be applied retroactively to support Steffan's claim that he was wrongly removed from the Naval Academy.³⁹⁰

Thus, the "status" military cases now in litigation will continue to bifurcate status and conduct. Few other cases provide the opportunity for such a complete bifurcation because there are few other governmental entities with an express policy against gay men and lesbians as a class.³⁹¹ Any one of these cases could end up before the Supreme Court,³⁹² at which point the Court would have the opportunity to clarify how *Hardwick* affects equal protection claims and to resolve the conduct/status dilemma.

Looking beyond the current military cases, litigators should not consider it necessary to bifurcate status from *all* conduct in order to avoid *Hardwick*. The conduct at issue in *Hardwick* was homosexual sodomy, as defined by the Georgia legislature. Thus a limited bifurcation—sodomy versus all other conduct—should suffice.³⁹³ To date, however, no litigated case has employed this limited bifurcation the-

³⁸⁸ 780 F. Supp. 1.

³⁸⁹ *Id.* at 3.

³⁹⁰ Lambda Legal Defense and Education Fund and the ACLU have filed suit on behalf of seven individual plaintiffs challenging the new policy and asking for declaratory and injunctive relief. See *Doe v. Aspin*, No. 93-1549 (D.D.C. filed July 7, 1993).

³⁹¹ For example, the FBI reports that its "focus in personnel matters has been and continues to be on conduct rather than status or preference." *Padula v. Webster*, 822 F.2d 97, 98 (D.C. Cir. 1987) (quoting a letter written by an FBI official).

³⁹² Although the Court has recently denied certiorari in two military cases, both of those cases had upheld the military's decision to terminate the lesbian or gay servicemember. See *BenShalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). The Court also denied certiorari in *Pruitt*, 113 S. Ct. 655 (1992), a case in which the ruling below was not favorable to the military. See *Pruitt*, 963 F.2d 1160 (9th Cir. 1991) (remanding to district court for application of the rational basis test, with instructions that the military has the burden of proving that its policy is rational). However, *Pruitt* was before the court on a motion to dismiss and thus can be appealed to the Supreme Court again once a decision on the merits has been made.

Appellate courts in *Steffan*, *Meinhold*, *Pruitt*, and *Cammermeyer* could conceivably rule against the military, in which case the Supreme Court might be more likely to grant a petition for certiorari.

³⁹³ This limited bifurcation theory is discussed further *infra* notes 427-41 and accompanying text.

ory with success.³⁹⁴ Instead, judges refuse to recognize lesbian and gay equal protection claims, citing *Hardwick*, and apparently assuming that all lesbians and gay men (or at least the plaintiffs in the case before the court) engage in homosexual sodomy. This assumption underlies the claim made by some judges that the class (i.e., homosexuals) is defined by the conduct (i.e., sodomy).

How the class is defined depends on who is doing the defining. If concepts of individual identity or definitions created by the lesbian and gay community are to play any role in defining the class, then there is no basis in fact for assuming that all lesbians and gay men engage in sodomy. Self-identified homosexuals surely have an identity apart from their sexual conduct. It is not uncommon for persons to identify themselves as gay or lesbian before they have engaged in any sexual conduct.³⁹⁵ Recognition of intense emotional attachments to persons of the same sex may be a sufficient indicator of sexual identity. A woman who chooses another woman as her life partner may attribute her lesbian identity to aspects of her relationship and events in her life apart from actual sexual conduct.³⁹⁶ Thus the reality for many gay men and lesbians is that sexual identity (status) is something much broader than sexual conduct, and in some cases (e.g., celibacy) may even exclude sexual conduct.³⁹⁷

³⁹⁴ The theory was successful in the district court in *High Tech Gays*, discussed *infra* at notes 433-41 and accompanying text, but was not adopted by the appellate court. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990).

³⁹⁵ See Carol Anne Beynon Warren, *Identity and Community in the Gay World* (1972). Warren concludes on the basis of her "participant observation" that:

Community-imputed identity as homosexual may or may not involve the commission of homosexual acts—clearly recognized within the community is the conception of a homosexual who has never engaged in genital sexual behavior with a member of his own sex. Secondly, the imputation of homosexuality includes, most importantly, the conscious expression of sexual and romantic feelings towards members of one's own sex, whether or not this is articulated into action.

Id. at 212; see also Mary McIntosh, *The Homosexual Role*, in *Forms of Desire*, *supra* note 182, at 24 ("Some [people] recognize that homosexual feelings and behavior are not confined to the persons they would like to call 'homosexuals' and some of these persons do not actually engage in homosexual behavior.").

³⁹⁶ As Marc Fajer explains: "My self-identity as a gay man is as much tied up with my wanting another man with whom to buy a car, attend dinner parties, and redecorate the house as it is with sexual fantasies and acts." Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 640 (1992).

³⁹⁷ See Halley, *supra* note 365, at 949.

An important question for constitutional equal protection theory is whether the category "homosexual" is one that ought to be defined by members of the class, in which case sodomy is not likely to be the determining factor, or whether the category is one that ought to be defined externally by judges or others, in which case the presumption of sodomy may well be determinative.³⁹⁸ Social scientists point out that society began labeling persons as homosexual in order to classify them as deviants and to punish and deter homosexual behavior.³⁹⁹ Today many people continue to discriminate against lesbians and gays in part because they presume that gay men and lesbians engage in immoral or criminal sexual acts.⁴⁰⁰ For these persons, status is defined by presumed conduct. Given the history of the construction of homosexuality, it should not be surprising that many judges think "sodomite" every time a gay man or lesbian proudly self-identifies as gay or lesbian.

Litigators might counter this presumption by arguing that it is incorrect. In particular, public interest litigators could use the presumption to educate the judiciary regarding the realities of gay and lesbian lives. Witnesses might be called upon to demonstrate the minor role that specific sexual conduct plays in the self-identification of many lesbians and gay men. Although I realize that such a tactic exposes witnesses to the risks of detailed cross-examination regarding their sexual activity, I am less concerned about these risks than others.⁴⁰¹ In cases in which the presumption of sodomy is likely to control disposition of the case, there seems to be little risk of real loss and some chance of gain.

Litigators might also want to undercut the sodomy presumption by arguing that the step from valid criminalization of actual conduct

³⁹⁸ An extended treatment of this question is beyond the scope of this Article. For an excellent discussion of the problems that can arise when a group attempts to use society's negative definition of its members in order to gain positive legal rights for the group, see Epstein, *supra* note 182, at 251-58.

³⁹⁹ See, e.g., Greenberg, *supra* note 14, at 2-3; McIntosh, *supra* note 395, at 27-28.

⁴⁰⁰ Discrimination may also be based on strong feelings about gender roles. Thus, gay men may be discriminated against because they are viewed as rejecting traditional masculinity. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wisc. L. Rev. 187 (1988).

⁴⁰¹ See, e.g., Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643, 1688-89 (commenting on this Article).

(*Hardwick*) to valid discrimination on the basis of presumed conduct is a big one. A number of pre-*Hardwick* cases can be cited for the proposition that conduct should not be presumed from the mere fact of status.⁴⁰² Relying on these cases, post-*Hardwick* equal protection challenges could ask courts to confine their analysis regarding conduct to proven rather than presumed conduct.⁴⁰³

To date, the status/conduct distinction has met with minimal success in the courts. This lack of success may be explained in part by the fact that in most cases it is virtually impossible to make a claim that the discrimination occurred solely because of the plaintiff's status. Those military cases identified earlier in this Part as "status cases" may be an exception,⁴⁰⁴ especially those in which status was privately communicated. But the dismissals of Dusty Pruitt and Keith Meinhold, whose cases have thus far met with favorable judicial rulings, could be recast as dismissals on grounds of conduct, i.e., the public announcement of their sexual orientation. Indeed, if homosexual status is accorded constitutional protection by the courts, there is every reason to believe that government actors will become more intent on justifying their discriminatory actions in terms of conduct rather than status. We are seeing such a move now as the new military policy broadly defines prohibited conduct to include acts of self-identification.

c. *Strategy Three: Nonbifurcation*

I do not believe that either of the two bifurcation strategies described above are useful long-range strategies. They have been

⁴⁰² See supra notes 98-107 and accompanying text (discussing *Stoumen v. Reilly*, 234 P.2d 969 (Cal. 1951)); supra notes 317-32 and accompanying text (discussing gay student organization cases).

⁴⁰³ This has been the approach in several post-*Hardwick* military cases. In *Steffan*, for example, the plaintiff refused to answer questions regarding conduct even though the district court ordered him to do so. Despite the court's finding that "the record is clear that plaintiff was separated from the Naval Academy based on his admissions that he is a homosexual rather than on any evidence of homosexual misconduct," the court at first dismissed the case when plaintiff refused to answer questions about conduct. *Steffan v. Cheney*, 733 F. Supp. 121, 124 (D.D.C. 1989), rev'd, 920 F.2d 74 (D.C. Cir. 1990). The district court, on the merits, subsequently upheld the Navy's decision despite the absence of any evidence regarding conduct. See *Steffan*, 780 F. Supp. 1, which is currently scheduled for oral argument on appeal to the D.C. Circuit; see also *Meinhold*, 808 F. Supp. at 1458 ("Gays and lesbians should not be banned from serving our country in the absence of conduct which interferes with the military mission.").

⁴⁰⁴ See supra note 387.

developed in response to *Hardwick*, a case that gay rights litigators would like to see reversed. Litigation strategies for the advancement of lesbian and gay rights should be planned with an eye to the eventual reversal of *Hardwick*. Bifurcating equal protection from due process, and status from conduct, does not sufficiently challenge the *Hardwick* holding. Thus, litigators should adopt strategies that emphasize our individual rights to engage in loving conduct, including sexual conduct, while simultaneously challenging class-based discrimination. Put another way, I would like to see litigators blend substantive due process claims with equal protection claims.

Bifurcation strategies are not necessary to litigate around *Hardwick*. Rather, by taking the position that *Hardwick* should be strictly limited to its facts and specific holding, litigators should be free to debate, and courts should be free to rule on, the numerous issue that *Hardwick* did not decide.

First of all, although the Court did decide that discrimination against gays and lesbians in the form of state criminalization of their sexual activity is rational,⁴⁰⁵ the case did not address any other form of discrimination against gays and lesbians. In other words, *Hardwick* did not decide that discrimination against gay men and lesbians is rational in every case. In future litigation challenging other forms of state-enforced discrimination, a nonbifurcation strategy would contend that *Hardwick*'s rational basis test ought to require, at the very least, some analysis of the governmental action at issue.⁴⁰⁶

⁴⁰⁵ *Hardwick*, 478 U.S. at 196. Although the Georgia statute involved in *Hardwick* criminalized both homosexual and heterosexual sodomy, see Ga. Code Ann. § 16-6-2 (Michie 1984), heterosexual sodomy was not before the Court because the heterosexual plaintiffs were dismissed below on standing grounds. See *Hardwick*, 760 F.2d at 1206-07. The Court's analysis suggests that it might decide a heterosexual sodomy case differently. The Court relied heavily on its perception that homosexuals had been viewed as outcasts by dominant traditions and stressed that homosexuality had nothing to do with marriage and procreation. *Id.* at 190-92. Heterosexual sodomy, by contrast, is an activity engaged in by husbands and wives and is a sexual activity that can be classified as a form of birth control. (Of course, homosexual sodomy is also a form of birth control, but given the absence of the risk of pregnancy during same-sex lovemaking, the Court would likely dismiss a privacy claim couched in birth control rhetoric as frivolous.)

⁴⁰⁶ The court in *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) recognizes this point, at least in part, when it says:

That [i.e., applying *Hardwick* to deny suspect classification for equal protection claims] does not mean, however, that any kind of negative state action against homosexuals would be constitutionally authorized. Laws or government practices must still, if challenged, pass the rational basis test of the equal protection clause. A governmental

In *Hardwick*, the state action was criminalization of certain conduct, and five of the justices determined that the statute at issue was a rational means to the accomplishment of a legitimate purpose, the protection of public morality. In challenging other forms of state-enforced discrimination, such as employment discrimination based on either homosexual status or conduct, litigators should ask judges to examine carefully both the state's end and means before determining that the discrimination is rational. It should not suffice in either a status or conduct case for the court to assume summarily that the discrimination is justified solely on the authority of *Hardwick*. At the very least, the court must ask whether denying jobs to homosexuals is a rational means to the accomplishment of a legitimate purpose.

For example, assume that the government were to assert in a job discrimination case the same purpose asserted in *Hardwick*, the protection of public morality. To support its position, the government would then have to argue that denying jobs to homosexuals is a rational way to protect public morality. It could not rely on *Hardwick* for that proposition because *Hardwick* was about the criminalization of specifically proven conduct and not about the denial of jobs to persons who may or may not have engaged in that conduct. Furthermore, in states that have chosen to decriminalize same-sex sodomy, one might argue that state employment against lesbians and gay men can hardly be justified on grounds of public morality since the state has apparently changed its mind about the immoral nature of the conduct or at least about the rationality of penalizing it.

Litigators who wish to claim heightened scrutiny for their clients should not abandon arguments about the irrationality of discriminatory treatment. Consider, for example, the strategy of the plaintiff's lawyers in *Padula v. Webster*,⁴⁰⁷ an equal protection challenge to FBI discrimination against a lesbian applicant. Padula's claim for heightened scrutiny was rejected by the court, and her attorneys failed to make any sort of back-up argument related to low-level rational basis

agency that discriminates against homosexuals must justify that discrimination in terms of some government purpose.

Id. at 103-04.

Whereas the *Padula* court mentions only governmental *purpose*, rational basis analysis ought to require some consideration of the *means* chosen to accomplish the purpose.

⁴⁰⁷ 822 F.2d 97.

review.⁴⁰⁸ The court was then free to decide for the defendant, constructing its own rational basis justification for the decision. The court concluded that the FBI's decision not to hire a "practicing homosexual" was rationally related to protecting the FBI's integrity because homosexuals are subject to blackmail.⁴⁰⁹ There was no factual basis in the record to support this conclusion in *Padula*. To the contrary, given the individual applicant's testimony about her openness and comfort with her sexual identity, it is hard to imagine how the risk of blackmail would have arisen. To support its position, the court merely cited *Dronenburg v. Zech*.⁴¹⁰ I am suggesting that rational basis analysis ought to require more than mere conjecture and that lesbian and gay rights litigators ought to engage in rational basis review arguments to combat this sort of judicial stereotyping of gay people.

Litigators in post-*Hardwick* employment discrimination cases may find it useful to draw upon earlier civil service discrimination cases in constructing arguments that discrimination on the basis of homosexual status or conduct is irrational. These "nexus" test cases, such as *Norton v. Macy*,⁴¹¹ required some showing that the immoral or illegal off-duty conduct of a civil service employee was relevant to job performance.⁴¹² Post-*Hardwick* litigators ought to be able to borrow from these "nexus test" cases. If there is no evidence of sexual conduct, presumed sexual conduct should not be sufficient to warrant job termination.⁴¹³ Even if the employee is arrested on sodomy charges,

⁴⁰⁸ Id. at 104.

⁴⁰⁹ Id. at 99, 104.

⁴¹⁰ 741 F.2d 1388 (D.C. Cir. 1984) (a case involving anti-gay discrimination against a Navy petty officer who had, not surprisingly, attempted to hide his homosexuality from the Navy). If homosexuality is a ground for discharge, then it would naturally be difficult for naval officers to be open. Thus, the Navy's own treatment of homosexuality creates the potential for blackmail. Nonetheless, reports commissioned by the military itself conclude that gay and lesbian servicemembers pose no greater security risk than non-gay servicemembers. See Kate Dyer, *Gays in Uniform: The Pentagon's Secret Reports* xvi (1990) (concluding that gay men and lesbians pose no special security risk). But see *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 575 (9th Cir. 1990) (noting that despite positive evidence that homosexuals are good security risks, the Department of Defense could rationally believe otherwise because the KGB tended to target homosexuals).

⁴¹¹ 417 F.2d 1161 (D.C. Cir. 1969).

⁴¹² Id. at 1167-68.

⁴¹³ Under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.), which codified the *Macy* test, an employee cannot be dismissed unless there is evidence of misconduct. See 5 U.S.C. § 4303 (1988).

some connection between the off-duty conduct and the job ought to be required.⁴¹⁴ As with the "nexus test," if the off-duty conduct is particularly notorious and egregious so that public confidence in the employee is likely to be affected, then the rational basis test would be met.⁴¹⁵

Second, litigation strategies should stress that *Hardwick* did not deny all substantive due process rights to gay men and lesbians. Thus, it is not necessary to abandon substantive due process claims and rely solely on equal protection claims to avoid *Hardwick*. At its narrowest, *Hardwick* held that there is no fundamental constitutional right to engage in homosexual sodomy, even when the act occurs in the privacy of an individual's bedroom.⁴¹⁶ The case decides nothing about constitutional protection for other forms of conduct. *Hardwick* thus leaves litigators free to make substantive due process claims regarding other forms of conduct, both sexual and nonsexual.

Justice White's opinion in *Hardwick* supports a narrow reading. He expressly limited the holding to the specific conduct in the case before the Court, i.e., homosexual sodomy.⁴¹⁷ At the same time, however, he warned that we should not read earlier precedent as establishing constitutional protection for "any kind of private sexual conduct between consenting adults."⁴¹⁸ *Hardwick* thus permits criminalization of homosexual sodomy. Other sexual conduct cases have yet to be decided.

The *Hardwick* majority reasoned that states could criminalize homosexual sodomy because such conduct was not part of a long-recognized tradition in American history. Indeed, according to Justice White, "[p]roscriptions against that conduct have ancient roots."⁴¹⁹ However, these age-old proscriptions do not necessarily

⁴¹⁴ See, e.g., *Bonet v. United States Postal Service*, 661 F.2d 1071, 1073-74 (5th Cir. 1981) (requiring proof that employee who committed indecency with a child was thereby unfit to be postal employee).

⁴¹⁵ Some courts are willing to presume "nexus" in such cases, although this presumption is used sparingly. See Neal Miller, Criminal Convictions, "Off-Duty Misconduct," and Federal Employment: The Need for Better Definition of the Basis for Disciplinary Action, 39 Am. Univ. L. Rev. 869, 875-88 (1990) (discussing presumption).

⁴¹⁶ See *Hardwick*, 478 U.S. at 191, 195-96.

⁴¹⁷ *Hardwick*, 478 U.S. at 188 n.2 ("We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.").

⁴¹⁸ *Id.* at 191.

⁴¹⁹ *Id.* at 192.

apply to all forms of lesbian and gay sex. History, to the extent it provides evidence of these ancient proscriptions, tells us that English common law prohibited the "infamous crime against nature, committed either with man or beast."⁴²⁰ Under English law "the infamous crime" was thought to be that of "buggery" or "sodomy." Both terms historically referred to anal intercourse, whether committed with another man, a woman, or a beast.⁴²¹ More ancient proscriptions are contained in biblical passages. The district court opinion in *Doe*, for example, relied on the following passage from Leviticus: "Thou shalt not lie with mankind, as with womankind: it is abomination."⁴²² This language suggests a prohibition on anal intercourse between men.

Recent, rather than ancient, proscriptions extended criminal sanctions to oral-genital sexual conduct, the act for which Michael Hardwick was arrested.⁴²³ Consensual lesbian sex was never criminally proscribed in Britain.⁴²⁴ Moreover, consensual lesbian sex was not an offense under the Georgia law until 1968.⁴²⁵ Indeed, some sex historians have produced historical evidence that lesbian relationships were

⁴²⁰ 4 William Blackstone, *Commentaries on the Laws of England* 215-16 (photo. reprint 1979) (1769).

⁴²¹ See generally Anne B. Goldstein, Comment, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers v. Hardwick*, 97 Yale L.J. 1073, 1082-83 nn.62-63 (1988) (discussing the historical meanings of the terms); see also Gr. Brit. Comm. on Homosexual Offenses and Prostitution, *The Wolfenden Report* 55-58 (Stein and Day 1963) (1957) [hereinafter *Wolfenden Report*] (explaining that buggery, meaning anal intercourse with another person or any type of intercourse with animals, was the term used in England and Wales, whereas sodomy, meaning anal intercourse with another person, was the term used in Scotland).

⁴²² *Doe*, 403 F. Supp. at 1202 n.2 (citing Leviticus 18:22).

⁴²³ Oral-genital conduct was criminalized in Britain in 1855, in a statute that prohibited acts of gross indecency between males. Criminal Law Amendment Act, 1855, 48 & 49 Vict., ch. 6, § 11 (Eng.). Criminalization of oral-genital conduct occurred somewhat later in the United States. See Goldstein, *supra* note 421, at 1086 n.74. The *Wolfenden Report*, *supra* note 421, at 57-58, reveals that in Britain anal intercourse (buggery and sodomy) was punished more severely than other forms of homosexual conduct.

⁴²⁴ Nonconsensual female-female sex, known as "indecent assault on a female by a female," was subject to criminal penalty by statute in England and Wales and by common law in Scotland. See *Wolfenden Report*, *supra* note 421, at 55-57. But see Ruthann Robson, *Lesbianism in Anglo-European Legal History*, 5 Wis. Women's L.J. 1, 7-13 (1990) (claiming that lesbian sex was criminalized during a 15 year period in Canada and suggesting that the British law might have been more complicated on this question than most scholars suppose).

⁴²⁵ See *Hardwick*, 478 U.S. at 200-01 n.1 (Blackmun, J., dissenting) (describing the earlier Georgia sodomy statute). In *Thompson v. Aldredge*, 200 S.E. 799, 800 (Ga. 1939), the Georgia Supreme Court held that the earlier statute did not prohibit lesbian activity.

thought to be positive so long as the women moved from them into heterosexual inarriage.⁴²⁶ And the British and Biblical proscriptions against male-male sex, described above, do not specifically cover such acts as mutual masturbation.

One possibility for chipping away at *Hardwick* would be to pursue other sexual conduct cases in which the specific sexual conduct can be distinguished from that in *Hardwick*.⁴²⁷ *State v. Walsh*,⁴²⁸ a post-*Hardwick* case in Missouri, provided just such an opportunity. The Missouri statute at issue criminalized any sexual contact (or attempted sexual contact) involving the hand of one person and the sexual organ of another.⁴²⁹ Although the majority decision willingly and readily applied *Hardwick* to uphold the conviction of a man whose hand touched the penis of another fully-clothed man,⁴³⁰ Judge Blackmar's dissent makes a compelling point:

I am . . . inclined to believe that [the Missouri statute] goes beyond the limits of state power in defining "deviate sexual intercourse" as involving the hand. This is not the offense of sodomy as discussed in [*Bowers v. Hardwick*] and it has no long history of legal sanction such as seemed very important to Justice White in that case. *Bowers* recognizes a right of privacy under the Constitution of the United States, but holds that this right of privacy does not extend to offenses traditionally punished as sodomy. Its rationale is absent here.⁴³¹

Another possibility for chipping away at *Hardwick* is to make substantive due process arguments, in conjunction with equal protection arguments, in lesbian and gay discrimination cases. The substantive due process claim can focus on the fundamental importance of lesbian and gay conduct, whereas the equal protection claim can attack the irrationality of the discriminatory classification. Again, a limited bifurcation strategy can be employed because *Hardwick* made a negative determination only as to the fundamental importance of criminal homosexual sodomy; the constitutional importance of other homosexual conduct remains open for debate in the lower courts. When sexual

⁴²⁶ See, e.g., Lillian Faderman, *Surpassing the Love of Men* 75 (1981) (discussing the role of female romantic friendships in England during the late 18th century).

⁴²⁷ See the discussion *supra* text accompanying notes 393-94 regarding limited bifurcation, i.e., bifurcating sodomy from other conduct.

⁴²⁸ 713 S.W.2d 508 (Mo. 1986).

⁴²⁹ *Id.* at 509.

⁴³⁰ *Id.* at 509, 511.

⁴³¹ *Id.* at 514 (Mo. 1986) (Blackmar, J., dissenting) (citation omitted).

conduct is at issue, gay rights litigators need to be explicit about what the conduct is. And if the conduct falls short of sodomy, we need to make that fact clear and distinguish *Hardwick* accordingly. Directly addressing issues of conduct under substantive due process would allow gay litigants to emphasize the positive aspects of their emotional and affectional lives.

Instead, most post-*Hardwick* gay rights litigants have elected to structure their cases primarily as equal protection cases, presumably to distance themselves from *Hardwick* and to argue for suspect or quasi-suspect classification. In some instances, cases that began pre-*Hardwick* included both substantive due process and equal protection claims, but dropped the substantive due process claims after the negative decision in *Hardwick*. *Padula* is one such case.⁴³² The litigants in *High Tech Gays v. Defense Industry Security Clearance Office*,⁴³³ by contrast, continued to argue for heightened judicial scrutiny under both equal protection and substantive due process.

Homosexual sodomy was not directly at issue in either *Padula* or *High Tech Gays*, but there was evidence of other homosexual conduct. The FBI's background check on *Padula* turned up evidence that she was a "practicing homosexual,"⁴³⁴ although it did not explain what she practiced. *Padula*, when questioned, affirmed her sexual orientation and explained "that although she does not flaunt her sexual orientation, she is unembarrassed and open about it and it is a fact well known to her family, friends and co-workers."⁴³⁵ The plaintiffs in *High Tech Gays*, civilian employees in the defense industry, were subjected to background checks by the Department of Defense, solely because of their homosexuality.⁴³⁶ Security clearances were denied various plaintiffs on the basis of information uncovered. In particular, one employee alleged that he was denied a clearance on the basis of his own admissions that: "(a) . . . he visits Gay bathhouses; (b) . . . he belongs to a Gay organization; (c) . . . he has homosexual activity with casual acquaintances; (d) he intend[ed] to inform his employer of

⁴³² "We do not address *Padula*'s initial assertion that her constitutional rights to privacy and due process were violated since she does not argue this on appeal." *Padula*, 822 F.2d at 99 n.1.

⁴³³ 668 F. Supp. 1361, 1367-68 (N.D. Cal. 1987), rev'd, 895 F.2d 563 (9th Cir. 1990).

⁴³⁴ *Padula*, 822 F.2d at 99.

⁴³⁵ *Id.*

⁴³⁶ *High Tech Gays*, 895 F.2d at 565.

his homosexuality; and (e) he intend[ed] to continue his homosexual lifestyle in the future."⁴³⁷

District Judge Thelton Henderson ruled in favor of the plaintiffs in *High Tech Gays*, responding to their substantive due process claim⁴³⁸ as follows:

The Supreme Court in *Hardwick* simply did not address the issue of all homosexual activity. . . . *Hardwick* does not hold, for example, that two gay people have no right to touch each other in a way that expresses their affection and love for each other. Nor does *Hardwick* address such issues as whether lesbians and gay men have a fundamental right to engage in homosexual activity such as kissing, holding hands, caressing, or any number of other sexual acts that do not constitute sodomy under the Georgia statute.⁴³⁹

Although *High Tech Gays* was reversed on appeal,⁴⁴⁰ Judge Henderson offers the better reasoned opinion on the substantive due process claim.⁴⁴¹ Substantive due process arguments should continue in gay rights litigation. *Hardwick* should be limited to its facts. And in each new case, judges should be asked to rule on the fundamental importance of love, affection, intimacy, commitment, expressions of

⁴³⁷ Id. at 579 (quoting Third Amended Complaint, ¶ 11).

⁴³⁸ Judge Henderson's opinion may be better remembered by gay rights litigators for its determination that the lesbian and gay plaintiffs constituted a quasi-suspect class for equal protection purposes. See *High Tech Gays*, 668 F. Supp. at 1368.

⁴³⁹ Id. at 1370.

⁴⁴⁰ *High Tech Gays*, 895 F.2d at 581 (reversing both the equal protection and substantive due process claims under lower level rational basis review).

⁴⁴¹ In dismissing the substantive due process claim, the court of appeals reasoned, in part, as follows:

There has been a repudiation of much of the substantive gloss that the Court has placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. . . . If for federal analysis we must reach equal protection of the Fourteenth Amendment by the Due Process Clause of the Fifth Amendment, see *Bolling*, 347 U.S. at 499, . . . and if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment, see *Hardwick*, . . . it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment.

Id. at 571.

I cannot unravel the court's logic in this point. Because the court is focusing on liberty interests and substantive due process, I do not understand why it is necessary to get to due process through equal protection. Why not focus directly on the claimed liberty, i.e., the right to engage in certain conduct? Because the court never mentions specific conduct other than the sodomy at issue in *Hardwick*, I cannot tell whether the court even understands that there is other conduct at issue. The court never addresses the point made by Judge Henderson, that *Hardwick* is a ruling on sodomy and that lesbians and gay men are being punished by the

concern, and all other forms of conduct that lesbians and gay men embrace as part of their lesbian and gay lifestyle.

To support nonbifurcation arguments that combine due process and equal protection claims, litigators might cite *Evans v. Romer*,⁴⁴² a favorable gay rights decision handed down by the Colorado Supreme Court on July 19, 1993. This case was litigated as part of the ongoing battle over anti-gay discrimination ordinances.⁴⁴³ Holding that the equal protection clause guarantees all groups equal access to the political process, the court affirmed the issuance of a preliminary injunction against the enforcement of Colorado's recently passed Amendment 2, which had prohibited the enactment and enforcement of anti-gay discrimination measures.⁴⁴⁴ Although the court justifies its decision under the equal protection clause, the case has an obvious "fundamental rights" aspect. The class of lesbians and gay men is cognizable under the equal protection clause because as a class they are being denied a fundamental right: the right to participate equally in the political process.⁴⁴⁵

*Shahar v. Bowers*⁴⁴⁶ is another case, currently in litigation, in which equal protection arguments may be strengthened by the presence of

Department of Defense for other forms of conduct. For these reasons, I conclude that Judge Henderson has the better reasoned opinion on substantive due process.

If the court means, in the above passage, to reject heightened scrutiny for equal protection purposes under the Fifth Amendment because equal protection under that Amendment must be derived from the concept of "due process," then the logic is understandable. But I read this passage as a denial of the plaintiffs' due process, not equal protection, claims.

⁴⁴² *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (en banc). The majority opinion does not even mention the *Hardwick* decision.

⁴⁴³ In 1992, Colorado and Oregon voters were faced with a ballots proposing amendments to their respective state constitutions, which would have banned pro-lesbian and gay legislation and administrative regulations. The Oregon initiative failed, but the Colorado amendment (known as "Amendment 2") passed. Bill McAllister, *Gay Rights Groups Applaud Clinton's Win*, Wash. Post, Nov. 5, 1992, at A30.

Similar anti-gay initiatives are being proposed by anti-gay activists in Florida, Idaho, Maine, Washington, and again in Oregon. See John Gallagher, *Bracing for Battle, The Advocate*, June 29, 1993, at 50. In response, the Oregon legislature has recently passed a statute outlawing such initiatives. *Oregon Lawmakers Ban Local Votes on Gay Bias*, N.Y. Times, July 30, 1993, at A10.

⁴⁴⁴ *Evans*, 854 P.2d at 1286.

⁴⁴⁵ See *id.* On July 20, 1993, the Governor of Colorado announced that the decision would be appealed to the United States Supreme Court immediately. 15 Nat'l L.J., Aug. 2, 1993, at 6.

⁴⁴⁶ No. 1:91-CV-2397-RCF (N.D. Ga. filed Oct. 3, 1991). As of this writing, motions for summary judgment have been made and briefed. The parties are currently waiting for the

recognized fundamental rights. Robin Shahar graduated at the top of her law school class at Emory Law School where she was the Notes and Comments Editor of the Law Review.⁴⁴⁷ During the summer before her final year in law school, she clerked for the Attorney General of Georgia, Michael Bowers. Based on her outstanding record and her job performance, she was offered a permanent job with the Criminal Division of the Attorney General's Office. The summer before she was to begin her employment, she called Bob Coleman, the Deputy Attorney General for Administration, to touch base and to notify him that she was changing her last name from Brown to Shahar. She also informed Mr. Coleman that the reason for the name change was that she and another woman had decided to be married in a Jewish religious ceremony, and they had agreed that they would both adopt the name "Shahar," which means "the act of seeking God" in Hebrew.⁴⁴⁸ Shortly thereafter, Shahar received a letter from Bowers withdrawing the offer of permanent employment because of information received concerning "a purported marriage between [Shahar] and another woman."⁴⁴⁹

Attorney General Bowers (the same person who defended the Georgia sodomy statute in the *Hardwick* suit), justified his action by asserting that Shahar's employment in the criminal division would interfere with that division's ability to enforce the laws of Georgia. At the core of Bowers' position is his belief that same-sex marriages are "inconsistent with the state laws prohibiting sodomy between partners of the same sex."⁴⁵⁰ In his own words, "the natural consequence of a marriage is some sort of sexual conduct, I would think to most people, and if it's homosexual, it would have to be sodomy."⁴⁵¹

Despite the presumptions made by Attorney General Bowers,⁴⁵² the actual conduct for which Robin Shahar is being punished by hav-

judge's ruling. Telephone Interview with Ruth Harlow, ACLU counsel for Shahar (Apr. 19, 1993).

⁴⁴⁷ See *Shahar v. Bowers*, 58 Fair Empl. Prac. Cas. (BNA) 668, 668 (N.D. Ga. Mar. 9, 1992) (order denying motion to dismiss).

⁴⁴⁸ See Mark Curriden, A.G. Refuses to Hire Lesbian, A.B.A. J., Dec. 1991, at 32.

⁴⁴⁹ Id.

⁴⁵⁰ Memorandum in Support of Defendant's Motion for Summary Judgment at 32, *Shahar* (No. 1:91-CV-2397-RCF).

⁴⁵¹ Id. at 32 (quoting Bowers Deposition at 80-81).

⁴⁵² Even if Shahar and her partner are sexual, which I admit is a reasonable assumption, it does not necessarily follow that they are violating the Georgia statute. The Georgia statute

ing her job withdrawn is not sexual conduct. Rather, she is being punished for her religious celebration of a personal relationship, her choice to share a name with her life partner, and her decision to communicate her name change to her employer. Because religious liberty and intimate association are involved, Shahar can argue that this particular act of anti-gay discrimination infringes upon fundamental rights. Because opposite-sex couples are not fired when they celebrate their unions in a church or synagogue, the state's treatment of Shahar directly burdens her religious liberty in a discriminatory fashion.⁴⁵³

Whether the *Shahar* court will recognize a Jewish lesbian marriage ceremony as a fundamental right remains to be seen. Nor is it clear that the court would then find that Bower's decision to revoke the offer of employment was a sufficient burden on this right to require to the application of the compelling state interest test.⁴⁵⁴ *Shahar* appears to be a strong case for fundamental rights analysis, particularly on the religious liberty claim,⁴⁵⁵ but her success on the substantive due process claim should not depend solely on whether the court elects to apply the compelling interest test. Rather, litigants such as Shahar should make substantive due process claims about their liberty interests regardless of whether these interests fit within a recognized category deemed fundamental. Intimate association and private celebrations of relationship, whether religiously motivated or not, are important personal liberty interests worthy of constitutional review when the state interferes with them. Meaningful judicial review would require the court to question the rationality of the state's interference even if the compelling state interest test is found to be inapplicable.

does not prohibit all forms of sexual conduct between same-sex partners. See *infra* text accompanying notes 416-18.

⁴⁵³ See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding that interracial marriage raised equal protection and fundamental liberty issues).

⁴⁵⁴ Although the fact of the marriage (as evidence of sodomy) appears to be a sufficient motivating factor in Bowers' decision, it is not clear whether he is opposed to the religious nature of the wedding.

⁴⁵⁵ Shahar's claim is considerably strengthened by the fact that her lesbian marriage resulted from her "sincerely-held religious beliefs." See Plaintiff's Reply Memorandum in Support of Her Motion for Summary Judgment on the Religion and association Claims at 4-5, *Shahar* (No. 1:91-CV-2397-RCF) (citing *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987), to support her claim).

Substantive due process arguments can be useful whether or not they bring victory to the parties making the arguments. Plaintiffs like Padula should testify in detail about what it means to be a "practicing homosexual," emphasizing those aspects of lesbian intimacy and affection that have nothing to do with the sexual conduct prohibited by the Georgia statute in *Hardwick*. And plaintiffs such as Shahar should testify in detail about commitment, relationship, and celebration to counter the state's emphasis on sodomy as the central activity of lesbian lives. Failure to make such arguments leaves the court free to equate "practicing homosexual" with sodomite, an equation that contributes to the "conduct is status" dilemma and unfairly simplifies the rich complexity of lesbian and gay lives.

Marc Fajer has argued that lesbian and gay rights litigators should rely more heavily on equal protection arguments because such arguments will allow us to tell lesbian and gay stories about relationships.⁴⁵⁶ He is less enamored of privacy arguments because they "necessarily focus on sex."⁴⁵⁷ Although I understand his reluctance to ask the current federal judiciary to focus on sex, I disagree with his conclusion. I, too, want to bring lesbian and gay stories about relationships into the courtroom. But I worry about the assimilationist nature of equality arguments.⁴⁵⁸ Substantive due process arguments would allow us (lesbians and gay men) to argue independently about the value of intimate association, construction of self through relationship, and the authenticity of lesbian and gay love. We could tell our stories of relationships in our own terms without forcing them to sound just like everyone else's.

Moreover, it is not certain that substantive due process claims focusing on conduct are doomed to fail. Although the current Supreme Court has been reluctant to expand the list of fundamental rights for purposes of due process analysis, pre-*Hardwick* decisions were willing to give some form of heightened scrutiny to homosexual due process claims.⁴⁵⁹ If litigants continue to argue that the interests at stake are important, even if they are not "fundamental," then perhaps substantive due process claims would begin to enjoy a form of

⁴⁵⁶ Fajer, *supra* note 396, at 649 n.802.

⁴⁵⁷ *Id.*

⁴⁵⁸ I have expressed this concern elsewhere with respect to sex discrimination issues. See Patricia Cain, *Feminism and the Limits of Equality*, 24 Ga. L. Rev. 803 (1990).

⁴⁵⁹ See *supra* notes 258-62 and accompanying text.

"active" rational basis review similar to that available for equal protection claims.⁴⁶⁰ In this event, the bifurcation of conduct and status would become meaningless. Lesbians and gay men would be entitled to meaningful judicial review of state action that discriminates against them under both the concepts of due process and equal protection regardless of whether the state justified its discrimination on the basis of an individual's status or conduct.

IV. CONCLUSION

In summary, current lesbian and gay rights litigation must contend with *Hardwick* and try to litigate around it. In arguing around *Hardwick*, litigators are relying more heavily on equal protection arguments and distancing themselves from issues of sexual conduct. This approach is sensible as a pragmatic, short-term strategy until *Hardwick* is reversed. But to the extent this approach rejects the centrality of sexual and affectional conduct to sexual identity, it presents certain difficulties. I have suggested that litigators combine substantive due process claims with their equal protection claim in order to argue for constitutional recognition of the important aspects of lesbian and gay lives apart from sodomy.

The post-*Hardwick* shift in focus by litigators from individual liberty to equal rights mirrors the general shift in the movement away from the original concept of "gay liberation,"⁴⁶¹ towards a more conservative concept of "gay rights." By gay liberation, I mean a commitment to the deconstruction of the categories homosexual and heterosexual as those categories have been constructed by dominant forces in society.⁴⁶² In order to challenge those categories, gay and lesbian liberation, in its early years, sought to protect and validate the

⁴⁶⁰ See *supra* notes 370-76 and accompanying text.

⁴⁶¹ See *supra* text accompanying notes 180-88. Compare this experience with that in Canada, which has also experienced a shift from radical to conservative in its gay movement. See Gary Kinsman, *The Regulation of Desire* 13 (1987).

⁴⁶² As one activist explained:

I will tell you what we want, we radical homosexuals: not for you to tolerate us, to accept us, but to understand us. And this you can do only by becoming one of us. We want to reach the homosexuals entombed in you, to liberate our brothers and sisters, locked in the prisons of your skulls. . . . We will never go straight until you go gay. As long as you divide yourselves, we will be divided from you—separated by a mirror trick of your mind.

Epstein, *supra* note 182, at 253.

creation of gay and lesbian identity, as constructed by gay and lesbian persons. To the extent sexual expression in private, free from state regulation, was necessary to that creation process, gay liberation sought to protect the process. Because sexual freedom was at the core of gay liberation, a legal theory that bifurcated sexual conduct from personal identity would have been useless to its goals.

Because sodomy challenges were about the validity of intimate sexual expression, they were consistent with the early movement message of gay liberation. A sodomy challenge argument, informed by gay liberation, would focus on the identity-affirming aspects of intimate sexual conduct,⁴⁶³ whether that conduct was gay or not. Legal arguments, informed by gay liberation, would talk openly about sex.

Post-*Hardwick* legal arguments, however, encourage lawyers to talk about homosexuality without talking about sex. Although it is true that gay men and lesbians as a class are more than the sex that they do, there is a certain degree of absurdity to making legal arguments in favor of gay and lesbian rights that ignore sex.

The conduct/status distinction contributes to this absurdity by pretending that status can be successfully bifurcated from conduct. Bifurcating *sodomy* from status is one thing. *Hardwick* requires that bifurcation. But there are other sorts of conduct, both sexual and affectional, untouched by *Hardwick*. Litigators who adopt the conduct/status approach to gay rights cases should be careful not to erase completely this other sort of conduct from their clients' stories. I have argued that litigators should make substantive due process arguments that focus on this "other conduct." Otherwise, the post-*Hardwick* emphasis on status will de-emphasize the importance to gay men and lesbians of what is most important in their lives: the love and affection they feel for their partners.

⁴⁶³ See, e.g., Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents at 2, 15, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (arguing that "[s]exuality is an important element in the lives and relationships" of couples, that "sex functions as a complex bond," and that the ability to engage in various types of sexual activity is "important to the psychological health of many individuals"). See also Brief of Amicus Curiae for Lesbian Rights Project et al. at 3, *Hardwick* (No. 85-140) ("Amici for respondents assert that the need for love is natural, and that the determination to express and receive love of a sexual nature by engaging in sexual activities with another adult of the same gender is . . . within the range of medical and psychological normalcy.").